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THE
FEDERAL REPORTER.

VOLUME 81.

CASES ARGUED AND DETERMINED

IN THE

CIRCUIT COURTS OF APPEALS AND CIRCUIT
AND DISTRICT COURTS OF THE
UNITED STATES.

PERMANENT EDITION.

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FEDERAL REPORTER, VOLUME 81.

JUDGES

OF THE

UNITED STATES CIRCUIT COURTS OF APPEALS AND THE
CIRCUIT AND DISTRICT COURTS.

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²Confirmed December 15, 1896.

³Resigned.

⁴Confirmed July 8, 1897.

⁵Confirmed May 11, 1897.

⁶Deceased October 10, 1896.

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¹Deceased.

²Confirmed May 5, 1897.

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¹Deceased November 17, 1896.²Commissioned December 15, 1896.³Resigned May 16, 1896.⁴Commissioned May 18, 1896. Confirmed same date.⁵Deceased October 28, 1896.⁶Resigned.⁷Deceased August 8, 1896.⁸Commissioned August 31, 1896. Confirmed February 18, 1897.⁹Deceased August 9, 1896.¹⁰Commissioned December 15, 1896.

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Hon. CHARLES S. JOHNSON, District Judge, Alaska.⁵

¹Resigned.²Commissioned May 20, 1897.³Commissioned June 8, 1897.⁴Removed.⁵Commissioned July 23, 1897.

CASES REPORTED.

	Page		Page
Abel, Du Pont v. (C. C.).....	534	Brown v. United States (C. C.).....	55
Abercrombie, United States v. (C. C.)....	152	Brown v. Western Contract Co. (C. C. A.)	454
Adams v. Tannage Patent Co. (C. C. A.)....	178	Bryant, Pliable Shoe Co. v. (C. C.).....	521
Albany, The, McCullough v. (C. C. A.).....	966	Buchanan, Comly v. (C. C.).....	58
Albany Ry., Dewey Electric Heating Co. v. (C. C. A.).....	860	Burdon Cent. Sugar-Refining Co. v. Payne (C. C. A.).....	663
Alice B. Phillips, The, Ford v. (C. C. A.)..	415	Burke v. Davis (C. C. A.).....	907
Amaretta Mosher, The (D. C.).....	237	Burlingame v. Lyons (C. C. A.).....	1002
American Grocery Co., Hunt v. (C. C.)....	532	Burns v. Wells Cultivator Co. (C. C. A.)..	1002
American Loan & Trust Co. v. South Atlantic & O. R. Co. (C. C.).....	62	Burt, Scanes v. (C. C. A.).....	1006
American Playing-Card Co., United States Printing Co. v. (C. C.).....	506	Camp, Baltimore & O. R. Co. v. (C. C. A.)..	807
American Soda-Fountain Co., Green v. (C. C. A.)	1004	Campbell v. City of New York (C. C.)....	182
American Strawboard Co. v. Indianapolis Water Co. (C. C. A.).....	423	Campbell v. Iron-Silver Min. Co. (C. C. A.)	1002
American String Wrapper Co., Williams v. (C. C.)	200	Campbell, Chicago & A. R. Co. v. (C. C. A.)	1003
American Trust & Savings Bank v. Farmers' Loan & Trust Co. (C. C. A.).....	924	Capital Sheet-Metal Co., Kinnear & Gager Co. v. (C. C.).....	491
Archibald, Hunt v. (C. C.).....	385	Carey v. Roosevelt (C. C.).....	608
Armonia, The (C. C. A.).....	227	Carroll v. Price (D. C.).....	137
Armstrong, McNeil v. (C. C. A.).....	943	Case Plow Works v. Finks (C. C. A.).....	529
Ashburn, Consumers' Cotton-Oil Co. v. (C. C. A.).....	331	Central Trust Co. v. Clark (C. C. A.).....	269
Ashton Valve Co., Consolidated Safety-Valve Co. v. (C. C.).....	384	Central Trust Co. v. Georgia Pac. R. Co. (C. C.).....	277
Ashuelot Nat. Bank v. Lyon County, Iowa (C. C.).....	127	Central Trust Co. of New York v. Louisville, St. L. & T. R. Co. (C. C.).....	772
Associated Press, Duncan v. (C. C.).....	417	Central Trust Co. of New York v. Southern R. Co. (C. C.).....	1002
Atchison, T. & S. F. R. Co., Interstate Commerce Commission v. (C. C. A.).....	1005	Central Trust Co. of New York, Echols v. (C. C. A.).....	454
Bache v. United States (C. C. A.).....	162	Central Vermont R. Co., Grand Trunk R. Co. v. (C. C.)	60
Bailey v. Berkey (C. C.).....	737	Central Vermont R. R., Grand Trunk Ry. v. (C. C.).....	541
Balbach Smelting & Refining Co., Collector of Customs at Newark v. (C. C.).....	950	Central Vermont R. Co., McPeck v. (C. C. A.)	1005
Baltimore & O. R. Co. v. Camp (C. C. A.)..	807	C. F. Simmons Medicine Co. v. Simmons (C. C.).....	163
Barnard, Randle v. (C. C. A.).....	682	Chappell v. United States (C. C. A.).....	764
Barnard, Sullivan v. (C. C.).....	886	Chicago, K. & S. R. Co., United States v. (C. C.).....	785
Barnard & Leas Manuf'g Co., Springfield Milling Co. v. (C. C. A.).....	261	Chicago, M. & St. P. R. Co., Van Patten v. (C. C.).....	545
Bates, Hoyt v. (C. C.).....	641	Chicago & A. R. Co. v. Campbell (C. C. A.)	1003
Bell, United States v. (C. C.).....	830	Chu Poy, In re (D. C.).....	826
Bellingham Bay Boom Co., United States v. (C. C. A.).....	658	Cincinnati, N. O. & T. P. R. Co., Thomas v. (C. C.).....	911
Berkey, Bailey v. (C. C.).....	737	Cincinnati, N. O. & T. P. Ry., N. K. Fairbank & Co. v. (C. C. A.).....	289
Blackmore v. Parkes (C. C. A.).....	899	Citizens' Nat. Bank of Waco, Howell Cotton Co. v. (C. C. A.).....	767
Blue Star S. S. Co. v. Keyser (D. C.).....	507	City of Chicago, Pennsylvania Co. v. (C. C.)	317
Blumenthal v. Craig (C. C. A.).....	320	City of Chicago, Yazoo & M. V. R. Co. v. (C. C.).....	317
Bowers v. Pacific Coast Dredging & Reclamation Co. (C. C.).....	569	City of Clarksdale, Miss., v. Pacific Imp. Co. (C. C. A.).....	329
Bradley Transp. Co. v. Creech (C. C. A.)..	971	City of Lynn, Green v. (C. C.).....	387
Bradshaw v. Miners' Bank of Joplin (C. C. A.).....	902		
Brooks v. Sacks (C. C. A.).....	403		
Brown v. Ingalls Tp. (C. C.).....	485		
Brown v. Reed Manuf'g Co. (C. C.).....	48		

	Page		Page
City of Naples, The, Hart v. (C. C. A.)...	231	Duncan v. Associated Press (C. C.).....	417
City of New Orleans, Siegel v. (C. C. A.)...	522	Dunham v. The Rochester (D. C.).....	237
City of New Orleans, Warner v. (C. C. A.)...	645	Du Pont v. Abel (C. C.).....	534
City of New York, Campbell v. (C. C.).....	182	Durkee v. Illinois Cent. R. Co. (C. C.)....	1
City of Philadelphia v. Western Union Tel. Co. (C. C.).....	948	Eastern Elevating Co., Dunbar v. (C. C. A.).....	201
City of Plattsmouth, Neb., v. Pollock (C. C. A.).....	1003	Echols v. Central Trust Co. of New York (C. C. A.).....	454
City of Santa Rosa, Seligman v. (C. C.)...	524	Echols, Western Contract Co. v. (C. C. A.)...	454
City of Seattle v. McNamara (C. C. A.)....	863	Elder, Southern R. Co. v. (C. C. A.).....	791
City of Sheboygan, The (C. C. A.).....	231	Elsas, National Folding-Box & Paper Co. v. (C. C.).....	197
Clark v. Great Northern R. Co. (C. C.)....	282	Equitable Life Assur. Soc. of United States v. Nixon (C. C. A.).....	796
Clark v. Sigua Iron Co. (C. C. A.).....	310	Equitable Loan & Investment Co., Latimer v. (C. C.).....	776
Clark, Central Trust Co. v. (C. C. A.).....	269	Evans v. Suess Ornamental Glass Co. (C. C.).....	198
Clark, Reed v. (C. C. A.).....	1006	Evey v. Mexican Cent. R. Co. (C. C. A.)...	294
Cliffe v. Pacific Mail S. S. Co. (C. C.)....	809	Evich, The Glendale v. (C. C. A.).....	633
Cloete United States v. (C. C. A.).....	399	Ewart Manuf'g Co., Mitchell v. (C. C. A.)...	390
Coates Clipper Manuf'g Co., Priest v. (C. C.).....	615	Fairbank & Co. v. Cincinnati, N. O. & T. P. Ry. (C. C. A.).....	289
Coffin v. Stewart, two cases (C. C. A.)....	239	Farmers' Loan & Trust Co. v. Oregon Imp. Co. (C. C. A.).....	1004
Coleman v. United States (D. C.).....	824	Farmers' Loan & Trust Co. v. Otis (C. C. A.).....	1004
Collector of Customs at Newark v. Balbach Smelting & Refining Co. (C. C.).....	950	Farmers' Loan & Trust Co., American Trust & Savings Bank v. (C. C. A.).....	924
Comer v. Polk County (C. C. A.).....	921	Farmers' Loan & Trust Co., Hunt v. (C. C. A.).....	1005
Comly v. Buchanan (C. C.).....	58	Farmers' Loan & Trust Co., Mercantile Trust Co. v. (C. C. A.).....	254
Conery v. Sweeney (C. C. A.).....	14	Farmers' Loan & Trust Co., Oregon R. & Nav. Co. v. (C. C. A.).....	1006
Consolidated Car-Heating Co., Dewey Electric Heating Co. v. (C. C. A.).....	860	Fidelity Insurance, Trust & Safe-Deposit Co. v. Roanoke Iron Co. (C. C.).....	439
Consolidated Fastener Co. v. Traut & Hine Manuf'g Co. (C. C.).....	383	Finks, J. I. Case Plow Works v. (C. C. A.)...	529
Consolidated Safety-Valve Co. v. Ashton Valve Co. (C. C.).....	384	Fitch, Rogers v. (C. C. A.).....	959
Consumers' Cotton-Oil Co. v. Ashburn (C. C. A.).....	331	Flick v. The Marion S. Harriss (D. C.)....	964
Continental Nat. Bank v. Heilman (C. C.)...	36	Ford v. The Alice B. Phillips (C. C. A.)....	415
Cory v. Penco (C. C. A.).....	227	Forgie v. Duff Manuf'g Co. (C. C. A.)....	865
Craig v. Michigan Lubricator Co. (C. C. A.)...	870	Franklin v. Union Loan & Trust Co. (C. C. A.).....	1004
Craig, Blumenthal v. (C. C. A.).....	320	Franz v. Wahl (D. C.).....	9
Crass v. McGhee (C. C. A.).....	1003	Fuller-Warren Co., Michigan Stove Co. v. (C. C.).....	376
Creech, Bradley Transp. Co. v. (C. C. A.)...	971	Furbush & Son Mach. Co. v. Liberty Woolen Mills (C. C.).....	425
Curran v. Grady Trading Co. (C. C. A.)....	1003	Gaskill v. Myers (C. C. A.).....	854
Daisy Manuf'g Co., Markham v. (C. C. A.)....	1005	Georgia Pac. R. Co., Central Trust Co. v. (C. C.).....	277
Dangberg, Union Mill & Mining Co. v. (C. C.).....	73	Gillingham v. Milligan (C. C. A.).....	1004
Daniel v. Miller (C. C.).....	1000	Gilreath, Pfeifer v. (C. C.).....	997
Darst v. Mathieson Alkali Works (C. C.)....	284	Gindorff v. Deering (C. C.).....	952
Davis v. Davis (C. C. A.).....	1003	Glasener, United States v. (D. C.).....	566
Davis, Burke v. (C. C. A.).....	907	Glendale, The, v. Evich (C. C. A.).....	633
Davison, Steel-Clad Bath Co. v. (C. C. A.)...	868	Goldie v. Diamond State Iron Co. (C. C.)...	173
Davis Pressed-Steel Co. v. Morris Box-Lid Co. (C. C. A.).....	407	Grabeel, Holmes v. (C. C.).....	145
De Beaumont v. Webster (C. C. A.).....	535	Grady Trading Co., Curran v. (C. C. A.)....	1003
Deering, Gindorff v. (C. C.).....	952	Graef, Saxlehner v. (C. C.).....	704
Defriar v. The Nicaragua (D. C.).....	745	Grand Trunk R. Co. v. Central Vermont R. Co. (C. C.).....	60
De Neufville v. New York & N. R. Co. (C. C. A.).....	10	Grand Trunk Ry. v. Central Vermont R. R. (C. C.).....	541
Despeaux v. Pennsylvania R. Co. (C. C.)...	897	Gratwick, The W. H. (D. C.).....	590
Devol, Kansas City Hay-Press Co. v. (C. C. A.).....	726	Great Northern R. Co., Clark v. (C. C.)....	282
Dewey Electric Heating Co. v. Albany Ry. (C. C. A.).....	860	Green v. American Soda-Fountain Co. (C. C. A.).....	1004
Dewey Electric Heating Co. v. Consolidated Car-Heating Co. (C. C. A.).....	860		
Diamond State Iron Co., Goldie v. (C. C.)...	173		
Diller v. Hawley (C. C. A.).....	651		
Dillingham v. Moran (C. C. A.).....	759		
Dow v. United States (C. C. A.).....	1004		
Draper v. Wattles (C. C.).....	374		
Duff Manuf'g Co., Forgie v. (C. C. A.).....	865		
Dunbar v. Eastern Elevating Co. (C. C. A.).....	201		

CASES REPORTED.

ix

	Page		Page
Green v. City of Lynn (C. C.).....	387	Johnson, Louisville & N. R. Co. v. (C. C. A.).....	679
Greene v. Société Anonyme des Matières Colorantes et Produits Chimiques de St. Denis (C. C.).....	64	Johnson Electric Service Co. v. Powers Regulator Co. (C. C.).....	626
Greene, Sels v., four cases (C. C.).....	555	Jones v. Schlapback (C. C.).....	274
Greene County v. Kortrecht (C. C. A.).....	241	Joseph B. Thomas, The, Jensen v. (D. C.)..	578
Gregory, The John (C. C. A.).....	971		
Gronmies v. Sullivan (C. C. A.).....	45	Kansas City Hay-Press Co. v. Devol (C. C. A.).....	726
Guckenheimer v. Sellers (C. C.).....	997	Keating v. The John Shay (D. C.).....	216
		Kelly v. Springfield R. Co. (C. C.).....	617
Harris, Michigan Stone & Supply Co. v. (C. C. A.).....	928	Kelly Maus & Co. v. Sioux Nat. Bank (C. C.).....	3
Harriss, The Marion S. (D. C.).....	964	Kentucky Refining Co., Merchants' & Planters' Oil Co. v. (C. C. A.).....	821
Harriss v. The Marion S. Harriss (D. C.)..	964	Keyser, Blue Star S. S. Co. v. (D. C.).....	507
Hart v. The City of Naples (C. C. A.).....	231	King, United States v. (D. C.).....	625
Hatch, Pacific Imp. Co. v. (D. C.).....	211	Kinnavey v. Terminal R. Ass'n of St. Louis (C. C.).....	802
Hawley, Diller v. (C. C. A.).....	651	Kinnear & Gager Co. v. Capital Sheet-Metal Co. (C. C.).....	491
Healey v. Humphrey (C. C. A.).....	890	Knowles Loom Works v. Ryle (C. C.).....	940
Heilman, Continental Nat. Bank v. (C. C.)	36	Kortrecht, Greene County v. (C. C. A.)....	241
Hench, National Harrow Co. v. (C. C.).....	926		
Hench, National Harrow Co. v. (C. C. A.)..	1005	La Chappelle, United States v. (C. C.)....	152
Hercules, The (D. C.).....	218	Laidlaw v. Oregon R. & Nav. Co. (C. C. A.)	876
Hesing, Lansing & Co. v. (C. C. A.).....	242	Lamb v. Stevens (C. C.).....	389
Hettinger v. Meyers (C. C.).....	805	Lansing & Co. v. Hesing (C. C. A.).....	242
Hinchman v. Parlin & Orendorff Co. (C. C. A.).....	157	La Rue, Pennsylvania R. Co. v. (C. C. A.)	148
Hobart v. Illinois Cent. R. Co. (C. C.).....	5	Latimer v. Equitable Loan & Investment Co. (C. C.).....	776
Holland Trust Co., International Bridge & Tramway Co. v. (C. C. A.).....	422	Leavenworth Coal Co. v. United States (C. C. A.).....	1005
Holland Trust Co., Rio Grande Bridge & Tramway Co. v. (C. C. A.).....	1006	Lewin v. Welsbach Light Co. (C. C.).....	904
Holloway, Sykes v. (C. C.).....	432	Liberty Woolen Mills, M. A. Furbush & Son Mach. Co. v. (C. C.).....	425
Holmes v. Grabel (C. C.).....	145	Lipsett, The William J. (D. C.).....	623
Hooper, Whitcomb v. (C. C. A.).....	946	Louisville, St. L. & T. R. Co., Central Trust Co. of New York v. (C. C.).....	772
Hoover v. McChesney (C. C.).....	472	Louisville & N. R. Co. v. Johnson (C. C. A.).....	679
Howell Cotton Co. v. Citizens' Nat. Bank of Waco (C. C. A.).....	767	Lyon County, Iowa, Ashuelot Nat. Bank v. (C. C.).....	127
Hoyt v. Bates (C. C.).....	641	Lyons, Burlingame v. (C. C. A.).....	1002
Hubbell, Smithson v. (C. C.).....	593		
Hughes County, S. D., v. Ward (C. C.).....	314	McChesney, Hoover v. (C. C.).....	472
Humphrey, Healey v. (C. C. A.).....	990	McCullough v. The Albany (C. C. A.).....	966
Hunt v. American Grocery Co. (C. C.).....	532	McDonald v. Seligman (C. C.).....	753
Hunt v. Archibald (C. C.).....	385	McGhee, Crass v. (C. C. A.).....	1003
Hunt v. Farmers' Loan & Trust Co. (C. C. A.).....	1005	McGreer, Monroe v. (C. C.).....	954
Hurlbut v. Turnure (C. C. A.).....	208	McNall, Metropolitan Life Ins. Co. v. (C. C.)	888
		McNamara, City of Seattle v. (C. C. A.)....	863
Ilgenfritz v. Mutual Ben. Life Ins. Co. of Newark, N. J. (C. C.).....	27	McNeil v. Armstrong (C. C. A.).....	943
Illinois Cent. R. Co., Durkee v. (C. C.).....	1	McPeck v. Central Vermont R. Co. (C. C. A.).....	1005
Illinois Cent. R. Co., Hobart v. (C. C.).....	5	M. A. Furbush & Son Mach. Co. v. Liberty Woolen Mills (C. C.).....	425
Illinois Watch Co., Robbins v. (C. C. A.)....	957	Mair v. The Marion S. Harriss (D. C.).....	964
Indianapolis Water Co., American Strawboard Co. v. (C. C. A.).....	423	Manhattan Trust Co. v. Sioux City & N. R. Co. (C. C.).....	50
Ingalls Tp., Brown v. (C. C.).....	485	Marion S. Harriss, The, Flick v. (D. C.)...	964
International Bridge & Tramway Co. v. Holland Trust Co. (C. C. A.).....	422	Marion S. Harriss, The, Harriss v. (D. C.)	964
Interstate Commerce Commission v. Atchison, T. & S. F. R. Co. (C. C. A.).....	1005	Marion S. Harriss, The, Mair v. (D. C.)...	964
Iron-Silver Min. Co., Campbell v. (C. C. A.).....	1002	Marion S. Harriss, The, Winsmore v. (D. C.)	964
		Markham v. Daisy Manuff'g Co. (C. C. A.)..	1005
Jensen v. The Joseph B. Thomas (D. C.)...	578	Mathieson Alkali Works, Darst v. (C. C.)...	284
Jensen, Norton v. (C. C.).....	494	Mayers, United States v. (D. C.).....	159
Jewett v. Yardley (C. C.).....	920	Meads v. United States (C. C. A.).....	684
J. I. Case Plow Works v. Finks (C. C. A.)..	529	Mercantile Trust Co. v. Farmers' Loan & Trust Co. (C. C. A.).....	254
John D. Spreckels & Bros. Co., Pederson v. (D. C.).....	205	Merchants' & Planters' Oil Co. v. Kentucky Refining Co. (C. C. A.).....	821
John Gregory, The (C. C. A.).....	971		
John R. Penrose, The, v. The William J. Lipsett (D. C.).....	623		
John Shay, The, Keating v. (D. C.).....	216		

	Page		Page
Metropolitan Life Ins. Co. v. McNall (C. C.)	888	North Carolina R. Co., Southern R. Co. v. (C. C.)	595
Mexican Cent. R. Co., Evey v. (C. C. A.)	294	Norton v. Jensen (C. C.)	494
Meyers, Hettinger v. (C. C.)	805	Norton v. United States (C. C. A.)	819
Michigan Lubricator Co., Craig v. (C. C. A.)	870		
Michigan Stone & Supply Co. v. Harris (C. C. A.)	928	Omaha Nat. Bank v. Mutual Ben. Life Ins. Co. (C. C.)	935
Michigan Stove Co. v. Fuller-Warren Co. (C. C.)	376	One Case Chemical Compound, United States v., two cases (D. C.)	373
Miles, Mutual Ben. Life Ins. Co. of Newark, N. J., v. (C. C.)	32	164 ^{48/100} Proof Gallons of Distilled Spirits, United States v. (D. C.)	614
Miller, Daniel v. (C. C.)	1000	Oregon Imp. Co., Farmers' Loan & Trust Co. v. (C. C. A.)	1004
Milligan, Gillingham v. (C. C. A.)	1004	Oregon R. & Nav. Co. v. Farmers' Loan & Trust Co. (C. C. A.)	1006
Miners' Bank of Joplin, Bradshaw v. (C. C. A.)	902	Oregon R. & Nav. Co., Laidlaw v. (C. C. A.)	876
Mitchell v. Ewart Manuf'g Co. (C. C. A.)	390	Otis, Farmers' Loan & Trust Co. v. (C. C. A.)	1004
Monroe v. McGreer (C. C.)	954		
Monroe v. Williamson (C. C.)	977	Pacific Bank, Montagu v. (C. C.)	602
Montagu v. Pacific Bank (C. C.)	602	Pacific Coast Dredging & Reclamation Co., Bowers v. (C. C.)	569
Monticello, The (D. C.)	211	Pacific Imp. Co. v. Hatch (D. C.)	211
Moore, In re (C. C.)	356	Pacific Imp. Co., City of Clarksdale, Miss., v. (C. C. A.)	329
Moorhead, Pfeifer v. (C. C.)	997	Pacific Mail S. S. Co., Cliffe v. (C. C.)	809
Moorhead, Porter Brewing Co. v. (C. C.)	997	Packer v. Whittier (C. C.)	335
Moran, Dillingham v. (C. C. A.)	759	Parkes, Blackmore v. (C. C. A.)	899
Morris Box-Lid Co., Davis Pressed-Steel Co. v. (C. C. A.)	407	Parlin & Orendorff Co., Hinchman v. (C. C. A.)	157
Moseley & Stoddard Manuf'g Co., Sharples v. (C. C. A.)	179	Patten, Whittemore v. (C. C.)	527
Mosher, The Amaretta (D. C.)	237	Payne v. Walker (C. C. A.)	1006
Mutual Ben. Life Ins. Co., Omaha Nat. Bank v. (C. C.)	935	Payne, Burdon Cent. Sugar-Refining Co. v. (C. C. A.)	663
Mutual Ben. Life Ins. Co. of Newark, N. J., v. Miles (C. C.)	32	Peck, Sinton v. (C. C. A.)	1006
Mutual Ben. Life Ins. Co. of Newark, N. J., Igenfritz v. (C. C.)	27	Peddie, Roemer v. (C. C. A.)	380
Mutual Ben. Life Ins. Co. of Newark, N. J., Voss v. (C. C.)	24	Pederson v. John D. Spreckels & Bros. Co. (D. C.)	205
Myers, Gaskill v. (C. C. A.)	854	Peirce, Ray v. (C. C.)	881
		Penco, Cory v. (C. C. A.)	227
National Folding-Box & Paper Co. v. Elsas (C. C.)	197	Pendleton, Santana Live-Stock & Land Co. v. (C. C. A.)	784
National Folding Box & Paper Co. v. Stecher Lithographic Co. (C. C. A.)	395	Pennsylvania Co. v. City of Chicago (C. C.)	317
National Harrow Co. v. Hench (C. C.)	926	Pennsylvania R. Co. v. La Rue (C. C. A.)	148
National Harrow Co. v. Hench (C. C. A.)	1005	Pennsylvania R. Co., Despeaux v. (C. C.)	897
National Malleable Castings Co., St. Louis Car-Coupler Co. v. (C. C.)	706	Penrose, The John R. (D. C.)	623
National Wall-Paper Co., Washburn v. (C. C. A.)	17	Pfeifer v. Gilreath (C. C.)	997
Nellie E. Rumball, The (C. C. A.)	239	Pfeifer v. Moorhead (C. C.)	997
Newman v. United States (C. C.)	122	Phillips, The Alice B. (C. C. A.)	415
Newsom's Adm'r v. Norfolk & W. R. Co. (C. C.)	133	Phillips v. Sullivan Machinery Co. (C. C. A.)	1006
New York Life Ins. Co., Steidle v. (C. C. A.)	489	Pierce, Tennessee Coal, Iron & Railroad Co. v. (C. C. A.)	814
New York, N. H. & H. R. Co., Sayles v. (C. C.)	326	Pliable Shoe Co. v. Bryant (C. C.)	521
New York, N. H. & H. R. Co., Wilcox v. (C. C.)	143	Polk County, Comer v. (C. C. A.)	921
New York & N. R. Co., De Neufville v. (C. C. A.)	10	Pollock, City of Plattsmouth, Neb., v. (C. C. A.)	1003
Nicaragua, The, Defrier v. (D. C.)	745	Porter Brewing Co. v. Moorhead (C. C.)	997
Nixon, Equitable Life Assur. Soc. of United States v. (C. C. A.)	796	Powers Regulator Co., Johnson Electric Service Co. v. (C. C.)	626
N. K. Fairbank & Co. v. Cincinnati, N. O. & T. P. Ry. (C. C. A.)	289	Price, Carroll v. (D. C.)	137
Norfolk & W. R. Co., Newsom's Adm'r v. (C. C.)	133	Priest v. Coates Clipper Manuf'g Co. (C. C.)	615
North American Commercial Co. v. United States (C. C. A.)	748	Puget Sound Nat. Bank of Everett, Snohomish County v. (C. C.)	518
North Bloomfield Gravel-Min. Co., United States v. (C. C.)	243	Pullman's Palace-Car Co., Stalker v. (C. C.)	989
		Purdy v. Wallace Muller & Co. (C. C.)	513
		Rabboni, The (C. C. A.)	239
		Randle v. Barnard (C. C. A.)	682
		Ray v. Peirce (C. C.)	881
		Redruth, The (C. C. A.)	227

	Page		Page
Reed v. Clark (C. C. A.).....	1006	Spaulding v. Tatum (C. C. A.).....	1007
Reed Manuf'g Co., Brown v. (C. C.).....	48	Spreckels & Bros. Co., Pederson v. (D. C.)	205
Richardson, United States v. (C. C.).....	152	Springfield Milling Co. v. Barnard & Leas Manuf'g Co. (C. C. A.).....	261
Rich Co., Tyler v. (C. C.).....	621	Springfield R. Co., Kelly v. (C. C.).....	617
Rio Grande Bridge & Tramway Co. v. Hol- land Trust Co. (C. C. A.).....	1006	Stalker v. Pullman's Palace-Car Co. (C. C.)	989
Roanoke Iron Co., Fidelity Insurance, Trust & Safe-Deposit Co. v. (C. C.).....	439	Standard Electric Co., Western Electric Co. v. (C. C.).....	192
Robbins v. Illinois Watch Co. (C. C. A.)..	957	Stecher Lithographic Co., National Folding Box & Paper Co. v. (C. C. A.).....	395
Robinson, United States v. (C. C.).....	152	Steel-Clad Bath Co. v. Davison (C. C. A.)..	868
Rochester, The, Dunham v. (D. C.).....	237	Steinle v. New York Life Ins. Co. (U. C. A.).....	489
Rodriguez, In re (D. C.).....	337	Stevens, Lamb v. (C. C.).....	389
Roemer v. Peddie (C. C. A.).....	380	Stewart v. Coffin, two cases (C. C. A.)....	239
Rogers v. Fitch (C. C. A.).....	959	Suess Ornamental Glass Co., Evans v. (C. C.).....	198
Rogers, United States v. (C. C. A.).....	941	Sullivan v. Barnard (C. C.).....	886
Roosevelt, Carey v. (C. C.).....	608	Sullivan, Grommes v. (C. C. A.).....	45
Ross v. Western Union Tel. Co. (C. C. A.)	676	Sullivan Machinery Co., Phillips v. (C. C. A.).....	1006
Rumball, The Nellie E. (C. C. A.).....	239	Suthon v. United States (C. C. A.).....	810
Ryle, Knowles Loom Works v. (C. C.).....	940	Sweeney, Conery v. (C. C. A.).....	14
Sacks, Brooks v. (C. C. A.).....	403	Sykes v. Holloway (C. C.).....	432
St. Louis Car-Coupler Co. v. National Mal- leable Castings Co. (C. C.).....	706	Tannage Patent Co., Adams v. (C. C. A.)..	178
Santana Live-Stock & Land Co. v. Pendle- ton (C. C. A.).....	784	Tatum, Spaulding v. (C. C. A.).....	1007
Saxlehner v. Graef (C. C.).....	704	Tennessee Coal, Iron & Railroad Co. v. Pierce (C. C. A.).....	814
Sayles v. New York, N. H. & H. R. Co. (C. C.).....	326	Tennessee & C. R. Co., United States v. (C. C. A.).....	544
Scanes v. Burt (C. C. A.).....	1006	T. E. Rich Co., Tyler v. (C. C.).....	621
Scheele v. The W. H. Gratwick (D. C.)....	590	Terminal R. Ass'n of St. Louis, Kinnavey v. (C. C.).....	802
Schlapback, Jones v. (C. C.).....	274	Texas & P. R. Co., Smith v. (C. C. A.)..	1007
Sea Queen, The (D. C.).....	218	Thomas, The Joseph B. (D. C.).....	578
Seligman v. City of Santa Rosa (C. C.)....	524	Thomas v. Cincinnati, N. O. & T. P. R. Co. (C. C.).....	911
Seligman, McDonald v. (C. C.).....	753	Tindal, Wesley v. (C. C.).....	612
Sellers, Guckenheimer v. (C. C.).....	997	Traut & Hine Manuf'g Co., Consolidated Fastener Co. v. (C. C.).....	383
Sels v. Greene (C. C.).....	555	Travis County, Tex., Wade v. (C. C. A.)..	742
Sharples v. Moseley & Stoddard Manuf'g Co. (C. C. A.).....	179	Tsu Tse Mee, In re (D. C.).....	562
Shay, The John (D. C.).....	216	Tsu Tse Mee, In re (D. C.).....	762
Shelp v. United States (C. C. A.).....	694	Turnure, Hurlbut v. (C. C. A.).....	208
Shipowners' & Merchants' Tugboat Co., In re (D. C.).....	218	Tyler v. T. E. Rich Co. (C. C.).....	621
Siegel v. City of New Orleans (C. C. A.)...	522	Union Loan & Trust Co., Franklin v. (C. C. A.).....	1004
Sigua Iron Co., Clark v. (C. C. A.).....	310	Union Mill & Mining Co. v. Dangberg (C. C.).....	73
Simmons, C. F. Simmons Medicine Co. v. (C. C.).....	163	United States v. Abercrombie (C. C.).....	152
Simmons Medicine Co. v. Simmons (C. C.)	163	United States v. Bell (C. C.).....	830
Sinton v. Peck (C. C. A.).....	1006	United States v. Bellingham Bay Boom Co. (C. C. A.).....	658
Sioux City & N. R. Co., Manhattan Trust Co. v. (C. C.).....	50	United States v. Chicago, K. & S. R. Co. (C. C.).....	783
Sioux Nat. Bank, Kelly Maus & Co. v. (C. C.).....	3	United States v. Cloete (C. C. A.).....	399
Sirius, The (C. C. A.).....	415	United States v. Glasener (D. C.).....	566
Smith v. Texas & P. R. Co. (C. C. A.).....	1007	United States v. King (D. C.).....	625
Smith v. Western Union Tel. Co. (C. C.)...	242	United States v. La Chappelle (C. C.)....	152
Smith, Wheeler v. (C. C.).....	319	United States v. Mayers (D. C.).....	159
Smithson v. Hubbell (C. C.).....	593	United States v. North Bloomfield Gravel- Min. Co. (C. C.).....	243
Snobomish County v. Puget Sound Nat. Bank of Everett (C. C.).....	518	United States v. One Case Chemical Com- pound, two cases (D. C.).....	373
Societe Anonyme des Matieres Colorantes et Produits Chimiques de St. Denis, Greene v. (C. C.).....	64	United States v. 164 ⁸ / ₁₀₀ Proof Gallons of Distilled Spirits (D. C.).....	614
Société Fabriques de Produits Chimiques de Thann et de Mulhouse, In re, two cases (D. C.).....	373	United States v. Richardson (C. C.).....	152
South Atlantic & O. R. Co., American Loan & Trust Co. v. (C. C.).....	62	United States v. Robinson (C. C.).....	152
Southern R. Co. v. Elder (C. C. A.).....	791	United States v. Rogers (C. C. A.).....	941
Southern R. Co. v. North Carolina R. Co. (C. C.).....	595		
Southern R. Co., Central Trust Co. of New York v. (C. C.).....	1002		

	Page		Page
United States v. Tennessee & C. R. Co. (C. C. A.)	544	Webster, De Beaumont v. (C. C. A.)	535
United States v. Williams (C. C.)	152	Wells Cultivator Co., Burns v. (C. C. A.)	1092
United States, Bache v. (C. C. A.)	162	Welsbach Light Co., Lewin v. (C. C.)	904
United States, Brown v. (C. C.)	55	Wesley v. Tindal (C. C.)	612
United States, Chappell v. (C. C. A.)	764	Western Contract Co. v. Echols (C. C. A.)	454
United States, Coleman v. (D. C.)	824	Western Contract Co., Brown v. (C. C. A.)	454
United States, Dow v. (C. C. A.)	1004	Western Contract Co., United States Trust Co. v. (C. C. A.)	454
United States, Leavenworth Coal Co. v. (C. C. A.)	1005	Western Electric Co. v. Standard Electric Co. (C. C.)	192
United States, Meads v. (C. C. A.)	684	Western Electric Co. v. Western Telephone Construction Co. (C. C.)	572
United States, Newman v. (C. C.)	122	Western Telephone Construction Co., Western Electric Co. v. (C. C.)	572
United States, North American Commercial Co. v. (C. C. A.)	748	Western Union Tel. Co., City of Philadelphia v. (C. C.)	948
United States, Norton v. (C. C. A.)	819	Western Union Tel. Co., Ross v. (C. C. A.)	676
United States, Shelp v. (C. C. A.)	694	Western Union Tel. Co., Smith v. (C. C.)	242
United States, Suthon v. (C. C. A.)	810	West Virginia Flint Bottle Co., United States Glass Co. v. (C. C.)	993
United States Glass Co. v. West Virginia Flint-Bottle Co. (C. C.)	993	Wheeler v. Smith (C. C.)	319
United States Printing Co. v. American Playing-Card Co. (C. C.)	506	W. H. Gratwick, The, Scheele v. (D. C.)	590
United States Trust Co. v. Western Contract Co. (C. C. A.)	454	Whitcomb v. Hooper (C. C. A.)	946
Vance, Ex parte (C. C.)	612	Whittemore v. Patten (C. C.)	527
Van Patten v. Chicago, M. & St. P. R. Co. (C. C.)	545	Whittier, Packer v. (C. C.)	335
Voss v. Mutual Ben Life Ins. Co. of Newark, N. J. (C. C.)	24	Wilcox v. New York, N. H. & H. R. Co. (C. C.)	143
Wade v. Travis County, Tex. (C. C. A.)	742	William J. Lipsett, The, The John R. Penrose v. (D. C.)	623
Wahl, Franz v. (D. C.)	9	Williams v. American String Wrapper Co. (C. C.)	200
Waite, In re (D. C.)	359	Williams, United States v. (C. C.)	152
Walker, Payne v. (C. C. A.)	1006	Williamson, Monroe v. (C. C.)	977
Wallace, Muller & Co., Purdy v. (C. C.)	513	Winsmore v. The Marion S. Harriss (D. C.)	964
Ward, Hughes County, S. D., v. (C. C.)	314	Wong Fock, In re (D. C.)	558
Warner v. City of New Orleans (C. C. A.)	645	Yardley, Jewett v. (C. C.)	920
Washburn v. National Wall-Paper Co. (C. C. A.)	17	Yazoo & M. V. R. Co. v. City of Chicago (C. C.)	317
Wattles, Draper v. (C. C.)	374		

CASES

ARGUED AND DETERMINED

IN THE

UNITED STATES CIRCUIT COURTS OF APPEALS AND THE CIRCUIT AND DISTRICT COURTS.

DURKEE v. ILLINOIS CENT. R. CO. et al. .

(Circuit Court, N. D. Iowa, W. D. June 3, 1897.)

**REMOVAL OF CAUSES—CITIZENSHIP—JOINDER OF A DEFENDANT TO PREVENT
REMOVAL.**

When a petition for the removal of a cause from a state to a federal court alleges facts to show that a defendant, who is a citizen of the same state as the plaintiff, has been joined merely for the purpose of defeating the jurisdiction of the federal court, it is open to the plaintiff to join issue upon the facts so alleged; and thereupon the court will hear the evidence, and decide accordingly, but, unless issue is joined, the facts alleged in the petition, if supported by affidavit, will be taken as true, and the cause will be removed.

Submitted on Motion to Remand to the State Court.

J. D. F. Smith, for plaintiff.

Duncombe & Kenyon and Marsh & Henderson, for defendants.

SHIRAS, District Judge. The plaintiff in this case is the administratrix of the estate of Charles H. Durkee, deceased, and in that capacity she brought this action in the district court of Cherokee county, Iowa, against the defendant railway companies, to recover damages for the death of said Durkee, it being alleged that while in the employ of the defendants as a brakeman, and while engaged in coupling cars upon a train operated by the defendants, he was caught and crushed between the cars, it being further averred that the accident was due to the negligence of the defendants. The Illinois Central Railroad Company, before any trial was had of the case in the state court, filed a petition for removal thereof into this court, upon the ground of local prejudice and influence, and averring, further, that the plaintiff, when the suit was brought, and ever since, has been a citizen of Iowa; that the Cherokee & Dakota Railroad Company, though a corporation created under the laws of the state of Iowa, did not own the railroad when the accident happened, was not operating the same, was not in any manner connected therewith, and had ceased to exist or do business as a corporation; and that it was named as a party defendant for the sole purpose of preventing a removal of the case into the federal

court; and that the Illinois Central Company is a corporation created under the laws of the state of Illinois. Upon this petition and the affidavit filed in support thereof, this court granted an order for the removal of the case; and, the transcript having been duly filed in this court, the plaintiff now moves for an order remanding the case on several grounds, the first being that the petition for removal was not filed in time, because an answer had been filed in the state court, thus presenting an issue on the record. When the removal is sought on the ground of local prejudice, the application is in time, if made before a trial of the case in any form upon the merits, and the filing an answer is not a trial, within the meaning of the statute. *Fisk v. Henarie*, 142 U. S. 459, 12 Sup. Ct. 207.

The ground mainly relied on in support of the motion to remand is that the petition of plaintiff declares against both defendants jointly, and that the defendants cannot make the action several, and therefore, upon the face of the record, it is a joint action against two defendants, one of whom is a corporation created under the laws of Iowa, of which state the plaintiff is a citizen. There can be no question that if the Cherokee & Dakota Railroad Company is an actual defendant, made so in good faith by the plaintiff, then this court is without jurisdiction over the case; but the petition for removal charges that the named company is not an existing corporation, has no interest or liability in the case, and was named as a co-defendant for the sole purpose of endeavoring to prevent a removal of the case into the federal court. If these averments of fact be true, the jurisdiction of this court cannot be thus defeated. This general question I had occasion to consider in the case of *Dow v. Bradstreet Co.*, 46 Fed. 824, and I therein held that it was open to a defendant to show, by proper allegations in a petition for removal, that a co-defendant had been joined in the action solely for the purpose of endeavoring to defeat the right of removal into the federal court, and that the questions of fact thus presented must be tried in the federal court; and, further, that if it was made to appear that a person or corporation having no real interest in the controversy was named as a co-defendant in the action, merely for the purpose of defeating the right of removal otherwise existing, such defendant would be deemed to be merely a nominal party, whose presence on the record would not defeat the jurisdiction of this court. Under the views expressed in that case, which I now see no reason to change, it is open to the plaintiff to join issue upon the facts alleged in the petition for removal, which are relied on as showing that the Cherokee & Dakota Company must be held to be merely a nominal party, and, if issue is joined, the court will hear the evidence thereon; but, unless issue is thus made on this question, the allegations of the petition, being supported by affidavit, will be taken to be true, and in that event it must be held that the case was properly removed into this court. The motion to remand will therefore be overruled, with leave to plaintiff to take issue upon the facts averred in the petition for removal, the same to be taken within 30 days.

KELLY MAUS & CO. v. SIOUX NAT. BANK et al.

(Circuit Court, N. D. Iowa, W. D. June 1, 1897.)

REMOVAL OF CAUSES—FEDERAL JURISDICTION—SUIT TO ENJOIN SALE UNDER STATE EXECUTION.

The E. Co., being indebted to the plaintiff, executed to it three promissory notes, and pledged certain chattels to secure their payment. Subsequently the E. Co. confessed judgment in a state court in favor of the S. Bank, then in the hands of a receiver. The receiver caused an execution issued from the state court to be levied on the same chattels which had been pledged to plaintiff. Plaintiff then filed a bill in equity in the state court, against the bank and its receiver, the E. Co., and the sheriff, to restrain the sale of the chattels and determine the rights of the parties. The receiver applied to remove this suit to the federal court. *Held*, that the subject-matter of the controversy, the pledged chattels, was within the jurisdiction and control of the state court, and therefore beyond the jurisdiction of the federal court, either original or by removal.

Motion to Remand to State Court.

Milchrist & Robinson, for plaintiff.

Shull & Farnsworth, for defendants.

SHIRAS, District Judge. From the record in this case, the facts appear to be as follows: The Sioux National Bank, a federal corporation doing business at Sioux City, Iowa, becoming insolvent, was put in liquidation, and Jonathan W. Brown was appointed receiver thereof by the comptroller of the currency; that the Sioux City Engine & Iron Works is a corporation created under the laws of the state of Iowa, and of which corporation Jonathan W. Brown is president; that in September and October, 1896, that corporation became indebted to Kelly Maus & Co., a corporation created under the laws of Illinois, in the sum of \$4,500, and as evidence thereof executed its three promissory notes, payable to the order of plaintiff, and as security therefor pledged and delivered to the plaintiff four steam engines and five well machines and their appurtenances; that the said Sioux City Engine & Iron Works became indebted to the Sioux National Bank in the sum of \$36,000, and on or about November 28, 1896, the said Jonathan W. Brown, as president of the engine and iron works, confessed judgment in favor of the Sioux National Bank, of which he was then receiver, for the sum due the bank, which confession of judgment was filed in the office of the clerk of the district court of Woodbury county, Iowa, and an execution thereon was issued and placed in the hands of the sheriff of the county, and by him levied on the personal property pledged as security to the plaintiff, the same being advertised to be sold at public sheriff's sale. Thereupon the plaintiff filed a bill in equity in the district court of Woodbury county, Iowa, setting forth the indebtedness from the Sioux City Engine & Iron Works, and the pledging of the personal property as security therefor, and prayed an injunction restraining the sheriff's sale until the rights of the parties could be determined, which injunction was granted by the state court. To this bill there were made parties defendant the Sioux

National Bank, Jonathan W. Brown, receiver thereof, the Sioux City Engine & Iron Works, H. F. Clough, receiver thereof, and W. C. Davenport, the sheriff of Woodbury county. Jonathan W. Brown, as receiver of the Sioux National Bank, filed in the state court a petition for the removal of the case into this court, on the ground that the real controversy in the suit is between the complainant and the receiver, and therefore is a controversy arising under the laws of the United States, and as such is removable to this court under the provisions of the act of 1888, and, furthermore, that if it be held that the bill presents the question of indebtedness between the engine and iron works and the national bank as a controversy, it also presents the question of the superiority of the liens on the property as a separable controversy pending between the plaintiff and the receiver as defendant, and that this controversy is one which the receiver can remove to this court.

I do not deem it necessary to undertake the consideration of the question whether the controversy is one arising under the laws of the United States, or whether there is or is not a separable controversy presented on the record, for the reason that the facts show that this court cannot take jurisdiction over the controversy existing between the plaintiff and the receiver. That controversy is over the rights of the parties to the personal property taken possession of by the sheriff of Woodbury county, under the writ of execution issuing from the district court of that county. The subject-matter of the controversy, to wit, the property levied on, is within the jurisdiction and under the control of the state court, and is, therefore, without the jurisdiction of this court. It was the receiver of the national bank who caused the property to be levied on by process issued by the state court, and by his own act he brought the property within the control and jurisdiction of the state court. Of necessity, when the plaintiff corporation sought to enforce its right to the property as pledgee, it was compelled to appeal to the state court for the protection of its rights. The property being within the jurisdiction and control of the state court, the possession thereof cannot be interfered with by this court, and therefore this court cannot properly attempt to entertain jurisdiction, either originally or by removal, over a suit brought to settle the priority or superiority of conflicting liens asserted upon the property within the possession of the state court. *Buck v. Colbath*, 3 Wall. 334; *Covell v. Heyman*, 111 U. S. 176, 4 Sup. Ct. 355; *Gates v. Bucki*, 4 C. C. A. 116, 53 Fed. 961. The only controversy presented on the record in this case, in which the receiver has any interest, is that with regard to the lien asserted in behalf of the plaintiff upon the property in possession of the state court. That possession exists by reason of the levy of the execution issued upon the judgment entered in the state court, and that judgment and the proceedings upon which it is based are not within the jurisdiction of this court, and therefore the possession of the property is with the state court, and cannot be taken from it, and all proceedings instituted for the purpose of asserting liens thereon are properly within the jurisdiction of that court, and are without the jurisdiction of this court so long as the possession

of the property remains in the state court. For these reasons, the case is not one in which the jurisdiction of this court can be properly invoked, and the motion to remand must be sustained.

HOBART v. ILLINOIS CENT. R. CO.

(Circuit Court, N. D. Iowa, W. D. June 3, 1897.)

1. REMOVAL OF CAUSES—LOCAL PREJUDICE.

Under the acts of 1887-88, a cause can only be removed from a state to a federal court on the ground of local prejudice before the trial of the case; and the submission of a demurrer to the petition, based upon the ground that the petition fails to show a cause of action, and the ruling of the court thereon, constitute a trial of the case, such as to prevent the removal. *Fisk v. Henarie*, 12 Sup. Ct. 207, 142 U. S. 459, followed.

2. PLEADING—AMENDMENT—NEW CAUSE OF ACTION.

When a demurrer to a petition, setting up a cause of action based on defendant's alleged negligence, has been filed and sustained, the filing of an amended petition, pursuant to leave, which sets up, and bases the right of action upon, a statute of the state where the accident happened, does not make the case a new action, so as to avoid the effect of the rule that a cause cannot be removed to a federal court on the ground of local prejudice after a trial on demurrer or otherwise. *Railway Co. v. Wyler*, 15 Sup. Ct. 877, 158 U. S. 285, distinguished.

A. C. Hobart, for plaintiff.

Duncombe & Kenyon and Marsh & Henderson, for defendant.

SHIRAS, District Judge. This action was brought originally in the district court of Cherokee county, Iowa, by the plaintiff, as administrator of the estate of George C. Parker, deceased; the cause of action alleged being that Parker, while employed as brakeman by the defendant corporation, met his death at Doran Station, in the state of Illinois, being run over by the cars when engaged in coupling the same; it being averred that the accident was due to the negligence of the railway company in not furnishing proper coupling pins, and in leaving the frogs at the switch in bad condition. To this petition a demurrer was interposed, presenting the question whether the petition showed on its face a cause of action; the accident having occurred in the state of Illinois. The court sustained the demurrer, and thereupon the plaintiff took leave to amend his petition, and amended by setting forth, as part of the petition, sections 1, 2, c. 70, Rev. St. Ill., which give a right of action for death resulting from the wrongful or negligent acts of another; this amendment being filed December 31, 1896. On the 2d day of January, 1897, a petition for removal of the case to this court on the ground of local prejudice was filed and submitted, and an order was made for the removal of the case, and a transcript of the record having been filed in this court the plaintiff now moves for an order remanding the case; and the question for decision is whether the filing and submission to the state court of the demurrer to the original petition, and taking the ruling of the court thereon, was a trial of the case, in such sense as to defeat a subsequent removal on the ground of local prejudice.

In the case of *Fisk v. Henarie*, 142 U. S. 459, 12 Sup. Ct. 207, it is

held that the acts of 1887-88 repealed subdivision 3 of section 639 of the Revised Statutes, and therefore the right of removal on the ground of local prejudice or influence is dependent upon the provisions of the acts of 1887-88, and that, as those acts declare that a removal on the ground of prejudice must be applied for before the trial of the case, the same construction must be given to these words as is given to the same words in the act of 1875, under which it is held that a hearing had upon a demurrer filed to a petition on the ground that it does not state facts sufficient to show a cause of action against the defendant is a trial of the case, in such sense as to preclude a removal thereof subsequent to the ruling upon the demurrer. *Alley v. Nott*, 111 U. S. 472, 4 Sup. Ct. 495; *Laidly v. Huntington*, 121 U. S. 179, 7 Sup. Ct. 855. Upon the authority of these cases, it must be held that under the provisions of the acts of 1887-88 a removal on the ground of local prejudice or undue influence can only be had before a trial of the case, and that the submission of a demurrer to the petition, based upon the ground that the petition fails to show a cause of action, and the ruling of the court thereon, constitute a trial of the case, so that thereafter the right of removal cannot be exercised.

On behalf of the defendant company it is urged that this general rule does not apply to this case, for the reason that the amendment to the petition filed after the ruling upon the demurrer sets up a new cause of action, based upon the statute of Illinois, and that it is this action which it is sought to remove, and which must be distinguished from the cause of action set up in the original petition, and which alone was put upon trial by the hearing upon the demurrer filed thereto. In support of this contention, counsel cite the case of *Railway Co. v. Wyler*, 158 U. S. 285, 15 Sup. Ct. 877. The question for decision in that case was when the running of the statute of limitations was interrupted, the facts being that in 1885 Wyler sued the railway company in the circuit court of Jackson county, Mo., for personal injuries received in 1883, when in the employ of the company in the state of Kansas. The suit was removed to the federal court, and was first heard upon a general demurrer to the petition, which was sustained upon the ground that the petition was based upon the general rule governing the relation of master and servant, and the petition showed upon its face that the injuries complained of resulted from the negligence of a co-servant, for which the master was not liable. More than five years after the happening of the accident, an amended petition was filed, setting forth the statute of Kansas which makes railroad companies doing business in that state liable for all damages caused to employes by the negligence of the other agents or servants of the company. A demurrer to the amended petition was interposed on the ground that it appeared that the action based upon the statute was barred because not brought within five years, the period fixed by the statute of Missouri. The supreme court sustained the demurrer, holding that the amended petition was based upon the right of action created by the statute; that the amended petition presented a new cause of action, which was in law a departure from the cause originally declared on, and therefore the action based upon the statute was not commenced, so as to interrupt the running of the period of

limitation, until the amended petition based thereon was filed. In that case the bar of the statute applied to the right of action based upon the statute of Kansas making railway companies liable to an employé for injuries caused by the negligence of a co-employé; and it is clear that it could not be said, in any just sense, that the running of the limitation period applicable to the right of action created by the statute of Kansas, and which period began to run when the accident happened, could be interrupted or suspended until the party injured sought to enforce the right of action created by the statute. The lapse of the period of time fixed by the statute of limitations bars the remedy or right of action. It does not destroy the cause of action. The right to remove a suit pending in a state court, upon the ground of local prejudice, has no necessary connection with the right of action sought to be enforced therein. The removal, if had, affects the suit or action as an entirety. In the strict sense of the words, the cause of action in the present case has not been changed or varied by the amendment setting forth the statute of Illinois, although there has been a change in the right of action relied upon. The plaintiff, in the amended petition as well as in the original petition, is seeking to recover the same damages, to wit, those caused by the injuries received at Doran Station, and resulting in the death of George C. Parker. In the sense of the removal statute, the case now pending is the same that was submitted and heard upon demurrer in the state court. In the original petition submitted on demurrer, the plaintiff sought to hold the defendant company liable for the death of George C. Parker, caused by the injuries received by him at Doran Station, and the defendant denied liability therefor. In the amended petition, plaintiff seeks to hold the defendant company liable for the death of George C. Parker, resulting from the injuries received at Doran Station, and the defendant denies liability therefor. Under the ruling of the supreme court in *Alley v. Nott*, supra, it cannot be questioned that this case has been once tried in the state court, and before the removal was sought, and that trial ended the right to apply for and secure a removal of the case into this court. In that case it is said that:

"A demurrer to a complaint because it does not state facts sufficient to constitute a cause of action is equivalent to a general demurrer to a declaration at common law, and raises an issue which, when tried, will finally dispose of the case as stated in the complaint, on its merits, unless leave to amend or plead over is granted. The trial of such an issue is the trial of the cause as a cause, and not the settlement of a mere matter of form in proceeding. There can be no other trial, except at the discretion of the court, and, if final judgment is entered on the demurrer, it will be a final determination of the rights of the parties, which can be pleaded in bar to any other suit for the same cause of action. Under such circumstances, the trial of an issue raised by a demurrer which involves the merits of the action is, in our opinion, a trial of the action, within the meaning of the act of March 3, 1875."

In this opinion the supreme court holds that the hearing and decision on a demurrer to a petition for the reason that the latter fails to show ground for relief is a trial, no matter whether the demurrer is sustained or overruled; for it is therein said that the ruling on the demurrer will finally dispose of the case, "unless leave to amend or plead over is granted," or, in other words, if the demurrer is sustained

the case is ended, unless plaintiff have leave to amend the petition, or if the demurrer is overruled the case is ended, unless the defendant have leave to plead over, and therefore, no matter whether the ruling upon the demurrer be for plaintiff or defendant, a trial has been had. It is clear from this ruling that the supreme court holds that, if a demurrer involving the merits of plaintiff's case is heard and determined, that is a trial of the suit, which bars the right of removal, even though leave to amend is granted to the plaintiff; and the contention of counsel for defendant that the amendment in this case introduces a new right of action, with regard to which the right of removal still exists, cannot be sustained. If a demurrer to a petition is sustained on the ground that the petition does not state or show a cause of action, and leave is granted to file an amended petition, it must be upon the theory that the amended petition will show a cause and right of action which were not shown by the original petition, and therefore it may be said in every such case that the amended petition is a departure from the original, in that the amended petition makes a case, whereas the original petition did not; yet in *Alley v. Nott* it is held that the ruling upon a demurrer to a petition, holding that the petition does not show a cause of action, is a trial of the case, barring the right of removal, even though leave to amend the petition be granted, which leave to amend, as already said, can only be granted upon the assumption that the amended petition will show a cause of action not appearing upon the averments of the original petition. The removal provisions of the acts of 1887-88 act upon a suit as an entirety. When this suit was brought against the defendant company to recover the damages resulting from the death of George C. Parker, the company knew what the case was, and the questions which might arise in the future progress thereof. The company knew that it was within the power of the court to permit amendments to the petition to be made, so long as such amendments were pertinent to the question whether there existed against the defendant company a liability for the death of George C. Parker, and the pecuniary damages resulting therefrom; and the company further knew that the issue or issues to be heard and determined in the case were largely under its control, depending upon the pleadings filed by it. The removal statute gave the company, as a foreign corporation, the right to remove the case for trial into this court, provided such removal was applied for before the trial thereof in the state court. It is not permitted to a party to experiment upon the case in the state court, and afterwards to remove the case into the federal court. Under the provisions of the acts of 1887-88, a party defendant, having the right of removal, must determine before a trial is had whether he will remove the case, or submit it to the state court. If he elects to bring it to a trial, upon a demurrer or otherwise, before the state court, he cannot thereafter exercise the right of removal in that case, no matter what changes may be made in the issues therein by amendment or otherwise. The record shows that the defendant company by its own act brought the case to trial before the state court, by filing and submitting a demurrer to the petition, which was intended to elicit a ruling upon the merits of the controversy; and thus it ap-

pears that the petition for removal was not filed until after a trial of the case in the state court, and therefore the application was not in time. The motion to remand is sustained.

FRANZ v. WAHL

(District Court, E. D. Arkansas. June 18, 1897.)

1. REMOVAL OF CAUSES—PROCEEDING TO PROBATE WILL.

The only way to contest a will under the Arkansas statutes being by objection to its probate, or by appeal to the circuit court from the order of the probate court, such a proceeding may be removed to the federal court in a proper case.

2. SAME—LOCAL PREJUDICE.

An affidavit stating directly and unequivocally that the applicant cannot get justice in the state courts, because of local prejudice and undue influence of the adverse party, is sufficient to justify a removal.

This was a proceeding to probate a will under the Arkansas statutes. The case was heard on an application to remove the cause to this court on the ground of local prejudice.

Rose, Heminway & Rose, for plaintiff.

Wood & Henderson, for defendant.

WILLIAMS, District Judge. There are two questions involved in the motion to remove: First, is the proceeding to probate a will a case at law or in equity which is removable under the federal statutes? And, second, does the affidavit in support of the petition sustain the allegation of local prejudice or undue influence?

Upon the first question, it would seem only necessary to recur to well-established fundamental principles in order to reach a proper conclusion. In the first place, the question of the validity of a will was one of which courts at law had jurisdiction by proceeding to try the issue *devisavit vel non* at the time the federal system of judiciary was established. It was therefore a case at law, within the meaning of the federal statutes; and, where the necessary conditions of diverse citizenship or local prejudice existed, it was a proceeding properly cognizable in a court of the United States, either upon suit brought there, or properly removed to it. That proceeding has been abolished by the Arkansas statutes, and now the only way to contest a will is by objection to its probate in the probate court, or by appeal from the order of the probate court to the circuit court. If this proceeding cannot be removed to the federal courts, then the right to contest a will in the federal courts at all is taken away by the Arkansas practice acts. This cannot be done. State legislation cannot curtail, by changing rules of practice or laws regulating the jurisdiction of the courts, the jurisdiction of federal courts. *Hyde v. Stone*, 20 How. 170, 175. As was recently decided by the court of appeals of this circuit in *Darragh v. Manufacturing Co.*, 23 C. C. A. 609, 78 Fed. 7, rights created or provided by the statutes of the states, to be pursued in the state courts, may be enforced and administered in the national courts, either at law or in equity, as the nature of the rights

or remedies may require, and rights at law or in equity will be administered in the federal courts without reference to state legislation regulating the manner in which such rights are administered. It is there repeated that a party loses nothing by going into a federal court; that his relief will be as complete in the federal court as it could be in the state court. The statutes of Arkansas provide that no suit can be brought against a county of the state, but that all proceedings against counties must be by petition of the county court. But the federal court has held that this statute cannot deprive a county of the right to sue a party in a federal court. *Chicot Co. v. Sherwood*, 148 U. S. 529, 13 Sup. Ct. 695. And this court entertains suits against counties notwithstanding the statute. *Thompson v. Searcy Co.*, 6 C. C. A. 674, 57 Fed. 1030. So that it is plain that if a proceeding to contest a will is not removable, because of our peculiar statutory regulation, the federal court has been deprived of its jurisdiction over matters formerly within its cognizance by state legislation. The precise question has been decided in Georgia, where the statutes are exactly similar to ours, in the case of *Brodhead v. Shoemaker*, 44 Fed. 518. Counsel, in opposing the motion, insists that this case is in conflict with an opinion delivered in Ohio by Judge Ricks. This appears to me plainly incorrect. In Ohio the proceeding to probate the will is *ex parte*, not conclusive upon the parties, and is therefore held to be not removable. Any party who desires to do so may contest the will after it has been admitted to probate, and, when a proceeding for that purpose is brought, it is removable, according to the Ohio decision. The decision of Judge Pardee in Georgia recognizes this rule as correct, but holds it inapplicable where the proceeding to probate the will is adversary, the parties are before the court, and the decision reached is final. Such is the effect of the proceeding now sought to be removed, and to me it seems plain that it is removable.

2. The amended affidavit in support of the motion to remove alleges directly and unequivocally that the applicant cannot get justice in the state courts, because of the local prejudice and undue influence of the proponent of the will. Some courts have held that the affidavit should set out fully the circumstances to support the conclusion, but Judge Brewer held that where the affidavit stated the facts in the language of the statute, and not a mere belief in the facts, it was *prima facie* sufficient. *Short v. Railway Co.*, 34 Fed. 227. The application for removal will be granted.

DE NEUFVILLE v. NEW YORK & N. RY. CO. et al.

(Circuit Court of Appeals, Second Circuit. May 26, 1897.)

I. EQUITY JURISDICTION—CORPORATIONS—STOCKHOLDER'S BILL—CONSPIRACY.

Complainant, a stockholder in the N. Ry. Co., alleged in his bill that a conspiracy had been formed between that company and the C. Ry. Co. to force the N. Co. into insolvency, and bring about its sale under foreclosure of a mortgage, and its purchase by the C. Co.; that in pursuance of such conspiracy the officers of the C. Co., while in control of the N. Co., after the C. Co. had acquired a majority of its stock, declined to accept traffic from other roads which would have produced a fund to pay the

interest on its mortgage, and diverted its income from the payment of such interest to improper purposes. *Held*, that the bill stated a case for relief in equity. *Farmers' Loan & Trust Co. v. New York & N. Ry. Co.*, 44 N. E. 1043, 150 N. Y. 410, followed.

2. EQUITY PLEADING—MULTIFARIOUSNESS.

A bill will not be dismissed as multifarious because the complainant, in addition to praying for the relief appropriate to the only cause of action supported by the facts pleaded in the bill, has also asked for other relief to which he is not entitled.

3. SAME—CORPORATIONS—STOCKHOLDER'S BILL—DIVERSION OF FUNDS.

A bill by a stockholder in a corporation, which sets out facts showing an improper diversion of the funds of such corporation, entitling it to sue for the protection of its rights, or, in default of action by the directors, entitling a stockholder to sue, will not be treated as a bill in the complainant's own right, though he uses language in the bill implying that he regards the wrong as a misappropriation of his own property.

4. SAME—WRONGFUL ACTS OF CORPORATE DIRECTORS.

When it is averred in a bill by a stockholder on behalf of a corporation that the board of directors has been elected in pursuance of the wrongful design on the part of the majority stockholder of which complaint is made, it is not necessary, under the ninety-fourth equity rule, to set forth with particularity efforts to secure action by such directors to right the wrong complained of.

Appeal from the Circuit Court of the United States for the Southern District of New York.

This is an appeal from a decree of the circuit court, Southern district of New York, sustaining a demurrer to complainant's bill.

Simon Sterne, for appellant.

Charles F. Brown and Thos. Thacher, for appellees.

Before WALLACE, LACOMBE, and SHIPMAN, Circuit Judges.

PER CURIAM. The action was brought by the appellant, as the holder of 275 shares of the preferred stock of the New York & Northern Railway Company, in behalf of himself and all other stockholders similarly situated; and the alleged cause of action arises out of the purchase by the New York Central & Hudson River Railroad Company of a majority of the second mortgage bonds and stock of the said Northern Railway Company, and the subsequent foreclosure of the mortgage securing such bonds. It is averred, with great detail, that the purchase was made and foreclosure effected in pursuance of a conspiracy between the defendants whereby the said New York & Northern Railway Company was to be forced into insolvency, and its property sold out, ostensibly in satisfaction of its bonded indebtedness, but really in the interest of the New York Central & Hudson road, which acquired title to the property upon foreclosure through a new corporation created by it solely for the purpose of taking such property and leasing it to the Central & Hudson. The same issues were raised in the state court upon the intervention of stockholders of the New York & Northern Railway Company other than complainant. It will be unnecessary to set forth in detail the facts averred in the complaint. A sufficient statement of them will be found in the decision of the New York court of appeals in the state court case. *Farmers' Loan & Trust Co. v. New York & N. Ry. Co.*, 150 N. Y. 410, 44 N. E. 1043.

The judge who heard this demurrer in the circuit court followed the decisions which had been then rendered by the supreme court at special and general term, and held that there was no equity in the bill. Upon appeal to the court of appeals in the state court case, it was held that the supreme court erred "in rejecting, as immaterial, evidence offered by the appellants to show that after the New York Central & Hudson River Railroad Company became the owner of a majority of the stock and bonds of the New York & Northern Railway Company, and while its officers were in control of the latter corporation and its affairs, it declined to accept traffic from other roads which would have produced a fund with which to pay the interest that was due; that the income of the road which should have been employed to pay such interest was used for other and improper purposes; and that such action upon the part of the majority stockholder occasioned the inability of the company to pay the interest and cure the default." The bill in this case contains these specific averments, and for the purposes of this appeal they must be taken as true. We concur with the New York court of appeals that such conduct on the part of the majority stockholder is improper, and that, when it is proved, equity will afford relief. The bill, therefore, is not obnoxious to the objection that it does not set forth facts entitling the complainant to relief in equity.

It is next objected that the bill is multifarious. The facts pleaded make out a case where the New York & Northern Railway Company, through alleged improper and fraudulent conduct on the part of defendants, has been stripped of its property. The bill sets forth a cause of action in favor of the New York & Northern Railway Company, which might be prosecuted either by it, or, if its directors failed to do their duty in that regard, then by one or more of its stockholders whose interest it is to have the corporation vindicate its rights. The pleader, it is true, uses language which seems to imply that he considers this a cause of action in favor of the complainant individually. The brief, too, speaks of the "confiscation of his [complainant's] property," asks that "there be restored to him the property which he had lost," and asserts that he is bringing the suit purely on his own behalf, and not attempting to assert a right of the corporation. But manifestly this is a mistaken conception of the case made by the bill. The property covered by the mortgage, affected by the foreclosure, and which has passed to the new company, is not, and never was, complainant's property. The acts of the conspirators of which he complains have not deprived him of any of his property. It is the property of the corporation which has been taken, and it is the corporation which is entitled to its return, or to an accounting for its proceeds. When the corporation succeeds, complainant's share of stock will be worth more; and to that extent he has an interest in the result, which the courts have recognized to the extent of allowing a dissatisfied stockholder, upon a sufficient showing of unsuccessful efforts to induce action by the officers of the corporation, himself to bring the cause of action before the court for consideration. But, in whatever form or under

whatever name it is presented, it is the cause of action of the corporation, and of the corporation alone. The real controversy is between the corporation, whose officers refuse to assert its rights, and the alleged conspirators, who have deprived it of its property. If the wholesome rule approved by the supreme court in numerous decisions were followed, and the parties arranged, not as they stand in the title, but according to their interest in the controversy, we would have the New York & Northern Railway Company classified as a plaintiff, and the diversity of citizenship necessary to confer jurisdiction would no longer exist. If the circuit courts were entirely free to enforce the provisions of the fifth section of the act of 1875 to every case where it logically applies, they would, no doubt, be able to relieve their dockets, as was suggested in *Hawes v. Oakland*, 104 U. S. 450, of many cases which have no proper place there; but the decisions in *Dodge v. Woolsey*, 18 How. 331, *Hawes v. Oakland*, supra, and *Quincy v. Steel*, 120 U. S. 241, 7 Sup. Ct. 520, and the ninety-fourth rule in equity, seem to preclude a strict application, in cases such as the one at bar, of the rule that parties may be rearranged according to interest in the controversy. The cause of action in favor of the corporation to recover its property being the only one supported by the facts pleaded in the bill, or cognizable by the court, and relief appropriate thereto being prayed for, the bill will not be dismissed as multifarious because complainant has also asked for other relief to which he may not be entitled.

There is no force to the suggestion that the bill is defective in failing to "set forth with particularity the efforts of the plaintiff to secure such action as he desires on the part of the managing directors or trustees, and, if necessary, of the shareholders, and the causes of his failure to obtain such action." In view of the averments that defendants obtained control of a majority of the stock and bonds on purpose to wreck the New York & Northern; procured, by resignation and election, a board of directors in harmony with that purpose, and which board did in fact, by refusing profitable business and diverting traffic, accomplish such purpose,—it would be an idle waste of time to urge the board of directors, or the majority stockholders who initiated and consummated the fraud, to bring suit in order to secure judicial condemnation of their own actions.

It sufficiently appears from averments in the bill that the subject-matter of the suit, viz. the entire property of the New York & Northern, exceeds in value the jurisdictional sum of \$2,000.

The only remaining ground of demurrer is that this court has no jurisdiction because the suit is "virtually to annul the foreclosure proceedings and judgment rendered in the state court." But *Arrowsmith v. Gleason*, 129 U. S. 86, 9 Sup. Ct. 237, is abundant authority for the proposition that the court may "lay hold of parties" whose fraudulent acts have put them into possession of property under a decree of the state court, and "compel them to do what, according to the principles of equity, they ought to do." The decree of the circuit court is reversed, with costs.

CONERY et al. v. SWEENEY et al.

(Circuit Court of Appeals, Fifth Circuit. December 5, 1896.)

No. 506.

1. EQUITY—PARTIES—CORPORATIONS.

Persons claiming to have been the equitable owners of a steamboat up to a certain period, and afterwards equitable owners of all the stock of a corporation to which she was conveyed, may maintain in their own names an action against a firm alleged to have had control of the boat, as her agent, during the entire period, for an accounting in respect to her earnings, and her proceeds after her sale, without making the corporation itself a party defendant.

2. LACHES—SETTLEMENT.

A delay of some three years in bringing suit for an accounting after an alleged settlement between the parties *held*, on the evidence, not to amount to laches.

Appeal from the Circuit Court of the United States for the Eastern District of Louisiana.

This suit was filed March 18, 1895, to compel an accounting by defendants to the complainants of the affairs of the steamboat *Alto* during the time complainants were her owners (from October 27, 1890, to February 27, 1891), during which time defendants were the agents of said boat, receiving all her earnings, and paying some of her bills, and an accounting of 72 shares of the *Alto Transportation Company*, belonging to complainants, after said boat was sold to said corporation for said stock, and which remained in the hands and under the control of defendants under power of attorney from the complainants. The original bill, in substance, alleged that on the 27th day of October, 1890, complainant T. C. Sweeney bought the steamboat *Alto* from one Hamilton for \$6,800 (part cash and part notes), for himself and his son, C. H. Sweeney, the other complainant, taking the title to the same in his own name, which notes were payable at the commercial house of defendants, and were to be paid by them from the earnings of said boat; that immediately on said purchase said boat was chartered to the *Ouachita Consolidated Line* for two years, and that while thus situated all of said charter money was collected by said defendants; that shortly after said purchase said E. Conery advised said T. C. Sweeney to put said steamboat in a corporation, saying that said T. C. Sweeney could, with his son, said C. H. Sweeney, be the owner of all the stock therein, with the exception of a few shares necessary to qualify officers of the corporation, but that said T. C. Sweeney could have entire control and could and would be president thereof, and that he (Conery) would procure a Mr. Woolfolk, of Louisville, Ky. (under whose laws, it was suggested, said corporation should be formed), to act as secretary at the domicile of said corporation, and he would only have to pay him \$100 per year for his services, and he (Conery) would have all of said matters attended to for him; that, having implicit faith in the judgment and integrity of said Conery, he consented to the formation of said corporation, and articles of incorporation were drawn up under the direction of said Conery, and were signed in the city of New Orleans, November 25, 1890, by said T. C. Sweeney and C. H. Sweeney, and by L. R. Woolfolk and R. L. Woolfolk in Louisville, Ky., and said corporation was called the *Alto Transportation Company*, whose stock was 75 shares, of the par value of \$100 each, and to which corporation said steamboat *Alto* was on the 27th day of February, 1891, duly sold for the above shares of stock, 36 shares of which were issued to complainant T. C. Sweeney, 36 shares to complainant C. H. Sweeney, and 1 share to each of said Woolfolks, and 1 share to defendant Conery; that when said stock was issued to complainants, and in their name, it came to them from the hands of said Conery, who requested that they deliver the same to him or his house as collateral security for any sum said T. C. Sweeney might owe said Conery and his house by reason of any advances he or said house might have to make in paying said purchase notes,

agreeing that when said advances were paid said stock would be returned complainants, and that with this understanding and agreement they gave said shares of stock to said Conery as security, but not otherwise; that said steamboat continued under said charter, with defendants, as agents of said boat and her owners, collecting all of her earnings, and looking after and managing the interest of complainants in said corporation, until April, 1892, when she was sold for \$8,200, which was paid to defendants, who received all the revenues and earnings of said boat during the time she was running, as the property of said T. C. Sweeney, as well as all the profits and dividends coming to the stock in said corporation belonging to complainants; that said Thomas O. Sweeney always believed he was the president of said corporation until said sale of said boat, and undertook to sign the bill of sale, when he was for the first time informed by Conery that he was not such president, but he (Conery) was; that they were informed that Conery, after securing said shares of stock, without notice to them, and without their knowledge and consent, surrendered their said shares of stock to the company, and had other shares issued to himself, from which he or his house have received large amounts of money, but the exact amount whereof is unknown to them; that after the delivery of said stock to defendants as collateral as aforesaid, with authority to manage the same, said E. Conery, without the knowledge or consent of complainants, and without knowing he was president of said company, instructed said Woolfolk to vote him a salary of \$200 per month as president of said company, and all in violation of his agreement that said T. C. Sweeney was to be president, in pursuance of which said Conery claimed to have received, sometimes \$2,600, and at other times \$3,000, to which it is alleged he was not entitled; that they have applied to said defendants, without avail, for an accounting of the affairs of said boat while she stood in the name of said T. C. Sweeney before the sale to the company, and for an accounting of all moneys received by defendants for said 72 shares of stock after the sale of said boat to said corporation. And the prayer of said bill is for an accounting of the affairs of said boat from October 27, 1890, to the time of her sale to said corporation, on the 21st of February, 1891, and for an accounting of all moneys and profits received on said 36 shares of stock of said T. C. Sweeney, and said 36 shares of stock of said C. H. Sweeney, and for judgment for such an amount as may be due on such accounting, and for costs and general relief. To this bill defendants demurred, and, for cause of demurrer, showed "that it appears by the bill that it is necessary that the Alto Transportation Company, a corporation therein mentioned, and concerning whose doings the principal complaint appears to be made in the bill, and which should be represented in this suit, is not made a party thereto, and no proper hearing and decree can be made without the presence of said company."

This demurrer the court sustained, unless within five days the complainants amended their bill by striking therefrom the allegations concerning the salary of Conery as president of said Alto Transportation Company. This amendment was duly made, and thereupon an answer was filed, which, in substance, alleged that said boat was really purchased from Hamilton for defendants in order to be put in the Ouachita Line, and the title was put in Sweeney's name, at his request, who was without means, the object being to give complainants employment and good salaries; that the company was formed in Kentucky, to which the boat was sold for 75 shares of stock, of which 36 were nominally issued to T. C. Sweeney, and 36 nominally issued to C. H. Sweeney, said nominal title being in the name of the complainants for the purpose aforesaid, and because defendants did not wish to take it in their own names, and that said shares were forthwith delivered to defendants with the authority from the complainants to transfer the same, and that each of the complainants, in writing, authorized said E. Conery, Sr., to transfer the same to any person; that said Conery was duly made president, and he and his firm gave said company the benefit of their experience, and kept said full accounts of the doings of said corporation; that, when said shares of stock were delivered to defendants, complainant T. C. Sweeney entered into a verbal agreement with defendants that when the amount due them for amounts advanced for said purchase and all other obligations should be paid, and the boat was free of debt, then one-half the stock of the company should be transferred to said T. C. Sweeney,

it being implied in that case the boat should be sold by the company, the same being the only property of the corporation, said T. C. Sweeney should secure one-half the net balance remaining from the price; that an account was opened, in which were duly entered receipts and expenditures; that said boat was duly sold; that thereafter said account was balanced on the 25th April, 1892, and it was found that there was coming to defendants \$1,189.97, and a like amount to complainants, which latter sum was received by said T. C. Sweeney in full settlement of said understanding and agreement; that said boat, the only asset of said company, having been sold, said shares of stock have no value, and are mere vouchers; that complainants have received all that is due them; that neither of defendants are indebted to them or either of them; that said account has been exhibited to complainants; that they have had the benefits of the facts therein set forth, "accepted" the benefits of the situation and the proceeds of said accounts, and are each estopped to make the demands which they made in said suit. Upon replication being filed, an examiner was appointed, and the taking of the evidence begun; and after it was about concluded an admission was made, which is in the following words: "It is admitted that the amount shown to be due on the 23d of April, 1892, on the accounting by the defendants herein, is \$3,638.77, including an item of \$965.50, known as the 'Contingent Fund of the Steamboat Alto,' and that said sum of \$3,638.77 now belongs either to the complainants or the defendants; that, according to the contention of complainants, 36/75 thereof belongs to C. H. Sweeney, and 36/75 to T. C. Sweeney, and according to the contention of defendants the whole of said sum belongs to defendants. It is further admitted that, independent of the above,—that is, on private account,—said T. C. Sweeney owed defendants on the 23d of April, 1892, \$1,672.72, which should be deducted from the above claim of T. C. Sweeney of 36/75 of the above amount of \$3,638.77 in case the same should be allowed to said T. C. Sweeney, and, in case said 36/75 should not be allowed said T. C. Sweeney, then nothing would be due to defendants."

W. W. Howe, for appellants.

Richard De Gray, for appellees.

Before PARDEE and McCORMICK, Circuit Judges, and MAXEY, District Judge.

McCORMICK, Circuit Judge. A careful inspection of the record in this case discovers no ground for reversing the judgment of the circuit court. The complainants sought no recovery against the corporation. The only allegation that affected the corporation in any way was stricken out, on demurrer, by the court. The ruling of the court on that demurrer is not in conflict with the authorities cited by the appellants. The vital issue, and the only substantial issue, in the case, was the equitable ownership, as between the complainants and the respondents, first of the steamer Alto, and afterwards of the stock issued by the Alto Transportation Company. The respondents had already, and so long ago that they claimed that they were quieted by lapse of time, made their own adjustment of their business relations with the complainants in this matter. Their claim that the complainants were guilty of laches in prosecuting their complaint is not supported by the proof, and the finding of the judge of the circuit court on the issue as to the ownership of the steamer and of the stock in the corporation is fully sustained by the proof. The decree in other respects is supported by the agreement of the parties. We conclude as we began, that we see no reason to set aside the decree of the circuit court, and it is therefore affirmed.

WASHBURN et al. v. NATIONAL WALL-PAPER CO. et al.

(Circuit Court of Appeals, Second Circuit. May 26, 1897.)

No. 109.

1. CORPORATIONS—ISSUANCE OF STOCK FOR GOOD WILL OF BUSINESS.

The good will of a business is property, and may have a value independent of any particular locality or any specific tangible property, and stock of a corporation issued for such good will is issued for property actually received, within the meaning of the New York stock corporation law (Laws 1892, c. 688).

2. SAME—OVERVALUATION—ESTOPPEL.

One who has sold the good will of his business to a corporation for certain shares of its stock, and has participated in and approved the method of valuation of such good will for the purpose, cannot afterwards claim that the good will so bought by the corporation was overvalued.

3. SAME—DEPRECIATION—EVIDENCE.

When the stock of a corporation has been issued for the good will of several separate business establishments, and it is claimed that the value thereof has depreciated, the court cannot determine that it has, in the absence of positive evidence of the value of such good will at the time of the issue of the stock and at a later time, and the fact that some of the establishments have been closed while their customers are supplied by the product of other establishments does not prove a depreciation.

This is an appeal from a decree of the circuit court, Southern district of New York, dismissing the bill.

The suit was brought by complainants, who are large owners of the stock of the defendants, the National Wall-Paper Company, to restrain the payment of interest upon certain obligations of the company called "debenture stock." The complainants insisted that such payment was not justified by the terms of the debenture stock itself, but was in violation of the agreement between the company and the complainants, and of the provisions of the articles of association and by-laws of the company. The company's president and treasurer were joined as defendants.

The defendant company was organized June 2, 1892, under the New York business corporation law, to carry on the business of manufacturing and dealing in wall paper, with a capital stock originally of \$14,000,000, but which was soon increased to \$30,000,000, all of which, however, has not been issued. The certificate of incorporation provided for the creation of obligations in the nature of certificates of indebtedness to the extent of \$8,000,000, to be known as "debenture stock," and sold for cash or for property or assets purchased by the corporation at the fair market value thereof. It further provided that: "The debenture stock hereby authorized to be issued shall be and remain an obligation of the corporation, or payable at the expiration of the corporate existence, and entitled meantime to interest at a rate not exceeding eight per cent. per annum, payable quarter-yearly, as an expense of the business, from and out of the profits of the company, before any dividend can be declared or paid on the stock or share capital. No payment of interest can or shall be made on such debenture stock which will impair the capital, nor unless the amount paid shall have been actually earned by the company. The holders of debenture stock shall not be entitled to demand or sue for the interest payable upon the obligations held by them unless such interest was actually earned by the company, in which event the amount earned shall be distributed amongst and paid to the holders of debenture stock, to the proportion of their holdings, but the unpaid interest shall, notwithstanding, become and remain an obligation of the company, payable out of any future profits to the full extent of the amount represented by the outstanding certificates before any dividends can be declared or paid on the stock or share capital. In the event of the dissolution or winding up of the company, the holders of debenture stock or of certificates representing the ownership thereof shall rank *pari passu* with other

unsecured creditors of the corporation, and shall be entitled to receive in full out of the assets of the company the amounts represented by the outstanding certificates of indebtedness or debenture stock in priority to the claims of the shareholders to be paid any amount in respect of such shares." The by-laws provided that the board of directors shall select accountants as official auditors to the company, who shall supervise its books of account, and all interest paid upon the debenture stock, and all dividends declared on the share capital, shall be based upon the net earnings of the company as certified by such auditors. Each certificate of debenture stock contained the following provision: "Each of the shares of debenture stock represented by this certificate is entitled to receive interest at the rate of 8 per cent. per annum, payable quarter-yearly on the first days of September, December, March, and June in each year, from and out of the profits of the company before any dividend can be declared or paid on the stock or share capital; but no payment of interest can or shall be made on such debenture stock which will impair the capital, nor unless the amount paid shall have been actually earned by the company. In event of default in payment of the interest on the debenture stock represented by this certificate, the unpaid interest shall become and remain an obligation of the company, payable out of any future profits to the full extent of such unpaid interest before any dividend can be declared or paid on the stock or share capital. In the event of the dissolution or winding up of the company, the holders of debenture stock shall rank *pari passu* with other unsecured creditors of the corporation."

At the time of the organization of the company the appellants, constituting the firm of Cresswell & Washburn, were manufacturers and dealers in wall paper under the firm name of Cresswell & Washburn. Other firms and individuals were engaged in like business in various parts of the country. These various concerns commenced negotiations with the National Wall-Paper Company, which resulted in the acquisition by the latter of the property and assets of the several concerns, including complainants' firm of Cresswell & Washburn. All these acquisitions took place under separate contracts in substantially the same form, which contained these provisions: (1) "The value of the fixed plant, machinery, fixtures, chattels, merchandise, book accounts, and other assets hereby transferred shall be fixed by * * * the appraisers." (2) "There shall be issued to the vendors, in payment for the property and assets acquired hereunder, the obligation of the company in the nature of one or more certificates of indebtedness to be known as 'debenture stock' in an amount equal to the appraised value of the property and assets hereby transferred, such appraised value to be fixed in the manner hereinbefore provided," etc. (3) "There shall be further issued and paid to the vendors for the good will of the business thereby transferred, and in consideration of the execution by them of this agreement, and of the further contracts assuring the continued good will of such business to the company, * * * an amount of common stock equal at par to sixteen times the net earnings of the vendors in their business for the eleven months commencing July 1, 1891, and ending May 31, 1892, less the appraised value of the property to be transferred to the company; but the issue of such common stock shall be subject to the conditions and restrictions hereinafter contained, viz. [that vendors should deposit their stock in a voting trust]." (4) "For the purpose of fixing the amount of the common stock of the company to which the vendors shall be entitled * * * as payment for the good will of the business so to be transferred, and for the assurance of such good will to the company," the agreement provided for an ascertainment of profits for the 11 months from July 1, 1891. (5) The vendors guaranteed the collection of the accounts and bills receivable transferred by them. In case of any failure of collection, the vendors were to surrender back to the company debenture stock equal at par to the face value of the uncollectible amount, "and also an amount of stock equal at par to sixteen times the face value of such uncollected book accounts and bills receivable, less the amount of debenture stock returned." The vendors further covenanted with the company that they would, neither directly nor indirectly, engage in the business of manufacturing, buying, or selling wall paper. If they did, they were to forfeit to the company all the stock issued to them. In valuing good will, patents, copyrights, and trade-marks were to be regarded as part of the

good will. These, however, were relatively insignificant. There is criticism supported by testimony, of the manner in which the profits of the respective concerns for the specified 11 months were ascertained, but it is not necessary to set forth the details; the figuring was all done by the same accountants, and the methods were alike in all the cases.

The stock corporation law (Laws 1892, c. 688), § 42, provides: "No corporation shall issue either stock or bonds except for money, labor done, or property actually received for the use and lawful purposes of such corporation. No such stock shall be issued for less than its par value; no such bonds shall be issued for less than the fair market value thereof." It will be perceived from the foregoing statement that the stock of the defendant company was issued for the "good will" of the different manufacturing plants (and some patents, trade-marks, etc.), the tangible assets of which plants, viz. machinery, fixtures, material, book accounts, etc., were paid for by the issue of the debenture stock. Practically the entire capital stock (i. e. the common stock) is represented by the good will of the establishments which the defendant company bought up. Complainants received for their old plant, book accounts, good will, etc., \$326,000 in debenture stock, and \$1,831,800 in common stock, of which, by reason of the uncollectibility of certain accounts, they subsequently returned \$7,702.19 of debenture stock and \$135,200 of common stock. When the suit was begun, the accountants, designated under the by-laws as auditors, had made no certificate of net earnings. Subsequently, and on April 22, 1896, they certified that they had examined the books and accounts from the date of inception to February 29, 1896, and found the net profits for the entire period to be \$3,046,639.66. They further certify that "the surplus profits remaining on hand on said 29th day of February, 1896, representing the net earnings of the company available for the payment of interest on its debenture stock, over and above the sums already expended for interest, amount to \$1,410,522.39." This sum so certified is \$866,528.29 in excess of the debenture interest unpaid and claimed to be accrued on February 29, 1896; i. e. for 11 months at 8 per cent. per annum, viz. \$543,994.

E. M. Shepard, for complainants.

Louis Marshall, for defendants.

Before WALLACE, LACOMBE, and SHIPMAN, Circuit Judges.

LACOMBE, Circuit Judge (after stating the facts). The contention of the complainants is that, notwithstanding the certificate of the auditors, no debenture interest could be paid without impairing the capital of the company, and that in fact there were no profits. They contend that they have demonstrated the impairment of the capital stock to an extent more than sufficient to prevent the payment of debenture interest: First, on the theory that the capital stock was originally issued for far less than its par value, and has never been fully, if at all, paid; second, on the theory that, even if it were originally fully paid, there has been an enormous depreciation in the value of the capital stock since that time; third, by losses and depreciations in assets other than the good will for which the capital stock was originally issued.

The first of these propositions suggests the questions whether stock is issued for "property actually received," within the meaning of the statute, when it is issued for good will only; and whether, assuming that the entire stock could, under the New York act of 1892, be issued solely for good will, the good will taken in this case was taken at its actual value. These questions are discussed at great length in the briefs. It is contended that, although "good will" is property in the sense that it is a subject of bargain and

sale, it is nevertheless but a so-called "parasitical species of property, which cannot exist apart from the substantial property of which it is an attribute"; that it is not a thing of value by itself; that the capital of a corporation must be invested in property capable of existence by itself; that in this case no effort was made to ascertain the actual value of the good will; that the value at which it was appraised and stock issued against it was purely arbitrary, and in no sense a proper valuation, and that in determining this arbitrary valuation elements of alleged profits were taken into consideration, which could not fairly be considered such. Upon this interesting, and possibly perplexing, discussion we do not find it necessary to embark. Good will has been defined as "all that good disposition which customers entertain towards the house of business identified by the particular name or firm, and which may induce them to continue giving their custom to it." There is nothing marvelous or mysterious about it. When an individual or a firm or a corporation has gone on for an unbroken series of years conducting a particular business, and has been so scrupulous in fulfilling every obligation, so careful in maintaining the standard of the goods dealt in, so absolutely honest and fair in all business dealings that customers of the concern have become convinced that their experience in the future will be as satisfactory as it has been in the past, while such customers' good report of their own experience tends continually to bring new customers to the same concern, there has been produced an element of value quite as important—in some cases, perhaps, far more important—than the plant or machinery with which the business is carried on. That it is property is abundantly settled by authority, and, indeed, is not disputed. That in some cases it may be very valuable property is manifest. The individual who has created it by years of hard work and fair business dealing usually experiences no difficulty in finding men willing to pay him for it, if he be willing to sell it to them. Legislation devised to restrict the accumulation of the fruits of industry may impair its value by denying to its producer the right to enter into a contract enforceable at law not to interfere with its enjoyment by the purchaser, but, so long as any belief in human honesty remains, there will be found some persons willing to buy such property, the very existence of which implies honest business dealing in the past. And so long as it remains salable it is valuable. Nor is it indissolubly connected with any particular locality, or any specific tangible property. Reference has been made on the briefs to the publishing house of "Harper & Bros." If its present establishment in Franklin Square were destroyed by fire to-morrow, and everything therein contained were swept out of existence, it is surely manifest that, so long as the firm itself survived, and continued to transact its old business, it would still hold its "good will," although the business should be thenceforward conducted in a new building erected on some uptown street, and supplied with entirely new machinery and equipments. If good will be a "parasite," it is a "parasite" of the business from which it sprung, not of the mere machinery by which that business was conducted.

Since good will is property, and since in some cases it is valuable property, it would follow that in some way or other it must be practically possible to determine what that value is. Whether the particular method employed in the case at bar to ascertain such value is or is not a proper one, and whether the appraisal made when these several wall-paper concerns were bought up by the defendant company was accurate, we are under no obligation to inquire upon the complainants' request. The method of valuation was one which they fully approved, and which was applied in fixing the value of their own property, as the result of which they received \$1,831,800 in common stock of the defendant. They certainly, participating in the transaction, and reaping its benefits, are in no position now to claim that the good will bought by the defendant company with common stock was overvalued.

The second proposition which has been discussed at great length in the briefs of counsel is the one advanced on behalf of complainants, viz. that, "even if the capital stock were originally fully paid, there has been an enormous depreciation in the value of the capital stock since that time." We do not find it necessary to review the discussion of this question as to what constitutes depreciation of capital, within the meaning of the statute and articles of incorporation. The defendants insist that "in determining whether a company is entitled to pay a dividend, the property acquired for permanent use in carrying on business may be valued at the price actually paid for it, although it could not be sold again except at a loss." Complainants' counsel controverts this proposition; but, even if complainants' contention be sound, the result here would be the same. There is an insuperable practical difficulty in the way of deciding whether or not there has been depreciation in the capital of defendant company, or in so much of the assets as represent good will. The case discloses no evidence advising us what the good will of these various concerns bought by the defendant company was worth on the day of purchase and what it was worth on February 29, 1896. With absolutely no information as to either minuend or subtrahend, we cannot make any determination as to what the difference may be between them. This court is advised of no rule or method of appraisal which can be applied to such facts as are in proof in order to determine the value of this asset at either time. The evidence is not entirely persuasive that the rule adopted when the properties were purchased is the true one; and the mere circumstance that complainants, who profited by that valuation, cannot now be heard to question its accuracy, does not make it so. No estimate or appraisal as of either date is testified to, no experts have made calculations, and rehearsed the results thereof. The fact that some of the workshops bought by the defendant company have been closed and dismantled, the business of selling goods to the customers of the concerns who formerly owned such shops being still carried on, does not dispose of the question. Even if the good will of such concerns has ceased to exist (which is by no means certain), it does not follow that the entire value of the good will of all the properties has depreciated. It may be that the disappearance of these concerns from the field has increased

the value of the business of such as are left. It is manifest that any conclusion as to this branch of the case would be but surmise based upon conjecture, and without definite information as to the actual value of this asset this court cannot undertake to say whether or not it is less than it was four years ago.

Complainants further contend that on February 29, 1896, there were not profits sufficient to warrant the payment of interest on the debenture stock, such interest concededly being payable only out of profits. This interest, it will be remembered, amounted to \$543,994, and the auditors certified that the profits on that day aggregated \$1,410,522.39. It is insisted that certain items of assets were taken by the auditors at an excessive valuation, that in some cases items not properly assets were included on the credit side of the account, and that sufficient sums were not deducted for depreciation, reserves, etc. These items are:

Birge good will.....	\$2,100,000 00
Birge bonus	300,000 00
Addition to Block account.....	100,000 00
Selling expenses treated as an asset.....	166,050 17
Reserve for depreciation.....	300,000 00
Reserve for bad debts of business of 1892 to 1894.....	50,000 00
Reserve for bad debts of business of 1894 to 1896.....	150,000 00
Eight per cent. for valuation of manufactured goods.....	60,000 00
	<hr/>
	\$3,226,050 17

The first two items may be considered together. About the time when complainants sold their business to the defendant company, in 1892, some effort seems to have been made to buy up the establishment and business of the firm of M. H. Birge & Sons, of Buffalo, upon the same terms as all the others, but Birge & Sons refused to entertain the offer. Subsequently, in December, 1894, a fire destroyed part of the Birge plant at Buffalo. Thereupon defendant company, apparently with a view of ingratiating itself with the firm, offered to lease it one of the defendant's factories, which was temporarily shut down. Negotiations for the purchase of the entire Birge business and outfit were subsequently begun, and finally Birge made an offer to sell at a certain price, leaving his offer open for but a brief period. It was accepted, although not without disapproval by a minority of the board of directors, including complainant Washburn. The price agreed upon was \$300,000 in cash on the day of signing the contract, \$2,100,000 in common stock, \$50,000 in debenture stock, and an additional sum in cash, to be paid when appraisement of the tangible assets was completed, and which turned out to be \$129,286.36. The auditors treated this transaction as a purchase of assets for permanent investment, and \$2,400,000 of it as paid for good will and patents. This is a strictly accurate statement of the transaction, and the only possible objection to the auditors' figuring is the suggestion that the good will and patents were not worth \$2,400,000, either when bought, in February, 1895, or when counted as an asset, in February, 1896. Here, again, the question is presented, what is the actual value of this property? But the record gives us no information upon which to answer. It is urged on behalf of

defendants that Birge & Sons were a well-known house, which had been in existence for over 40 years, and were most favorably known throughout the entire western part of the state of New York; that their annual business largely exceeded \$1,000,000; that their profits for the three years preceding the purchase (including the disastrous years of 1893 and 1894) amounted to from \$175,000 to \$225,000 a year; that they were the owners of a number of patents of great utility in the manufacture of wall paper, and 147 design patents; that Mr. Birge, the head of the house, was a man in the prime of life, active, energetic, of high business capacity, with a thorough understanding of the wall-paper business, and one of the strongest and most dangerous competitors of the defendant company. The president of defendant company testified that he considered the property well worth what was paid for it, that it was an extremely valuable business, and that he still considers it one of the best purchases the company ever made. On the other hand, the complainant Washburn expressed the opinion that the price paid for it was extravagant, although he would have been willing to buy it on the same terms as the other plants, and that the patents were not of much, if any, value. This is practically all the testimony we have from which to determine at what figures the auditors should have set down the property represented by the Birge patents and good will. Evidently the majority of the board of directors supposed it was worth the price paid, or they would not have paid it. It would seem to require affirmative evidence to discredit their conclusions. It is suggested in the brief that "\$2,100,000 is a large amount of money." So, too, is \$1,800,000, and it is quite apparent from this record that a long-established and well-known concern engaged in this business represents much more value than is to be found in its real estate, factory outfit, goods, and credits. Certainly it was something of value which enabled complainants in the face of active competition to make a net profit of over \$110,000 in 11 months out of a plant worth considerably less than \$320,000. Reference is made to the statement of the president on direct examination that the price paid for the Birge property was reached "arbitrarily." It is evident from the rest of his testimony, however, that what he meant was that the rule used in other cases, viz. the difference between tangible assets and 16 times the net profits, was not applied. Upon the testimony as it stands, we cannot find that the auditors erred in treating the Birge good will and patents as an asset worth what the company paid for it.

It will not be necessary to review the other items objected to in the auditors' balance sheet. As to some of them—e. g. the "addition to block account" and the "selling expenses"—the testimony seems to sustain the action of the auditors. But further discussion is unnecessary. Eliminating the two Birge items, it will be found that the others objected to aggregate \$826,050.07, but the balance sheet gives a surplus over and above the debenture interest of \$866,528.39; so that, whatever conclusion should be reached as to these other items, there would be sufficient profit to pay the interest, and complainants are not entitled to enjoin such payment.

It is contended that complainants should not have been required to pay costs, on the theory that "there was ground for the suit when brought." Manifestly, under the by-laws, there was no authority for paying debenture interest until the auditors had certified that there were sufficient profits. No such certificate had been made when the suit was brought in June, 1895, nor was a sufficient certificate made until April, 1896. But the evidence does not warrant a finding that the company or its officers had any intention of paying the interest in advance of the certificate. The president expressly denies the charges of the bill to that effect. Under these circumstances we see no reason to disturb the conclusion of the circuit court. The decree appealed from is affirmed, with costs of this appeal.

VOSS v. MUTUAL BEN. LIFE INS. CO. OF NEWARK, N. J.

(Circuit Court, W. D. Missouri, O. D. May 26, 1897.)

PAYMENTS—ACCEPTANCE—NOTICE.

In 1886, F. R. and N. R., through one T., obtained from defendant a loan of \$2,500 on mortgage, which was extended at maturity for 5 years, and, in consideration of the extension, made payable at defendant's office in New Jersey. Subsequently the mortgaged land was sold to plaintiff's husband, V., and by him devised to plaintiff. Desiring to make a payment of \$1,000, in advance of maturity of the extended loan, V. applied, through T., to defendant, to know if it would be accepted, and defendant replied that it would if certain interest were paid. Some months later, V. gave to T. a check for \$1,000, and T. notified defendant of the receipt thereof, and that it was intended as a payment on the loan, if defendant would accept it, to which defendant replied that the payment would be accepted if certain other interest were paid. T. did not remit the money, but defendant never called for it, nor made any inquiry, nor did anything further in the matter for more than a year, when T. had absconded. *Held*, that the defendant had accepted the payment, and plaintiff was entitled to have the same credited on the mortgage.

G. W. Barnett, for plaintiff.

Montgomery & Montgomery, for defendant.

PHILIPS, District Judge. On the 1st day of March, 1886, Frank B. Reed and Nathan Reed obtained a loan from the defendant company of \$2,500, on application, through J. C. Thompson, of Sedalia, Mo., for which they executed their promissory note to defendant, due five years after date, at 6 per cent. interest, payable semiannually on the 1st days of March and September in each year. To secure this note, they executed to defendant a mortgage on certain real estate in Pettis county, Mo. The interest on this note was paid by the makers up to the maturity of the principal of said debt. On the 28th day of February, 1891, an extension agreement was made between the parties for the extension of said loan for a period of five years. By the terms of this agreement, the principal and interest of said debt were made payable at the office of the Mutual Benefit Life Insurance Company, in Newark, N. J. In 1892 the said Reeds conveyed the mortgaged land to one Charles Voss, the husband of this complainant. Charles Voss died in 1893, and, by his will, the legal title to said land

vested in the complainant. On the 12th day of February, 1892, said Thompson wrote to the defendant, asking if it would accept a \$1,000 payment on account of a \$2,500 loan, before maturity, to which the defendant made answer, asking for the name of the borrower; and on being advised by Thompson that it was the Reed loan on the land then owned by said Voss, on the 23d day of February, 1892, it wrote as follows:

"Newark, N. J., Feb. 23, 1892.

"Mr. J. C. Thompson, Sedalia, Mo.—Dear Sir: Your favor of the 18th inst. is received. In view of the fact that the loan of F. B. Reed and others, No. 13,508, has now been running for so long a time (6 years), we are willing in this instance to allow a payment to be made of \$1,000.00 on account of the principal, provided such payment is made to us, together with interest to March 1st, 1892. We note that the property of F. B. Reed is now owned by C. Voss, and we inclose form of transfer of fire insurance policy on the loan, which please have properly completed, and return. Yours, truly,

"[Signed]

Edward L. Dobbins, Secretary."

Charles Voss having died in 1893, and Thompson having fled the country in May, 1894, it is not known what conversations occurred between them respecting this matter; but on September 1, 1892, said Voss wrote to Thompson the following letter:

"Beasor, Sept. 1st, 1892.

"J. C. Thompson, Esq.—Dear Sir: Inclosed please find draft for \$1,000.00 (one thousand), which I hope you will arrange satisfactorily with the insurance company. Yours, respectfully,

"[Signed]

Charles Voss."

The draft referred to in the letter is in evidence, drawn on the Continental National Bank of St. Louis, Mo., payable to the order of J. C. Thompson, indorsed as follows: "J. C. Thompson." "For collection and credit account of First National Bank, Sedalia, Mo. J. C. Thompson, Cashier."

It seems that Thompson for some reason did not send a receipt to Voss for this money until the 31st day of August, 1893, which was found in a letter inclosed to him after his death. The receipt is as follows:

"August 31st, 1893.

"Received of C. Voss \$1,000.00, part payment on F. B. Reed loan of \$2,500.00.

"[Signed]

J. C. Thompson."

On the 13th day of September, 1892, Thompson wrote to defendant the following letter:

"Edward L. Dobbins, Esq., Secretary, Newark, N. J.—Dear Sir: Some time ago I wrote you in reference to receiving a payment of \$1,000.00 on the F. B. Reed loan for \$2,500.00, and which is now in the name of Charles Voss, the present owner of the farm. You expressed a willingness to receive a payment of that amount, but nothing further was done in the matter. Mr. Voss has now left with us \$1,000.00, to be applied on the loan, provided you accept it. Will you please take and advise me at once in regard to the matter, and, if you take the money, it will be remitted at once. Yours, truly,

"[Signed]

J. C. Thompson."

On the 16th day of September, 1892, the defendant sent the following letter in answer:

"Mr. J. C. Thompson, Sedalia, Mo.—Dear Sir: Your favor of the 13th inst. is received. In this instance we will, for reasons stated in our letter of February last, accept at this time a payment of \$1,000.00 on account of principal of

loan No. 13,508, Frank B. Reed & al., provided the accrued interest is paid on the \$1,000.00 from September 1st, at the time of payment of said \$1,000.00.

"Yours, truly,

Edward L. Dobbins, Secretary."

Thompson never remitted this \$1,000 to the defendant, and nothing more was heard of the matter until after the 1st of May, 1894, when Thompson failed in business, and fled the country, to the city of Mexico. The defendant refusing to credit said note with said sum of \$1,000, and asserting that the land in question is bound for the whole principal sum of \$2,500, and interest thereon, the complainant filed this bill, asking to have said credit allowed, and that she be permitted to redeem said land from said mortgage on the payment of \$1,500 of the principal and whatever interest there may be due.

It may be conceded to the contention of defendant that said Thompson was not the general agent of the defendant at Sedalia, Mo., authorized by it to accept payment of the character in question, and therefore special authority to Thompson to receive this money should be shown. But it does seem to me that the correspondence between Thompson and defendant, under all the circumstances of this case, is sufficient to bind the defendant to such payment. In the letter of February 23, 1892, the defendant expressed a willingness to Thompson to allow the payment, provided the same "is made to us, together with interest to March 1, 1892." And in this letter they recognized Voss as the owner of the land burdened with this debt. It is quite inferable that Thompson had, at some time between that and the 1st of September, informed Voss of the willingness of defendant to accept this payment, provided the interest was paid according to the provisions of the mortgage bond. There was just as much consideration for defendant to permit the payment the 1st of September as there was on the 1st of March preceding, which were the dates of accruing semiannual interest. Accordingly, Voss sent to Thompson the draft for the \$1,000 on the 1st of September, 1892. Thompson, with his characteristic dilatoriness, did not advise defendant of the receipt of this money until the 13th day of September. In this letter Thompson called attention to the fact that defendant had expressed a willingness to receive the payment of that amount; and he distinctly advised the defendant that "Mr. Voss has now left with us \$1,000, to be applied on the loan, provided you will accept it." So, the defendant was thus advised of the fact that the \$1,000 had been paid by said Voss to Thompson, and that Thompson then held the money. In the reply thereto, made by the defendant on the 16th day of September, it made no objection to the fact that Thompson had received this payment from Voss, instead of making the payment direct to the defendant, at its office in Newark, N. J., but the letter reaffirmed its willingness, "for reasons stated in our letter of February last," to accept the payment of \$1,000, subject to the single proviso that the interest on the \$1,000 should be paid from September 1st, "at the time of payment of said \$1,000." It thus recognized "the payment of said \$1,000" to Thompson; that is to say, that the payment to Thompson was perfectly satisfactory to it so far as the mode of payment was concerned, but added the requirement that it would expect interest thereon up to the time it received the money.

The evidence shows that the interest on the debt of \$2,500 was paid up to the 1st of September, 1892; and as no objection was made by Voss to such condition, and the presumption being, as Thompson, in respect of this negotiation, was acting both for Voss and the defendant, that he advised Voss of the receipt of this letter from defendant; and the defendant being thus advised that the debtor had paid this \$1,000 to Thompson for it, it was its duty to have made inquiry of Thompson thereafter as to what disposition he had made of this payment. But it does not appear that it ever corresponded with Thompson thereafter respecting this matter. Thus Voss, up to the time of his death, was left to repose upon the reasonable assumption that his \$1,000 had been received by defendant, and that his principal debt had been reduced by that sum. And so was his widow and heir, the complainant, left to believe and trust, until the flight of Thompson and his defalcations became known to the public, that her property was not subject to a repayment of this debt of \$1,000. And as, under the decree which the court will make in this case, the defendant will be accorded the interest, amounting to about \$2.50, on said \$1,000, from the 1st day of September, 1892, to the 16th day of September, 1892, the date when defendant said, in its letter, it would "accept at this time," exact justice will be done between these parties. Decree will accordingly be entered granting the relief prayed for in the bill.

ILGENFRITZ v. MUTUAL BENEFIT LIFE INS. CO. OF NEWARK, N. J.

(Circuit Court, W. D. Missouri, C. D. May 26, 1897.)

PAYMENTS TO UNAUTHORIZED AGENT.

In 1885 plaintiff, through one T., obtained from defendant a loan of \$25,000, secured by mortgage. At the maturity thereof the loan was extended for five years, and, in consideration of the extension, was made payable at defendant's office in New Jersey. As the interest coupons matured, they were sent to the F. Bank, at plaintiff's residence, in Missouri, of which bank T. was cashier, and the interest was collected by T. and remitted to the defendant. Before the maturity of the extended loan, plaintiff applied to T. for permission to make a payment in advance of maturity, and, on T.'s assurance that it would be accepted, gave a check to the F. Bank for \$7,000. T. did not remit the money to defendant, nor inform it of the payment, but, while collecting interest on the reduced amount from plaintiff, accounted to defendant as for interest on the whole amount of the loan. A similar transaction took place later, when plaintiff paid \$5,000 to the bank. Defendant was not informed of the payments till T. absconded, some time later, and the bank failed. *Held*, that the payments so made were not payments to the defendant, and plaintiff was not entitled to have them credited on the mortgage.

G. W. Barnett, for complainant.

Montgomery & Montgomery, for defendant.

PHILIPS, District Judge. In 1885 the complainant, through James C. Thompson, of Sedalia, Mo., obtained from the defendant a loan of \$25,000, secured by deed of trust upon real estate. On the maturity of the principal of this debt, she obtained, through said Thompson, an extension of the loan for five more years. As the coupons

of interest became due, they were forwarded by defendant company to the First National Bank of Sedalia, Mo., for collection, with appropriate indorsements thereon, authorizing the bank to collect the same. Thompson was the cashier of said bank. When these coupons were paid by complainant, the money was forwarded by Thompson to the defendant, at Newark, N. J. These payments of interest were made by checks given by complainant on said Sedalia bank, where she usually kept her deposits; or the money would be forwarded by the bank, and charged up to the account of the complainant, with her knowledge and consent. C. E. Ilgenfritz, the son of the complainant, seems to have had a general power of attorney from her for attending to her business affairs. On the 1st day of October, 1892, said C. E. Ilgenfritz called to see said Thompson, and made inquiry as to whether his mother would be permitted to make a payment on said note prior to maturity thereof, and upon the mere assurance of Thompson he gave a check, in the name of his mother, M. D. Ilgenfritz, on the First National Bank, payable to the said bank or order, for the sum of \$7,000, with the understanding that it was to be applied as a payment on said note. Thompson neither then applied to the defendant to obtain permission to receive such payment, nor did he at any time inform the defendant of the payment of said sum of \$7,000, or remit same to defendant. As the coupons of interest became due on the \$25,000, the defendant, as heretofore, sent the coupons to said bank for collection. Thompson, the cashier, would collect from complainant the interest on the basis of the reduction of the principal of the debt by the \$7,000 payment, but would account to the defendant as though no part of the principal debt had been paid. On the 3d day of October, 1893, said C. E. Ilgenfritz, for his mother, and in her name, drew a check on the Citizens' National Bank of Sedalia, payable to said First National Bank or order, for the sum of \$5,540, which was intended by him to be an additional payment of \$5,000 on the principal sum of said debt, and the other \$540 was to pay the then accrued interest upon the debt reduced by the former payment of \$7,000, and took therefor the following receipt:

"Sedalia, Mo., Oct. 3. 1893.

"Received of Mrs. M. D. Ilgenfritz five thousand dollars, part payment on loan held by Mut. Ben. Life Ins. Co.

J. C. Thompson, Cas.

"\$5,000.00."

On the 5th day of October, 1893, after the receipt of said \$5,000, said Thompson wrote to the defendant, stating that complainant desired to make a payment on the principal of said debt, and asking permission, if she did, to reloan the money to some other person. He gave no intimation to the defendant of either of said prior payments having been made. On the 9th of October, 1893, the defendant replied as follows:

"We have your favor of the 5th inst., written over the matter of the probable payment about to be made by Mrs. Ilgenfritz on account of the principal of her mortgage. In reply, we would say we prefer, if payment is made by her, that the amount be sent to us. The company does not at present desire to make other loans in your section."

The complainant continued thereafter to pay interest as theretofore on the basis of said supposed reductions of the principal debt, Thompson accounting to the defendant on the basis of the existence of the whole debt of \$25,000. On the 4th of May, 1894, the said First National Bank of Sedalia failed, and went into the hands of a receiver. Thompson was insolvent, and fled the country. The first intimation that defendant had of the payment of said sums of money by complainant was conveyed to it on the date of the failure of said bank, by the following telegram from said C. E. Ilgenfritz:

"Sedalia, Mo., May 4, 1894.

"Mutual Benefit Life Insurance Company, Newark, N. J.: At what dates did you receive the two payments made in 1892 and 1893, aggregating \$12,000.00, on the Malinda Ilgenfritz mortgage on her property in Sedalia? Answer at my expense.

"[Signed]

C. E. Ilgenfritz."

The defendant not having received said money so paid by complainant, and the principal of said debt becoming due and remaining unpaid, the complainant, Mrs. Ilgenfritz, filed her bill herein, alleging a payment to defendant of \$12,000 on the principal of said debt, and making tender of the balance due thereon, praying to have said mortgage satisfied and the whole of the debt declared paid. The defendant has filed a cross bill asking for a foreclosure of the mortgage. The question to be decided by the court is simply whether or not the payments made to the First National Bank of Sedalia were, in law, payments to the Mutual Benefit Life Insurance Company. The payments in question were made to the bank. The checks in the name of M. D. Ilgenfritz, the complainant, were written by her agent, C. E. Ilgenfritz. The one for \$7,000 was drawn on the First National Bank, in favor of said bank. The second one, for \$5,000, was drawn on the Citizens' National Bank of Sedalia, in favor of the First National Bank. Both sums went to the First National Bank, and, without the knowledge or consent of the defendant, were credited by the bank on its books to defendant, and were diverted by the bank to the credit of some other debtor of the bank, with the exception of \$5,000 later credited back to the defendant. But the entire sum of \$12,000 was absorbed by the bank in its business. The evidence not only fails to show that Thompson individually received or appropriated a dollar of the money, but his direct testimony is that he did not. The face of this transaction, therefore, is that the \$12,000 were paid by complainant to the First National Bank of Sedalia. To entitle her to credit therefor, the burden rests upon her to prove that the bank had authority from defendant to receive it, in the absence of ratification by defendant. There is scarcely a pretense for such a contention. It is not claimed that the bank had any express authority from the defendant to accept the payments. What is there, then, in the evidence to warrant a finding that such authority arose from implication? The only instances shown in which the bank hitherto had acted for the defendant were in collecting for it coupons of interest from Mrs. Ilgenfritz, and on other mortgage bonds; but in every such instance the coupons were indorsed

by defendant and sent to the bank, to be collected by it in the regular course of banking business. Both on reason and authority, these transactions gave no colorable authority to the bank to collect any other debt or claim on behalf of the defendant. *Padley v. Neill*, 134 Mo. 378, 35 S. W. 997; *Klindt v. Higgins* (Iowa) 64 N. W. 414; *Security Co. v. Douglass* (Wash.) 44 Pac. 257. The only answer attempted on argument by complainant's counsel to be made to this embarrassing aspect of the case is that Thompson, by the course of dealing between him and the defendant, was held out to the public as its agent authorized to make such collections. If that were conceded, it could not help the complainant, because of the stubborn fact that the payments were not made to Thompson. He neither got nor appropriated the money. The fact that he may have consented to the appropriation of the money by the bank could upon no rule of law bind the defendant, as he had no express or implied authority to consent that the banking corporation might embezzle the defendant's money. The only explanation made by C. E. Ilgenfritz in his deposition respecting the payments is that he supposed, from what he had heard, that Thompson had authority to receive such payments, and that he considered Thompson and the bank "the same." But neither his suppositions nor assumptions can conclude the absent creditor, nor confound the individuality of Thompson and the corporate entity, the bank. If Thompson had in fact authority to receive such payments, the debtor could exonerate herself from the demand of the principal only by payment made directly to this agent. She could not, of her own motion, conclude the creditor by paying the money into the bank to the credit of the defendant, even by the direction of the agent. His agency would extend only to the taking of the money from the debtor, and not to an authorization of the debtor to make a deposit in any bank. The debtor so making the deposit would take the risk of the depositary accounting therefor. There is not in this case any evidence that Thompson even directed or requested C. E. Ilgenfritz to make payment in the way he did to the bank. The checks are in Ilgenfritz's handwriting. And conceding that Thompson had knowledge of such fact, and that he acquiesced therein, I know of no rule of the law of agency that such knowledge and ratification by the agent could bind the principal; for the palpable reason that his agency extended only to the receipt of the money itself, and its transmission to the principal. In this view of the case, it is hardly necessary to enter upon any discussion of the question of the nature and extent of Thompson's agency. But there are a few conspicuous facts, touching upon this issue, quite decisive to my mind. By the terms of the first mortgage bond, executed in 1885, the principal and interest were payable at the First National Bank of Sedalia. But in the agreement for the extension of this loan, of date December 1, 1890, the complainant, over her own signature, stipulated, in consideration of the extension, that both principal and interest should be paid at the office of the Mutual Benefit Life Insurance Company, in Newark, N. J. She is presumed, as a matter of law, to have been familiar with this provision of the extension agreement.

She was thereby advised that the place of payment of the principal of this bond was at the office of the defendant, and not at the Sedalia bank. And therefore, when Thompson, or anybody else, should consent that the payment could be made at the bank in Sedalia, it was her duty, at her peril, and that of her agent, to know and see that the person or corporation to whom she made payment had authority to waive this explicit compact. More than that, the contract of extension did not provide for any payment of the principal until the end of the five years. It did not contain an option for an earlier payment. All the lender sought by the loan was semiannual interest, and security for the principal during that time. To pay any part of the principal prior to the expiration of the five years would therefore require the express consent of the creditor. Without one word of inquiry as to whether Thompson had such consent, her agent paid to the bank her money, upon the bare assumption that all that was necessary was to obtain Thompson's consent thereto. And from the evidence in this case, and other cases of like import before this court, it is quite apparent that both Thompson and the bank were always open to receive anybody's money about that time. The very utmost that C. E. Ilgenfritz could testify to in this particular was that he had heard that Thompson had received such part payments, but could give only one instance,—that of one Woods. But an examination of the correspondence between defendant and Thompson shows that in every instance where payments had been made of the principal, and extensions made, Thompson applied to defendant respecting the matter; and in no instance does it appear that, with the knowledge or approval of defendant, did he ever assume, of his own motion, to receive such payments. The transaction with Woods did not occur until 1893, long after the payment of the \$7,000. It does not even appear that Ilgenfritz made inquiry of Woods or anybody else as to the circumstances of any payments made by them, or ask Thompson one word respecting his authority. The bond on account of which payments were made was not at the Sedalia bank, nor was it, under the stipulation for extension, payable there. A debtor who thus pays without the precaution to see that the party to whom he pays holds the obligation does so at his peril. *Cummings v. Hurd*, 49 Mo. App. 139; *Englert v. White* (Iowa) 60 N. W. 224, 225; *Murphy v. Barnard*, 162 Mass. 72, 38 N. E. 29; *Johnston v. Investment Co.*, 46 Neb. 480, 64 N. W. 1100; *Joy v. Vance* (Mich.) 62 N. W. 140. The postulates laid down by Mr. Justice Field in *Ward v. Smith*, 7 Wall. 447, cover this case:

"When the instrument is lodged with the bank for collection, the bank becomes the agent of the payee or obligee to receive payment. The agency extends no further, and without special authority an agent can only receive payment of the debt due his principal in the legal currency of the country, or in bills which pass as money at their par value by the common consent of the community. In the case at bar only one bond was deposited with the Farmers' Bank. That institution therefore was only agent of the payee for its collection. It had no authority to receive payment of the other bonds for him, or on his account. Whatever it may have received from the obligors to be applied on the other bonds, it received as their agent, not as the agent of the obligee. If the notes have depreciated since in its possession, the loss must

be adjudged between the bank and the depositors. It cannot fall upon the holder of the bonds."

This case further holds that the collecting agent is limited by law to receive for the debt of his principal only that which the law declares to be legal tender, or which, by the consensus of the business world, is considered and treated as money. It would be more than a pleasure to me, personally, if the facts and law of this case permitted me, to follow my sympathies, and relieve this complainant of the hardship of having to pay this money over again, provided she fails to collect it from the bank. But I must follow where the evidence and the law direct. It results that the issues on complainant's bill are found for the defendant, and the prayer of defendant in its cross bill is granted. Decree accordingly.

MUTUAL BEN. LIFE INS. CO. OF NEWARK, N. J., v. MILES et al.

(Circuit Court, W. D. Missouri, C. D. May 26, 1897.)

PRINCIPAL AND AGENT—EXISTENCE OF AGENCY—PAYMENTS TO ASSUMED AGENT.

In 1887, defendants, through one T. as their agent, borrowed \$3,000 of plaintiff, and gave a note therefor, payable at their residence, in Missouri, in five years, and secured by mortgage. In 1892 the loan was extended for five years, and, in consideration thereof, made payable at plaintiff's office, in New Jersey. In 1894 defendants applied to T. to have him secure a release of part of the mortgaged land, which defendants had sold, on payment of \$1,000. Plaintiff informed T. that it would not release the land, but, if the title were satisfactory, it would accept payment of the \$3,000 loan and make a new loan of \$2,000 to defendants on the unsold land. Defendants then delivered to T. a check for \$1,000, drawn to the order of a bank of which T. was cashier, and a new mortgage for \$2,000, for which T. receipted as cashier of the bank. Plaintiff did not release the \$3,000 mortgage, and knew nothing of these transactions till T. absconded, some time later, when the \$2,000 mortgage was found in the bank. *Held*, that the \$1,000 was not paid to plaintiff, in fact or in law, and plaintiff was not bound to credit the same on its mortgage.

G. W. Barnett, for complainant.

Montgomery & Montgomery, for defendants.

PHILIPS, District Judge. On the 1st day of July, 1887, the defendants borrowed of the complainant the sum of \$3,000, for which they executed to complainant their promissory note, payable five years after date, with 6 per cent. interest per annum, payable semi-annually on the 1st days of January and July in each year. To secure the payment of this note, they executed a deed of mortgage on certain real estate, consisting of three lots in the city of Sedalia, Mo. This loan was effected by defendants through one James C. Thompson, by sending in their application to the complainant company, containing the usual provisions that they constituted said Thompson their agent therefor. By the terms of the note, the same was made payable at the First National Bank of Sedalia, Mo., with exchange on New York City. On the 1st day of July, 1892, on the application of defendants, this loan was extended by an agreement in writing for

an additional period of five years from July 1, 1892. This agreement provided, inter alia, that in consideration of the extension both principal and interest should be paid, when due, at complainant's office in Newark, N. J. The lots in question belonged to the defendant Mary T. Miles, the wife of co-defendant, John R. Miles, who acted in these transactions as agent for his wife. On or about the 1st day of March, 1894, the defendants made a contract of sale of one of said lots and 10 inches off of another thereof to one Drucker, and applied to said Thompson to have him obtain a release of the property so sold to said Drucker from said mortgage deed on the payment of \$1,000 on said \$3,000 loan. Thereupon, on the 7th day of March, 1894, Thompson wrote to the treasurer of the complainant, advising it of defendants' proposition, and asking their consent thereto; to which said treasurer made answer, on March 10, 1894, as follows:

"Mr. J. C. Thompson, Sedalia, Mo.—Dear Sir: Your favor of the 7th inst. is received. In reply, would say that it is contrary to our rules to make releases of portions of mortgaged premises. If John R. Miles and wife will prepare and present an application for a new loan of \$2,000.00 upon the property they desire us to retain as security, we will have the same considered, and, if granted, new loan made and present paid. I should receive some assurances that the interest will be promptly paid in the future.

"Yours, truly,

Sam'l W. Baldwin, Ass't Treasurer."

On the 16th day of March, 1894, Thompson wrote the following letter:

"Samuel W. Baldwin, Esq., Ass't Treas., Newark, N. J.—Dear Sir: Referring to your favor of March 10th, concerning loan to John R. Miles and wife for \$3,000.00, upon which they desire to make payment of \$1,000.00, and a release of part of the ground, I now hand you herein new application for a loan of \$2,000.00 upon the ground mentioned in my letter of the 7th inst., which please submit, and advise me of your decision in the matter.

"Yours, truly,

J. C. Thompson."

On March 21, 1894, the following telegram was sent:

"Mr. J. C. Thompson, Sedalia, Mo.: Miles' application approved, subject to title. Edward L. Dobbins, Secretary."

So far as complainant is concerned, this is the last heard of the matter by it until after the 4th day of May, 1894, at which time the said First National Bank of Sedalia, Mo., of which Thompson was cashier, failed, and was placed in the hands of a receiver, and Thompson fled the country to Mexico. The defendant John R. Miles, without more, joined his wife in a deed of trust on the unsold portion of said lots to the complainant for the sum of \$2,000, and drew his check for the sum of \$1,000 in favor of the First National Bank of Sedalia, and thereupon the bank passed the same to the credit of the complainant, and absorbed the proceeds thereof in its business. At the time of the payment of said \$1,000 as aforesaid, the following receipt was given therefor:

"Received of Mrs. Fannie Drucker \$1,000.00, to be applied on deed of trust of Mutual Benefit Life Insurance Company of Newark, N. J., as a release of lot 3 and 10 inches off of the east side of lot 2, in block 57, in Smith & Martin's Second addition to the city of Sedalia, said deed of trust to be released within the present month, and is recorded in Book 53, page 444, Records of Pettis County, Mo.

"[Signed]

J. C. Thompson, Cash."

After the failure of the bank and the flight of Thompson, the receiver in charge of the bank found said \$2,000 deed of trust among papers in the bank.

The question to be decided is whether or not the said mortgage for \$3,000 should be canceled and satisfied by complainant, and the second deed of trust for \$2,000 accepted by it. In other words, was the \$1,000 paid to complainant in fact and in law? Because of the fact that Thompson had obtained the original loan for the defendants, and the application for extension thereof had been made and obtained through him, the defendants seem to have assumed that he was the proper person to apply to to effect the release of part of the mortgaged premises on the payment of the \$1,000. It is not contended seriously, by reason of Thompson's office in effecting the loan for defendants, that authority could be implied in him to thereafter collect either the principal or interest on the bond. *Englert v. White* (Iowa) 60 N. W. 224; *Cummings v. Hurd*, 49 Mo. App. 147. The evidence fails to show that Thompson individually ever made collection of even the interest on the bond. As in the *Ilgenfritz Case* (decided contemporaneously herewith) 81 Fed. 27, the coupons were sent by the company, indorsed, to the First National Bank of Sedalia for collection in the usual course of banking business. The fact that defendants went to the bank, and paid the interest, and it was forwarded by Thompson, could give no claim of a colorable holding out by the company of Thompson as their general agent for the collection of any money that any debtor might wish to pay on bonds to the complainant. More than that, the defendants had express notice that the principal of this bond was not payable at the First National Bank at the time the \$1,000 was paid therein. The original contract expressed in the bond provided for payment at said bank, but in consideration of the extension of the loan it was changed, and both principal and interest thereafter were made payable at the office of complainant in the city of Newark, N. J. The principal not being due when defendants proposed to make payment thereon, it could only be done by a conventional rearrangement between the obligors and the obligee. And especially must the presumption be indulged that no such alteration of the mortgage bond could be effected whereby any part of the security could be released, without the express consent of the mortgagee. The exercise of such plenary power by the local agent would have been so extraordinary as to excite special wonder and inquiry of the mortgagors as to the authority of such an agent. Thompson did not even assume to so act when the defendants applied to him to effect such release on the payment of the \$1,000. This is rendered absolutely certain by the deposition of defendant John R. Miles. He states in his deposition that after the sale was made to Mrs. Drucker he went to see Mr. Thompson, "to know if, by paying off \$1,000, if that would release that place, and take it off that place, and leave the remaining \$2,000 on the home place where we live. He said he would write immediately to the company, and find out." And he further admitted that Thompson showed him the letter received from the company, which was evidently the letter of March 10, 1894. This letter advised him that Thompson had no authority to

act in respect of this particular transaction, unless specially authorized thereto by the company. Accordingly, the defendants made out and sent through Thompson their application for a new loan of \$2,000, which Thompson forwarded in the letter of March 16, 1894. In this letter Thompson asked the treasurer to submit the matter to the company, and advise him of the decision. To this the secretary of the company made answer by telegram, saying, "Miles' application approved, subject to title." This was the last ever heard of the matter by the company until after the collapse of the bank, and Thompson had fled. No title was submitted to the company, and no deed of trust nor money was forwarded to them, and no release of the first mortgage was given by the company. If the \$1,000 is to be regarded, as defendants claim, as payment on the \$3,000 bond, it was not paid to the company at its office, as the contract of extension expressly stipulated it should be; and, if Thompson could be regarded as clothed with authority to receive it, the money was not paid to him, but to the bank, by check made payable to the bank, and a receipt was taken therefor from Thompson as cashier of the bank. This was done in the face of the fact that the authority of the bank to receive either the principal or interest of the debt had been revoked in consideration of the extension agreement. Thompson never got the money, but the bank received and appropriated it.

As the facts in the case show that this whole transaction, with the knowledge of defendants, was made to depend upon the special arrangement, it is useless to discuss the suppositions of defendants respecting the scope of Thompson's agency in effecting the loans of the company. The money was not paid to him, and there is not the shadow of authority that the bank had any agency to receive this money for complainant. The defendants, with a confused identity in law and fact of Thompson and the bank, elected to leave their money with the bank, and trust it to account therefor to the complainant. They thus constituted the bank their agent for this \$1,000 payment, and must look to it for its recovery. *Ward v. Smith*, 7 Wall. 451.

There is no evidence in this case to warrant the court in finding that Thompson directed the defendants to draw or have drawn the check on the bank as a method of payment to Thompson individually. And, if there had been such testimony, as matter of law Thompson had no authority as a claimed agent of complainant to receive or accept anything from defendants except money. He had no implied nor incidental authority to direct a payment to or deposit in the bank, so as to bind the principal. When the check was made payable to the bank, and passed to complainant's credit therein, the bank was insolvent in fact, and known to be so by Thompson. The money could not then be drawn out of the bank on the order of anyone save that of complainant, if ratified by them. Thompson had no special or implied authority from complainant to check out its account. It does seem to me that if such a method of payment should be held to constitute payment to the absent creditor on a bond then in its possession, and payable by express agreement at its office in New Jersey, the court, instead of enforcing, would unmake, a contract. It results that the issues are found for complainant, and decree accordingly.

CONTINENTAL NAT. BANK v. HEILMAN et al.

(Circuit Court, D. Indiana. June 5, 1897.)

1. PRINCIPAL AND AGENT—NOTE SIGNED BY AGENTS INDIVIDUALLY.

M. and H., who were the agents of the subscribers to a syndicate formed to buy the securities of two railroads, executed to the C. Bank, through which the financial operations of the syndicate were carried on, a note for \$100,000, which was headed "M.-H. Syndicate," and read: "On demand the undersigned promise to pay * * *, having deposited with said bank as collateral security for this or any other liability of ——— to the said bank * * * syndicate securities and agreement,"—signed by M. and H. in their own names. The loan was entered in the discount book of the bank as made to the M.-H. Syndicate. A guaranty taken by the bank described the note as the note of the M.-H. Syndicate, and demands for interest from time to time were addressed by the bank to the M.-H. Syndicate. *Held*, that the note was the obligation of the syndicate, and not the individual debt of M. and H.

2. EVIDENCE—WAIVER OF OBJECTIONS—COURT RULES.

Rule 34 of the circuit court for the district of Indiana, requiring the filing of briefs on all motions, demurrers, and exceptions, in default of which they are waived, does not apply to objections made on the trial to the competency of evidence contained in a deposition.

3. COMPETENCY OF WITNESSES—SUIT AGAINST HEIRS—AGENT OF DECEDENT—FEDERAL COURTS.

Rev. St. § 858, does not provide for the case covered by the Indiana statute (Rev. St. 1894, § 508; Rev. St. 1881, § 500) excluding, as against the heirs or representatives of a decedent, the testimony of one who has acted as an agent in making or continuing a contract with such decedent, and such statute is the rule of decision as to the competency of such testimony in the federal courts.

4. FEDERAL COURTS—JURISDICTION—SUIT TO CHARGE HEIRS—LIMITATION OF ACTIONS.

The federal courts have original and inherent jurisdiction, apart from any state statutes, to take cognizance of a suit by a creditor to charge heirs, devisees, and legatees, to the extent of the assets taken by descent or devise, with ancestral debts, and they are not restricted therein by state statutes limiting the time for bringing such suits, but the right to maintain such a suit may be lost by laches, and a failure to proceed within the time limited by a state statute may be evidence of laches.

5. LACHES—FAILURE TO PRESENT CLAIMS AGAINST DECEDENT'S ESTATE—DEPRECIATION OF COLLATERAL.

When one who claims to be a creditor of a deceased person neglects for over three years to present his claim, of which the representatives of the decedent are ignorant, and in that time collateral securities held for the claim depreciate from more than its amount to much less, such creditor is guilty of laches which bars him from proceeding in equity against the heirs and devisees of the decedent.

A. C. Harris, for complainant.

Gilchrist & De Bruler and Duncan, Smith & Hornbrook, for defendants.

BAKER, District Judge. This is a suit brought by the complainant against the widow and heirs of William Heilman, deceased, to charge them, as devisees and legatees under the last will of the decedent, with the amount of a promissory note for \$100,000, alleged to have been executed by the decedent and David J. Mackey to the complainant. The note is as follows:

Mackey-Heilman Syndicate.

\$100,000.

New York, April 10, 1889.

On demand the undersigned promise to pay to the Continental National Bank of New York or order, at their banking house, one hundred thousand dollars, for value received, with interest at the rate of — per cent. per annum, having deposited with said bank, as collateral security for this or any other liability of — to the said bank, the property stated below, with authority to sell the same, or any securities added thereto or substituted for the same, at any broker's board, or at public or private sale, at the option of said bank, on the nonperformance of this promise, and without notice; the proceeds, after deducting expenses, to be applied to the payment of — indebtedness to the said bank, any surplus to be returned to —, and holding — liable for any deficiency. Market value this day. Syndicate securities and agreement.

[Signed]

D. J. Mackey.

William Heilman.

\$2,094,000 Lou. Ev. & St. L. 2nd Mtg. bonds.

9455 shs. do. do. Pfd.

9017 " " do. Comm.

1400 " Ill. & St. L. R. & Coal Co. Pfd. stock.

This note grew out of a transaction of the so-called "Mackey-Heilman Syndicate." This syndicate was formed by a subscription paper, which is set out in the evidence. Its objects were to buy the securities of the Louisville, Evansville & St. Louis Railroad Company and those of the Illinois & St. Louis Railroad & Coal Company, to consolidate the two companies, and to issue the bonds and stock of the consolidated company to the subscribers to the syndicate in proportion to the amount of their several subscriptions. The agreement provided that the securities should be purchased at the prices fixed therein. Heilman and Mackey were made, for that purpose, the agents of the subscribers to the syndicate agreement. The subscriptions were to be paid to the Continental National Bank as those agents called for them. The resulting securities were to be divided among the subscribers in proportion to the amounts of their subscriptions. The Continental National Bank was made the agent of the syndicate to receive the subscriptions, to receive the securities purchased, to cause them to be converted into securities of the consolidated company, and to make distribution of the new securities among the subscribers. In all these matters, and in all matters relating to the note in suit, Mr. Randolph, the president of the bank, acted for it as its agent with full authority. The syndicate agreement was dated February 11, 1889. On February 15, 1889, the complainant lent to the syndicate \$50,000 on a note similar in all respects to the one in suit. Both notes were guarantied by Mr. Baldwin by a separate instrument in writing. The bank took its pay for the \$50,000 note out of the syndicate moneys, making no demand for payment upon Heilman or Mackey. On February 25, 1889, the draft of Heilman and Mackey for \$112,000, with stock of the Illinois & St. Louis Railroad & Coal Company attached (which stock had been bought by them for the syndicate), was paid by the bank out of syndicate funds. Subscriptions were made from time to time, and on April 8, 1889, Heilman and Mackey were in Boston securing further subscriptions. At this time they borrowed \$100,000 from the Bank of North America. They had previously headed the subscriptions with \$100,000 each. Upon borrowing the \$100,000 from the

Bank of North America, they jointly subscribed an additional \$100,000. They then applied to the complainant for more money, and it sent them \$100,000 to be used in purchasing the securities for the syndicate. Two days later Heilman and Mackey returned to New York, and the note in suit was then signed by them. The loan of the \$100,000, as shown by the discount book of the bank, was made to the Mackey-Heilman Syndicate. The application for the loan is shown by the offering book of the bank to have been made by the Mackey-Heilman Syndicate. At the time the bank took the guaranty of Mr. Baldwin for the payment of the loan he was one of the directors of the complainant, and one of the subscribers to the syndicate agreement. The guaranty described the note as that of the Mackey-Heilman Syndicate, and Mackey and Heilman were not mentioned as makers of the note. The bank afterwards sent demands for interest to Mr. Baldwin, which were in every instance addressed to the Mackey-Heilman Syndicate. In no book entry or paper produced in evidence was this note described by the complainant as the note of Mackey and Heilman, but always as the note of the Mackey-Heilman Syndicate. In every other case to be found in the offering book of the bank the name of the actual borrower is put down. This loan was made to the Mackey-Heilman Syndicate upon the pledge of the securities purchased by the syndicate.

In my opinion, the evidence shows that the loan was made to the Mackey-Heilman Syndicate for syndicate purposes, and it was not understood to be, nor was it in fact, the individual loan or debt of Heilman and Mackey. They signed the note as agents of the syndicate. It was not understood at the time that they were to be liable upon the note as for their own personal debt. The complainant has made no effort to collect the note from the syndicate, nor from Mr. Baldwin, the guarantor. Until legal recourse is exhausted, no suit in equity is maintainable against the heirs of a deceased maker of the note. Even though the note may have created a personal liability against Mackey and Heilman alone, and not a liability against the members of the syndicate, the court is of opinion that the subsequent conduct of the complainant shows that it became a subscriber to the syndicate for the amount of this loan. It made the distribution, designating itself as a subscriber to the syndicate to the amount of \$100,000. It set apart to itself the share of securities to which it was entitled as such subscriber. It sent a copy of the distribution sheet, showing what it had done, accompanied by a letter written by Mr. Randolph to Mr. Heilman, asking him to advise the bank if what it had done was not satisfactory to him. Mr. Heilman answered, but the complainant professes its inability to produce his letter. However, it is not claimed that Mr. Heilman expressed any dissent. The written evidence, and the conduct of the parties prior to Mr. Heilman's death, are in harmony with this view, and in conflict with any other. After Mr. Heilman's death, there were some acts on the part of the bank inconsistent with the view that it became a subscriber to the syndicate. No notice of such purpose was communicated to the executrix of the Heilman estate, nor to any one interested therein, until after the estate had been finally set-

tled by the decree of the circuit court of Vanderburg county, Ind. Mr. Heilman died testate in that county September 22, 1890. His will was probated September 27, 1890, and letters testamentary thereon were issued to his widow, Mary Jenner Heilman. Notice of such appointment was immediately given in the manner provided by law. The estate was finally settled, and the executrix discharged on December 16, 1893. At no time pending the settlement of the estate did the executrix, or any one of the defendants, have notice or knowledge of the existence of the note in suit, or of the alleged collateral securities.

The conduct of the complainant in respect to the note and securities is inconsistent with its present contention, and the conduct of Mr. Heilman is explainable only on the theory that he regarded his liability on the note as extinguished, and that he had no claim upon the securities which had been taken by the bank upon their distribution. After Mr. Heilman's death, the complainant dealt with these securities by exchanging a part of them for other securities as though it was the absolute owner of them. The excuse offered is that it understood that Mr. Baldwin was the agent of Mr. Heilman in respect of these securities, and that Mr. Baldwin assented to such exchange. The evidence of such agency is of doubtful and uncertain character; and, even if he was such agent, the death of Mr. Heilman terminated such agency. Knowing of his death, the complainant was bound to know and did know that Mr. Baldwin had no right to speak for a dead man. So, unless complainant was the absolute owner of these securities, its conduct in making such exchange was wrongful and fraudulent. The court prefers to explain the conduct of the complainant on the theory that it had become the owner of the securities, and thus rightfully exchanged a part of them, rather than to impute fraudulent and wrongful conduct to it. The failure to collect the note is sought to be explained by the testimony of Mr. Randolph to the effect that after the making of the note and the distribution of the securities Mr. Heilman told the witness that he wanted to let the note run because the securities would at any time be worth more than enough to pay it off. The counsel for the defendants at the hearing moved to suppress so much of the deposition of Mr. Randolph as detailed the statements of the decedent to him in relation to the note and securities on the ground that the witness was in such interviews acting as the agent of complainant in making and continuing the contract. Counsel for complainant insist that the objection so taken is waived under rule 34 of this court. This rule is as follows:

"Ordered, that all motions, demurrers, and exceptions hereafter filed must be supported by written or printed briefs, to be filed in duplicate with such motion, demurrer, or exception. Failure to file such briefs shall be deemed a waiver."

This rule was not intended to apply, nor has it ever been construed by the court as applying, to objections made, on the trial or hearing, to the competency of evidence contained in a deposition. Where the objection seeks the suppression of the deposition for some curable defect, a motion to suppress is required to be made seasonably before the trial or hearing. But when the objection goes solely to the

competency of particular parts of the deposition, and when the objection of incompetency cannot be avoided by retaking the deposition, it has been the constant and uniform practice of the court to consider and decide upon such objections during the progress of the trial.

Counsel further insist that Mr. Randolph is not a party, under section 858, Rev. St. U. S., and is not excluded by the proviso; citing *Potter v. Bank*, 102 U. S. 163; *Bank v. Jacobus*, 109 U. S. 275, 3 Sup. Ct. 219; and *Snyder v. Fiedler*, 139 U. S. 478, 11 Sup. Ct. 583. The statute is as follows:

"In the courts of the United States no witness shall be excluded in any action on account of color, or in any civil action because he is a party to or interested in the issue tried: provided, that in actions by or against executors, administrators or guardians, in which judgment may be rendered for or against them, neither party shall be allowed to testify against the other, as to any transaction with, or statement by, the testator, intestate or ward, unless called to testify thereto by the opposite party, or required to testify thereto by the court. In all other respects the laws of the state in which the court is held shall be the rules of decision as to the competency of witnesses in the courts of the United States in trials at common law, and in equity and admiralty."

In *Potter v. Bank*, *supra*, it is held that in an action against an executor in his representative capacity a witness who was interested in the issue, but was not a party thereto, was competent, and his evidence admissible.

In *Bank v. Jacobus*, *supra*, a creditor had obtained judgment against one Patterson. He levied on capital stock in a corporation claimed by Jacobus under an assignment from Patterson, and in the original suit summoned Jacobus, as garnishee of Patterson, to answer. Pending these proceedings, Patterson died, and his administrator was substituted as defendant. Jacobus and the administrator were offered as witnesses on Jacobus' behalf in regard to transactions at the time of the assignment. It was held that each was a competent witness on his own motion, notwithstanding the proviso to section 858. The court said:

"The real issue was between the bank and Jacobus, and consequently the case is within the first clause of section 858, which provides that 'No witness shall be excluded * * * in any civil action because he is a party to or interested in the issue tried.' Within the meaning and object of the proviso, this is not an action by or against an administrator, in which judgment may be rendered for or against him."

In *Snyder v. Fiedler*, *supra*, the administratrix of her husband's estate commenced suit to recover a claim alleged to be due the estate. She resigned, and was discharged, and an administrator *de bonis non* was appointed and qualified, and appeared, and obtained leave to prosecute the suit as plaintiff therein. It was held that she was a competent witness for the plaintiff at the trial.

These cases decide that no witness can be excluded because he is a party to or interested in the issue. The objection to the testimony of Mr. Randolph is not upon either of these grounds. The objection is that he was the agent of complainant in making and continuing the contract involved in suit. The last clause of section 858 makes the law of the state the rule of decision in all other respects

than those provided for in the preceding part of the section. The statute of this state (Rev. St. 1894, § 508; Rev. St. 1881, § 500) provides that:

"No person who shall have acted as an agent in the making or continuing of a contract with any person who may have died, shall be a competent witness in any suit involving such contract, as to matters occurring prior to the death of such decedent, on behalf of the principal to such contract against the legal representatives or heirs of such decedent, unless he shall be called by such heirs or legal representatives."

Section 858 does not provide for the case covered by the state statute. Neither section 858 nor the construction placed upon it by the cases cited *supra* affects the application of the state law to the question of the competency of the agent to testify for his principal. Mr. Randolph was confessedly the agent of the complainant both in making and continuing the contract in suit. The state law is made the rule of decision, and under that law his testimony as to matters occurring prior to Mr. Heilman's death is incompetent, and must be disregarded.

On the competent evidence in the case the court is of opinion that the loan was made to the Mackey-Heilman Syndicate, and not to Mackey and the decedent, and that the complainant, after the execution of the note, became a subscriber to the syndicate in the amount of the note, and accepted its pro rata share of the securities in satisfaction of the loan evidenced by the note. But, if the entire testimony of Mr. Randolph were held competent, the court could not reach any other conclusion. The written evidence, coupled with the conduct of the complainant, ought not to be explained away by the uncertain memory of witnesses who speak to matters which death prevents the decedent from contradicting or explaining.

But there is another ground equally fatal to the complainant's right of recovery. Counsel for complainant bottom the bank's right of recovery upon the statute of this state concerning the liability of heirs, devisees, and legatees for ancestral debts. The statute (Rev. St. 1894, § 2465; Rev. St. 1881, § 2310) provides that no action shall be brought by complaint and summons against an executor or administrator for the recovery of any claim against the decedent, but the holder thereof, whether such claim be due or not, shall file a succinct statement thereof in the office of the clerk of the court in which the estate is pending; and, if such claim is filed after the expiration of one year from the giving of notice by the executor or administrator of his appointment, it shall be prosecuted solely at the cost of the claimant, and, if not filed at least thirty days before final settlement of the estate, it shall be barred, except as hereinafter provided in cases of liabilities of heirs, devisees and legatees. The statute (Rev. St. 1894, § 2597; Rev. St. 1881, § 2442) provides:

"That the heirs, devisees and distributees of a decedent shall be liable to the extent of the property received by them from such decedent's estate, to any creditor whose claim remains unpaid, who, six months prior to such final settlement, was insane, an infant, or out of the state; but such suit must be brought within one year after the disability is removed; provided, that suit upon the claim of any creditor out of the state must be brought within two years after such final settlement."

It is insisted that a new right of action is created by the state statute, that it is equitable in its nature, and is enforceable in the national courts of equity to the full extent of the equitable rights thus created. The national courts, upon their equity side, will not only give equitable relief according to the ancient and original jurisdiction of the high court of chancery of England, but will also enforce any new equitable right created by a state statute. The question for solution, then, is this: Has the statute of this state created a new right or liability of an equitable nature against heirs and devisees for ancestral debts unknown to the equity jurisprudence of the national courts? It is undoubtedly true that an action at common law will not lie against an heir or devisee for the recovery of any debt or liability of the ancestor, unless the ancestor has expressly bound himself and his heirs in an instrument under seal, and then only to the extent of assets by descent from the obligor. But the jurisdiction of a court of equity to entertain a bill on behalf of a creditor and all others who may choose to make themselves parties, to charge the heirs and devisees with the payment of the ancestor's debt to the extent of assets by descent, is undoubted. *Adams, Eq. (3d Am. Ed.) 570; Story, Eq. Pl. & Prac. §§ 99-102, 106; 2 Beach, Mod. Eq. Jur. §§ 1039, 1040; 2 Woerner, Adm'n, §§ 575, 576; Stratford v. Ritson, 10 Beav. 25; Payson v. Hadduck, 8 Biss. 293, Fed. Cas. No. 10,862; Johnston v. Roe, 1 Fed. 692; Chewett v. Moran, 17 Fed. 820; Riddle v. Mandeville, 5 Cranch, 322; Williams v. Gibbes, 17 How. 238, 254, 255; Public Works v. Columbia College, 17 Wall. 521; Borer v. Chapman, 119 U. S. 587, 7 Sup. Ct. 342.*

In *Williams v. Gibbes*, supra, the supreme court say:

"Now, the principle is well settled, in respect to these proceedings in chancery for the distribution of a common fund among the several parties interested, either on the application of the trustee of the fund, the executor or administrator, legatee, or next of kin, or on the application of any party in interest, that an absent party, who had no notice of the proceedings, and not guilty of willful laches or unreasonable neglect, will not be concluded by the decree of distribution from the assertion of his right by bill or petition against the trustee, executor, or administrator; or, in case they have distributed the fund in pursuance of an order of the court, against the distributees. *David v. Frowd, 1 Mylne & K. 200; Greig v. Somerville, 1 Russ. & M. 338; Gillespie v. Alexander, 3 Russ. 130; Sawyer v. Birchmore, 1 Keen, 391; Shine v. Gough, 1 Ball & B. 436; Finley v. Bank, 11 Wheat. 304; Story, Eq. Pl. § 106; Wiswall v. Sampson, 14 How. 52, 67.*"

The general principle governing courts of equity in proceedings of this description is more clearly stated by Sir John Leach, M. R., in *David v. Frowd*, supra, than in any other case that has come under my notice. The master of the rolls, in the course of his opinion, observed:

"That if a creditor does not happen to discover the proceedings in the court until after the distribution has been actually made, by the order of the court, amongst the parties having, by the master's report, an apparent title, although the court will protect the administrator who has acted under the orders of the court, yet, upon a bill filed by this creditor against the parties to whom the property has been distributed, the court will, upon proof of no willful default on the part of such creditor, and no want of reasonable diligence on his part, compel the parties defendants to restore to the creditor that which of right belongs to him."

In *Public Works v. Columbia College*, supra, the supreme court say:

"The jurisdiction of a court of equity to reach the property of a debtor justly applicable to the payment of his debts, even when there is no specific lien on the property, is undoubted. It is a very ancient jurisdiction, but for its exercise the debt must be clear and undisputed, and there must exist some special circumstances requiring the interposition of the court to obtain possession of and apply the property. Unless the suit relate to the estate of a deceased person, the debt must be established by some judicial proceeding, and it must generally be shown that legal means for its collection have been exhausted. In all cases we believe property pledged or conveyed for the payment of the debt must be first applied. The rule requiring the existence of special circumstances bringing the case under some recognized head of equity jurisdiction should not only be insisted upon with rigor whenever the property sought to be reached constitutes, as here, assets of a deceased debtor which have already been subjected to administration and distribution; but some satisfactory excuse should be given for the failure of the creditor to present his claim, in the mode prescribed by law, to the representative of the estate before distribution."

In *Borer v. Chapman*, supra, Mr. Justice Matthews, speaking for the court, observes:

"Such assets were impressed with a trust which such creditor had a right to have administered for his benefit. It is upon the ground of such a trust that the jurisdiction of courts of equity primarily rests in administration suits, and in creditors' bills brought against administrators or executors, or, after distribution, against legatees, for the purpose of charging them with liability to apply the assets of the decedent to the payment of his debts. As a part of the ancient and original jurisdiction of the courts of equity, it is vested by the constitution of the United States, and the laws of congress in pursuance thereof, in the federal courts, to be administered by the circuit courts in controversies arising between citizens of the different states."

These authorities clearly show that this court is possessed of original and inherent jurisdiction to take cognizance of a suit by a creditor to charge heirs, devisees, and legatees, to the extent of assets taken by descent or devise, with ancestral debts. The state statute created no new right, and this court, in cases of this sort, will administer the law of its own forum as settled by the decisions of the supreme court. It was well said by judge, now Mr. Justice Brown, in *Chewett v. Moran*, supra:

"The jurisdiction of the federal courts cannot be ousted or impaired by any provision of a state law requiring creditors to appear before a state court, and present their claims."

Hence this court was open to the complainant, while the estate was pending, to prosecute his claim here to final judgment, but when final judgment was obtained it would be satisfied in due course of administration in the state court. The assets of the estate could not be levied upon in the hands of the executor or administrator. *Byers v. McAuley*, 149 U. S. 608, 13 Sup. Ct. 906.

The complainant, being a nonresident, was not bound to bring its suit here, pending the settlement of the estate, nor to present its claim in the court which had jurisdiction of the settlement of the estate. Such failure is not treated by the supreme court as an absolute bar to its bill, but only as evidence of laches requiring explanation and excuse. As the nonresident creditor is not bound to prove his claim in the court exercising probate jurisdiction over the estate, he is not restricted nor aided by the other provisions of

the act requiring all claims to be prosecuted against the heirs within a limited time. In *Johnston v. Roe*, supra, it is held that a national court will assume equitable jurisdiction of a suit by a receiver of a bank against the heirs of an estate which had been settled by the decree of the state court having probate jurisdiction to charge such heirs with a debt of the decedent, although the debt was barred by the statute of limitations of the state. In *Chewett v. Moran*, supra, it was held that it was not a bar to the maintenance of a bill in equity against heirs in a national court that the estate of the ancestor had been administered in the probate court of the state; that commissioners had been appointed to audit claims against the estate; that a time had been limited within which all claims must be proven; and that the complainant had not appeared before such commissioners, nor offered to make proof of the debt, notwithstanding the law of the state declared that all claims against such estate not so presented should be forever barred. It was further held that the failure to present such claim was evidence of laches, and that the burden was on the complainant to excuse the same.

These cases settle the doctrine that the statute of a state prescribing the time within which a suit must be brought against heirs to charge them with an ancestral debt cannot be invoked for their protection in the national courts. If such a statute will not inure to their protection, can it be invoked to charge them with a liability which is barred by laches? The court is of opinion that the state statute neither adds to nor takes from the ancient and original jurisdiction of this court in suits to charge heirs with ancestral debts. The right to maintain such suit depends on the question whether the complainant is chargeable with laches. The failure to present such claim in the court having probate jurisdiction is evidence of negligence which the complainant must excuse before he can recover. See authorities, supra. There is no evidence in this case relieving the complainant from the imputation of laches. The complainant knew of the death of Mr. Heilman within a few days after it occurred. It knew that his estate would be settled in the court of this state having probate jurisdiction over the same. It knew, if its present contention is true, that the estate had more than \$100,000 worth of securities that ought to be inventoried and sold subject to complainant's claim. The estate was pending for more than three years before final settlement. These securities, for nearly three years after Mr. Heilman's death, were worth from fifteen to thirty thousand dollars more than the amount of the note. The claim was not presented to the executrix, and its existence was unknown to her and to the heirs. No excuse is offered for this great delay, and no notice was given to any one interested in the estate until the securities had become nearly worthless. It is difficult to find a case of more inexcusable laches, and, in my judgment, a court of equity ought not now to impose the great loss arising from such negligence upon the defendants.

The bill will be dismissed for want of equity, at complainant's costs.

GROMMES et al. v. SULLIVAN.

(Circuit Court of Appeals, Seventh Circuit. June 17, 1897.)

No. 374.

1. CORPORATIONS—POWER TO CONTRACT DEBTS—NEGOTIABLE INSTRUMENTS.

Corporations authorized to do a particular business, unless specially denied the power, have implied authority to contract debts in the legitimate transaction of the business authorized; and the power to contract debts, under the American rule, carries with it power to give negotiable notes or bills in payment or as security for such debts, unless that power is expressly denied.

2. BUILDING AND LOAN ASSOCIATIONS—POWER TO CONTRACT DEBTS—NEGOTIABLE INSTRUMENTS.

A building and loan association, empowered expressly or by implication to incur debts in various ways, as to its secretary for his services, to withdrawing members, to the representatives or beneficiaries of deceased members, etc., and to purchase, sell, or mortgage real estate, has by implication power to execute the customary evidences of indebtedness, including negotiable paper.

3. SAME—AUTHORITY OF VICE PRESIDENT.

Where a building and loan association has implied power, under ordinary circumstances or in the usual course of its business, to execute negotiable obligations, a bona fide purchaser of a particular obligation executed by the vice president has a right to presume that it was executed under circumstances giving the requisite authority.

Appeal from the Circuit Court of the United States for the Northern District of Illinois.

This appeal is from a decree dismissing the intervening petition of the appellants, John B. Grommes and Michael Ullrich, in the case of Towle v. Investment Soc., 78 Fed. 688, wherein William K. Sullivan had been appointed receiver of the assets of the society. The case was submitted and heard upon the petition, answer, and a stipulation of the parties. The substance of the petition is that George F. Montgomery, being indebted to the appellants in the sum of \$1,608.47, on October 5, 1893, executed to them the following accepted draft:

"\$1,608.47-100

Chicago, Oct. 4, 1893.

"Sixty days after date pay to the order of Grommes & Ullrich one thousand six hundred eight and 47-100 dollars, value received, and charge to account of

"George F. Montgomery.

"To the American Building & Loan Society, Owings Building."

The acceptance written upon the face of the draft being as follows:

"10-5-'95. Accepted. Am. B., L. & I. Soc'y, F. B. Modica, V. P."

It is alleged that prior to the delivery of the acceptance the appellants had from time to time taken from Montgomery "various and sundry other accepted drafts," drawn upon, and which at their maturity had been severally paid by, the American Building, Loan & Investment Society; that at the time when the first of the drafts had been taken from Montgomery in satisfaction of the amount which he owed the appellants, they had been advised by F. B. Modica, as the agent of the society, that Montgomery was a creditor of the society, and that his drafts upon it were good, and would be met at maturity; that each of the earlier drafts was accepted by the association "by F. B. Modica, its vice president, in manner and form precisely similar to the acceptance on the face of the draft of October 4, 1893, aforesaid"; that "Modica was, at the time, in full charge and control" of the society, "and in all business matters, so far as your petitioners were concerned, he was the chief managing officer of the said society." It is further alleged that, the draft not having been paid at maturity, the petitioners in December, 1893, began in the superior court of Cook county an action at law, and procured a writ of attachment to be issued

and levied upon real property of the society in the county of La Salle, Ill.; that the attachment was a first and valid lien upon that property, which was worth more than the amount of the demand. The petition concludes with an offer to dismiss the proceedings in the superior court of Cook county, and to release the attachment, if leave to file the petition be granted, and the receiver ruled to answer the same within a short day.

The receiver answered, admitting the averments of fact in the petition, but alleging that when the draft was accepted Montgomery was not, and had not since been, a creditor or member or stockholder of the society; that by the by-laws of the society, of which the articles defining the powers of the president and vice president are set out, Modica had no authority to sign, and that the society had no right or power to execute, the acceptance. The by-laws referred to read as follows: "It shall be the duty of the president to preside at all meetings of the shareholders and of the board of directors, to sign all certificates of stock, and to sign all releases of mortgages, and he shall do all other duties usually pertaining to this office." "The vice president shall perform all the duties of the president in his absence. In case of any vacancy in that office he shall be *ex officio* president until the vacancy is filled."

The stipulation of the parties is to the effect that the copy of the by-laws set out in the answer is correct; that the petitioners, when the accepted draft was delivered to them, had no knowledge that such were the by-laws, other than the general knowledge imputed to them from the nature of the society; that it is true, as alleged in the answer, that the society was not and had not been indebted to Montgomery, of which fact, and that he was not a member or stockholder of the society, the petitioners were ignorant until the date of the stipulation. The American Building, Loan & Investment Society was incorporated on November 22, 1888, under the act of the general assembly of Illinois entitled "An act to enable associations of persons to become a body corporate to raise funds to be loaned only among the members of such association," which went into force July 1, 1879. 1 Starr & C. Ann. St. (2d Ed.) c. 32, §§ 108-134.

Frederick S. Winston and James F. Meagher, for appellants.
Lorin C. Collins and Wm. Meade Fletcher, for appellee.

Before WOODS, JENKINS, and SHOWALTER, Circuit Judges.

WOODS, Circuit Judge, after making the foregoing statement, delivered the opinion of the court.

We are of opinion that, under the law of its creation, the American Building, Loan & Investment Society had power to execute negotiable paper. The rule is well established that corporations authorized to do a particular business, unless especially denied the power, have implied authority to contract debts in the legitimate transactions of the business authorized; and the right to contract debt, it is the equally well settled American rule, carries with it the power to give negotiable notes or bills in payment or security for the debts, unless that power is expressly denied. Rees, *Ultra Vires*, § 100; Green's Brice, *Ultra Vires*, p. 253; Daniel, *Neg. Inst.* §§ 381, 382; *Mor. Priv. Corp.* §§ 350, 351. The decisions upon the subject are numerous, and many of them are cited in the footnotes to the texts referred to. With respect to municipal corporations the supreme court of the United States has established a different doctrine (*Police Jury v. Britton*, 15 Wall. 566; *Merrill v. Monticello*, 138 U. S. 673, 11 Sup. Ct. 441); but for further exception to the rule as stated there seems to be no authority in this country.

In the usual course of its business the American Building, Loan & Investment Society was empowered, expressly or by implication,

to incur debt in various ways,—as, for example, to its secretary for his services, to withdrawing members, to the representatives or beneficiaries of deceased members, and to others, strangers to the association, for stationery, office supplies, office rent, for real estate to be used as a place of business; and by express provision it was authorized “to purchase at any sheriff’s or other judicial sale, or at any other sale, public or private, any real estate” in which it had an interest, “and the real estate so purchased, to sell, convey, lease, or mortgage, at pleasure, to any person or persons whatsoever.” This power to mortgage its real estate imported, necessarily, the power to borrow or in some way to become indebted. It had power, also, to receive from its vendees negotiable notes for the price of real estate sold, and from its members like notes for loans made to them, and the notes so acquired it had the right to sell, to pledge, and to indorse. In short, its right to incur debt and to execute the customary evidences of indebtedness was not exceptional or extraordinary, but pertained to the ordinary line and scope of the business which it was organized to do. It was competent, and doubtless would have been wiser, for the legislature to have provided that such societies should not have power to bind themselves by negotiable promises or contracts, into the consideration of which, when in the hands of a good-faith purchaser, there can be no inquiry; but it is not for the courts to put upon the powers granted a restriction which would be inconsistent with an established rule of construction, from which, presumably, the legislature intended no departure.

The power of the society to execute notes or bills for the various purposes suggested being conceded, and there being no ground for questioning the authority of Modica as vice president to sign the name of the society to such obligations executed in the regular course of business, the case comes within the rule that, when a corporation has power—“under any circumstances,” as some of the cases say, and certainly when it has power under ordinary circumstances, or in the usual course of its business—to execute negotiable obligations, the bona fide purchaser of a particular obligation has a right to presume that it was executed under circumstances which gave the requisite authority. *Gelpcke v. City of Dubuque*, 1 Wall. 175; *Railway Co. v. McCarthy*, 96 U. S. 258–267; *County of Macon v. Shores*, 97 U. S. 272–279; *Bissell v. Railway Co.*, 22 N. Y. 258; *Monument Nat. Bank v. Globe Works*, 101 Mass. 57; *Webster v. Machine Co.*, 54 Conn. 394, 8 Atl. 482; *Bank v. Young*, 41 N. J. Eq. 531, 7 Atl. 488. It is admitted in the answer that the appellants received the acceptance in question of Montgomery “for a bona fide indebtedness,” and, whether that be regarded as meaning in discharge of or only as collateral security for the debt, it made the appellants purchasers for value (*Swift v. Tyson*, 16 Pet. 1–18; *Railroad Co. v. National Bank*, 102 U. S. 14); and, in the absence of proof that they purchased with knowledge or notice that the acceptance was without consideration, or was otherwise wrongfully obtained, gave them the rights of good-faith purchasers. *King v. Doane*, 139 U. S. 166, 173, 11 Sup. Ct. 465; *Bank v. Holm*, 34 U. S. App. 472, 19 C. C. A. 94, and 71 Fed. 489.

The chief contention of the appellee is that the American Build-

ing, Loan & Investment Society is not a trading or manufacturing corporation, that building and loan associations are essentially corporate partnerships, and that the officers thereof have no more authority to bind them by negotiable paper than has a member of a nontrading partnership to make such paper in the firm name. Numerous authorities are cited in support of these propositions. Of the English cases referred to it is enough to observe that they proceed upon the theory that a corporation, without special authority, express or implied, cannot make, accept, draw, or indorse bills or notes. That is not the American rule. The only American cases cited, which need be mentioned, are *State v. Oberlin Building & Loan Ass'n*, 35 Ohio St. 263, and *Christian's Appeal*, 102 Pa. St. 184. These cases are not in point. In the first, the procedure was by quo warranto against the society for an abuse of its powers, and involved no question of the validity of a corporate obligation in the hands of an innocent purchaser. The Pennsylvania case had reference to the rights of the members in the distribution of the assets of an insolvent company, and contains nothing which can be regarded as bearing upon the question now under consideration. See *Davis v. Building Union*, 32 Md. 285.

It follows that the decree below must be reversed, and, accordingly, it is ordered that the decree entered be set aside, and a decree given for the interveners for the amount of the acceptance, with interest.

BROWN et al. v. REED MANUF'G CO.

(Circuit Court, N. D. New York. June 5, 1897.)

1. PATENTS—CONSTRUCTION OF CLAIMS—INFRINGEMENT.

A claim for a pan or other vessel having its perpendicular sides provided with a "continuous loop" to form "continuous parallel flanges" and an intermediate "continuous zinc plate" is infringed by a vessel made of two tin plates and two zinc strips, soldered together, because the vessel is too large to be made conveniently of one piece.

2. SAME—IMPROVED PANS.

The Brown patent, No. 480,555, for an improved pan or other vessel, construed, and held valid and infringed.

This was a suit in equity by Tristram D. Brown and others against the Reed Manufacturing Company for alleged infringement of a patent relating to pans and other vessels. On final hearing.

F. H. Hamlin, A. C. Paul, C. G. Hawley, and C. H. Duell, for complainants.

George B. Selden, for defendant.

COXE, District Judge. The character of the invention of the Brown patent, No. 480,555, is sufficiently indicated by the claim. The claim is:

"As an improved article of manufacture, a pan or other vessel having its perpendicular sides provided with a continuous loop or made full and bent to form continuous parallel flanges or creased edges all in one perpendicular piece,

and an intermediate continuous zinc plate or strip in said groove or recess, and having its edges secured by said flanged or creased edges, whereby it is held rigid in said groove or recess, substantially as set forth."

As intimated at the argument I have no doubt whatever on the question of infringement. The defendant's device is almost an exact reproduction of the structure of the patent, the only difference being that the defendant's wash boiler is made of two tin plates and two strips of zinc. This is so because the vessel is too large to be made conveniently of one piece of tin. When joined together to form the boiler, these plates have a continuous groove which holds a continuous zinc strip. It is wholly immaterial that at one time these parts were separate. When united to make the boiler they form a continuous piece without break or interruption. If the exceedingly narrow construction of the defendant be adopted no structure would be within the claim unless composed of one piece without joint of any kind. An infringer would only need to show that the sides of his vessel were at one time disunited, to escape. There is nothing in the prior art or in the patent which requires such a construction. Not only would it eviscerate the claim, but it would lead to the absurd result that a tin cup would infringe, whereas a tin boiler, too large to be made of one piece, but constructed upon precisely similar principles, would escape infringement.

It seems clear beyond question that the defendant's strip is "continuous" in a mechanical and an electrical sense and also according to the ordinary dictionary meaning of the word. Many pieces of twine may be tied together to form a continuous kite string, many different breadths may be united to form a continuous carpet and surely two pieces of zinc may be soldered together to form a continuous strip. The patentee probably used the word "continuous" to distinguish his invention from prior patents where separate zinc disks wholly disconnected from each other were used.

Upon the question of patentability it is unnecessary to review the prior patents introduced by the defendant, as none of them shows the construction of the Brown patent. That the device of the claim is superior to anything in the prior art, and obviates many of the difficulties then existing, is clearly established. If there were any doubt on this subject the course of the defendant has removed it. The defendant is the owner of the Reed patent, No. 434,464, which covers an anti-rust pail having a strip of zinc extending across its bottom and up its sides. But the defendant makes the Brown and not the Reed vessel. At the argument it was asserted that there was no advantage in Brown's location of the zinc, and that the strip could as well run vertically as longitudinally. The defendant's counsel was asked by the court why, if this were so, the defendant did not use the vertical strip? He answered that he thought it could and would do so, but was not then prepared to give a definite answer. The complainants' counsel stated that they wished nothing more than the protection of their continuous zinc strip construction, and offered the defendant a fair decree waiving all claims for profits and damages. After due deliberation and consultation with the defendant's officers this offer was refused.

The conclusion cannot be resisted that the defendant agrees with the complainants as to the value of the invention, and clings to it with all this pertinacity because the Reed structure cannot compete with it in the market. Decree for complainants.

MANHATTAN TRUST CO. v. SIOUX CITY & N. R. CO. (DUBUQUE
& S. C. R. CO. et al., Interveners).

(Circuit Court, N. D. Iowa, W. D. June 1, 1897.)

RAILROAD RECEIVERS—RESPONSIBILITY UNDER PRIOR CONTRACTS—CROSSING OF
TRACKS.

The S. Ry. Co. and the D. Ry. Co. entered into a contract by which the latter granted to the former the right to cross its tracks, and the S. Co. agreed, as a condition of the grant, that if the statutes of Iowa, in which state the lines were situated, should be so amended as to permit trains of intersecting railroads to cross each other's tracks without stopping when a safe system of interlocking switches had been constructed, the S. Ry. Co. would construct and maintain such a system at its own expense. The contract was duly executed, but not recorded. After the crossing had been built, the S. Ry. Co. mortgaged its road to secure an issue of bonds, and subsequently the road was placed in the hands of receivers under foreclosure of the mortgage. The statutes of Iowa were amended so as to permit trains to cross the tracks of other railroads without stopping where a safe system of interlocking switches existed, and the D. Ry. Co. and its lessee applied to the court to require the receivers to put in such a system. The statutes of Iowa provide that one railroad may obtain the right to cross another's track without its consent, and also that upon application to a court a system of switches at a crossing may be ordered put in, and the cost equitably apportioned among the several roads. *Held*, that the bondholders, who were equitably the real owners of the S. road, were not bound by the contract to put in and maintain switches, either as running with the land, or on the theory of a vendor's lien or of a condition of a grant, and that the court would not be justified in compelling the receivers to carry out such contract, and in throwing the whole expense of the construction and maintenance of the switch system on the bondholders, or those who might succeed to their rights.

Duncombe & Kenyon and Marsh & Henderson, for interveners.
Strong & Cadwalader and Mr. Wickersham, for Manhattan
Trust Co.

Wright & Hubbard, for receivers of Sioux City & Northern R. Co.

SHIRAS, District Judge. From the record in this case, it appears that during the year 1889 the Sioux City & Northern Railroad Company was engaged in the construction of its line of railway extending from Garretson, in the state of South Dakota, to Sioux City, Iowa; that this line, as located, intersects and crosses the line of railway owned by the Dubuque & Sioux City Railroad Company at or near the town of Hinton, in Plymouth county, Iowa,—the line owned by the Dubuque & Sioux City Company extending from Dubuque to Sioux City, and having been built and in operation for 20 years or more; that on the 2d day of December, 1889, the Dubuque & Sioux City Railroad Company, as party of the first part, entered into a written contract with the Sioux City & Northern Railroad Company, as party of the second part, to the effect:

"That the party of the first part, for and in consideration of the sum of one dollar to it in hand paid by the party of the second part, the receipt whereof is hereby acknowledged, and in further consideration of the covenants of the party of the second part herein contained, hath granted, and by these presents doth grant, unto the party of the second part, upon the conditions and with the reservations hereinafter set forth, the right to lay down, maintain, and operate a single-track railway, of standard gauge, over and across the right of way and main track of the party of the first part, at a point in the northeast quarter of section four, township ninety north, range forty-six west of the fourth p. m., in Plymouth county, in the state of Iowa, at which point a crossing is marked and shown on the plat hereto attached and made a part hereof, subject always to the observance and performance by the party of the second part of all and singular the following conditions, covenants, and agreements to be by it observed, kept, and performed. * * * (5) It is a further condition of the aforesaid grant, and the party of the second part also agrees, that if at any time the laws of the state of Iowa shall not require the trains and engines of railroad companies crossing each other at grade to stop at such crossing, in case the same shall be protected by a system of interlocking and automatic signals, or by other works, fixtures, and machinery, for the purpose of rendering it safe for engines and trains to pass over such crossing without stopping, then and in every such case it, the party of the second part, shall and will, when and as required so to do by the party of the first part, but at its own cost and expense, and subject to the approval of the party of the first part and the proper officers of the state of Iowa, furnish, erect, and at all times thereafter maintain and operate, at the crossing hereinabove granted to it, all the works, fixtures, and machinery necessary and requisite for the purposes aforesaid."

This contract was duly signed and executed by the parties thereto, but was not recorded in the recorder's office of Plymouth county.

It further appears that on the 3d day of December, 1889, in pursuance of the right granted it by the contract just recited, the Sioux City & Northern Company constructed its track across the right of way and track of the Dubuque & Sioux City Company at the point named, and completed the laying of its track into Sioux City about January 14, 1890. It also appears that a trust deed, in the nature of a mortgage, was executed by the Sioux City & Northern Company to the Manhattan Trust Company, as trustee, covering the right of way, track, rolling stock, and other property of the company, and being given to secure the coupon bonds issued by the company under the terms of the trust deed; the deed bearing date of January 1, 1890, but which was not signed and acknowledged by the grantor until January 28, 1890. It further appears that on the 5th of October, 1893, Warwick Hough and Samuel J. Beals were appointed by the court receivers of the Sioux City & Northern Railroad Company by an order granted in the present case, and have been since that date, and are now, in possession of the railway line and its appurtenances. It further appears that in December, 1889, and for years previous thereto, the statutes of Iowa required all trains upon lines of railway in the state which intersected or covered other railway lines upon the same level to be brought to a full stop at a distance of not less than 200 nor more than 800 feet from the crossing. McClain's Code Iowa, § 2005. But under date of March 19, 1894, the general assembly of the state passed an act, the first section of which is as follows:

"That when, and in case two or more railroads crossing each other at a common grade, or any railroad crossing a stream by swing or draw bridge, shall equip such crossing or bridge with an interlocking switch system, or other suitable safety device, rendering it safe for engines or trains to pass over such

crossings or bridge without stopping, and if such interlocking switch system, or other safety devices, shall be approved by the railroad commissioners, then and in that case, it is hereby made lawful for the engines and trains of such railroad or railroads to pass over such crossings or bridge without stopping, any law or the provisions of any law now in force to the contrary notwithstanding; and all such other provisions of law contrary thereto are hereby declared not to be applicable in such case."

The Dubuque & Sioux City Company and the Illinois Central Railroad Company, which is now operating the line of railway from Dubuque to Sioux City, and which is intersected by the line of the Sioux City & Northern Company, having obtained leave to intervene in this case, have filed a bill in which they seek, in effect, a decree of specific performance of the contract requiring the construction of an interlocking system at Hinton Crossing; claiming that, as the general assembly of the state of Iowa has now provided that when such a system is put in at a crossing the provisions of the statute requiring all trains to stop before reaching the crossing are no longer applicable, the interveners are entitled to demand the putting in of such a system, under the terms of the fifth condition found in the contract of December 2, 1889. In support of this bill, in addition to the facts already recited, evidence has been introduced showing that the crossing at Hinton is used by the Illinois Central Railroad Company as lessee of the line owned by the Dubuque & Sioux City, by the Chicago, St. Paul, Minneapolis & Omaha Railway, and by the Sioux City & Northern, operated by the receivers of this court, and that the number of trains passing over the crossing daily is from 22 to 26, varying somewhat with the season of the year, of which number from 4 to 6 are trains of the Sioux City & Northern Company. It is also shown in the evidence that the estimated cost of stopping average trains at crossings is from 70 to 80 cents for freight trains, and somewhat less for passenger trains. The interveners have also filed with the petition a sketch or plan showing the character of the interlocking system which they desire to have put in at the crossing in question, and have introduced evidence showing that the estimated cost thereof would be about \$4,400, and that to maintain and operate the same would cost about \$100 per month. It may be further stated that in the act of the general assembly of the state of Iowa of March 19, 1894, in addition to the section already quoted therefrom, it is further enacted that any company, whose line intersects at a common grade with that of another, may apply by petition to the district court of the county wherein such crossing is located for an order directing the putting in of such a device; and the act provides for the mode of hearing upon such petition, and, in case the order is granted, provides for a proper apportionment of the costs of putting in and operating the system. In the present case, however, the interveners do not base the application upon these remedial sections of the statute, but rely upon the contract of December 2, 1889, as the basis of the right asserted. From the facts developed in the evidence and in the record of this case, it is apparent that the real contest is between the interveners and the trust company, as the representative of the mortgage bondholders. The record embraces a bill brought by the trust company

for the purpose of foreclosing the trust deed upon the property of the Sioux City & Northern Railroad Company, and it is clear that sooner or later a decree of foreclosure will be entered for the sale of the property. There is no reasonable foundation for assuming that the property will again pass under the control or into the possession of the Sioux City & Northern Company. The court, through the receivers, is now holding the property for the benefit of the creditors of the company; and, under the facts appearing of record, it is manifest that the creditors are the real parties in interest touching all matters affecting the mortgaged property, although as yet the title of the railway company therein has not been cut off by a decree and sale. In the prayer in the intervening petition it is asked that the receivers of this court be directed to put in the locking system and device; and it is clear, beyond question, that, if the prayer be granted, the cost of putting in the system must come out of the funds in which the bondholders are directly interested. Not only so, but, if the court should grant the relief sought by the interveners, it would entail upon the bondholders the duty of maintaining the locking system in the future; and therefore it is that the question must be viewed as one wherein the bondholders, represented by the trust company, are the parties interested adversely to the interveners. The question, therefore, is whether a court of equity is justified in enforcing against the trustee as the representative of the bondholders—the latter being equitably the real owners of the mortgaged property—the contract with regard to the putting in and maintaining a locking system at Hinton Crossing, when it is apparent that the cost thereof must fall upon the bondholders. There is nothing appearing in the record which shows that the trustee or the bondholders, when the mortgage was executed and delivered, had any knowledge of the contract in question, and it is difficult to see upon what theory the contract can be enforced against them. If the claim is that the conditions in the contract are covenants running with the land, or affecting it as realty, then, to charge the trustee with knowledge, the contract should have been recorded; for the statute of Iowa expressly declares that no instrument affecting real estate is of any validity against subsequent purchasers for value without notice, unless the same is duly recorded in the county wherein the land lies, and it is settled that a mortgagee is a subsequent purchaser, within the meaning of the statute. *SeEVERS v. Delashmutt*, 11 Iowa, 174; *Hewitt v. Rankin*, 41 Iowa, 35. If the contention is that the agreement to put in an interlocking system must be deemed to constitute part of the consideration which the Sioux City & Northern Company paid for the right to cross and use the right of way belonging to the Dubuque & Sioux City Company, and that the latter can enforce a vendor's lien therefor, then the difficulty is that section 1940 of the Code of Iowa enacts that:

"No vendor's lien for unpaid purchase money, shall be recognized or enforced in any court of equity after a conveyance by the vendor, unless such lien is reserved by conveyance, mortgage or other instrument duly acknowledged and recorded."

In the case at bar the vendee is the Sioux City & Northern Company, and after the lien and right in favor of the Dubuque & Sioux City Company had been created by the agreement of December 2, 1889, and after the vendee therein had entered into possession of the rights created by that contract, the deed of trust, which is a conveyance and mortgage, within the meaning of the statute, was executed to the trustee, which defeats the right to enforce a lien for the purchase price, assuming that the agreement to put in an interlocking system can be deemed in equity to be part of the purchase price of the right and interest conveyed to the Sioux City & Northern Company. It must therefore be held, under the facts of this case, that when the trust deed was executed to the trustee the title and interest conveyed thereby passed to the trustee free from any lien, charge, or equity created by the conditions contained in the written contract of December 2, 1889; it appearing in the evidence that when the trust deed was executed and delivered to the trustee, in January, 1890, the named contract had not been recorded as required by the statute of Iowa, and the trust company had no actual notice of the existence of the contract, nor of any facts putting it on inquiry with regard to any right or equity existing in favor of the Dubuque & Sioux City or Illinois Central Company. All that can be claimed on behalf of the interveners is that the Sioux City & Northern Company is bound by the conditions of the contract to put in an interlocking system at Hinton Crossing, but there is no ground upon which it can be held that the conditions of this contract are binding upon the mortgage bondholders represented by the trust company. Are there any equitable grounds upon which a specific performance of the contract can be rightfully decreed in the case, it being apparent to the court that the burden thereof must fall upon the mortgage bondholders, who are, in equity, in case of an insolvent railway company, deemed to be the real owners of the mortgaged property? If it be urged that the putting in and maintenance of an interlocking system at Hinton Crossing would result in a saving of time and money to the companies running trains over the lines of railway intersecting at that point, it can be replied that under the statute of Iowa now in force, and adopted March 19, 1894, a proceeding in equity can be brought, wherein it can be ascertained whether need exists for putting in such a system, and, if ordered, the cost of putting in and maintaining the same can be properly and equitably apportioned among the several railway companies using the crossing. It is apparent that the interveners are seeking to compel the putting in and maintenance of the interlocking system at Hinton under the contract of December 2, 1889, rather than under the terms of the Iowa statute, for the reason that, if the contract can be enforced, the cost of putting in the system and maintaining it in the future can be placed upon those who are now or may become the owners of the Sioux City & Northern Line of railway, whereas, if the application be made under the statute, then the cost of putting in and maintaining the system can be equitably apportioned; and thus it is made to appear that, in effect, the purpose of

the present intervening bill is to cast the burden of putting in and maintaining the system in the future upon the mortgage bondholders of the Sioux City & Northern Company. To place the burden of paying the entire cost of putting in and maintaining the interlocking system upon the mortgagees, it must be held that they are bound by the terms and conditions of the written contract between the railway companies, and, as already pointed out, there seems to be no foundation for so holding. It is urged with much confidence, on part of the interveners, that the right of the Sioux City & Northern Company and its assigns to construct and operate its line across the right of way of the Dubuque & Sioux City Company is derived from the grant made in the contract of December 2, 1889, and that all parties who rely upon this grant, and enjoy its benefits, must be held bound by all the conditions which formed part of the consideration moving the Dubuque & Sioux City Company to grant the right of crossing to the Sioux City & Northern Company. If it were true that the right to cross the line of the Dubuque & Sioux City Company depended solely upon the grant and contract in question, then there would be much force in the argument, but such is not the fact. Section 1933, McClain's Code Iowa, was in force in 1889, and it declared that "any such corporation may construct and carry its railway across, over or under any railway, canal, or water course." When, therefore, the Sioux City & Northern Company constructed its line, in 1889, across that of the Dubuque & Sioux City, it had the right so to do without obtaining any grant from the latter company; and the receivers now operating the road, and any new company which may succeed to the ownership of the property under a foreclosure sale, as the representative of the present bondholders, have now, and will continue to have, the right to use the crossing under the authority given in the statute, and the court cannot impose, as a condition to such continued use, the burden of paying the entire cost of putting in and operating an interlocking system. For these reasons it must be held that the court is not justified in granting a decree compelling the receiver to carry out and perform the conditions of the contract of December 2, 1889, it not appearing that the conditions thereof are binding upon the trust company as the representatives of the mortgage bondholders; it being open to the interveners, in case the facts are such as to justify and require the putting in and operating an interlocking system at Hinton crossing, to make application therefor under the provisions of the act of the general assembly of the state of Iowa adopted March 19, 1894.

BROWN et al. v. UNITED STATES.

(Circuit Court, E. D. Virginia. June 3, 1897.)

EMINENT DOMAIN—RIVER IMPROVEMENTS—TAKING OF SUBMERGED LANDS.

When the government, for the purpose of improving the navigation of a river, takes possession of submerged land which is in the use and possession of a citizen, under a right derived from the state, it takes private property for a public use, and must compensate the owner therefor.

L. L. Lewis, for petitioners.
Wm. H. White, U. S. Atty.

SIMONTON, Circuit Judge. The petition in this case, as amended, alleges: That the petitioners, as partners, under their firm name, citizens and residents of Virginia, are the lessees or assignees, under a special statute of that state, of certain ground under water, below low-water mark in York river; that this land, in all 366 acres, is suitable for the planting and propagating of oysters; that they proceeded after the execution of the assignment in 1885, pursuant to the provisions of the act aforesaid, to plant oysters on said ground, at great trouble, labor, and expense. The petition further states that in 1891, 1892, and 1893 the agents of the United States engaged in the improvement of York river, in aid of foreign and interstate commerce, under various acts of congress in that behalf made and provided, cut a wide and deep trench through the oyster beds of the petitioners, and, besides this, deposited upon them great quantities of mud and other material dredged from the channel of the said river, in the lawful prosecution of said improvement, thus destroying about 30,000 bushels of oysters which petitioners had planted; that besides this, in the further prosecution of this work, the agents of the government, under these acts of congress, constructed a high and substantial wooden dike on the oyster beds of the petitioners, extending their entire length, for the purpose of diverting the current of the river and maintaining the channel, the effect of which was to destroy the value of the property of the petitioners for the purposes for which it was obtained. The petition further alleges that, in the action stated, no title was asserted by the United States to these oyster beds, or any part thereof, and that, on the contrary, the ownership of the petitioners was acknowledged by those engaged in the prosecution of the work; no proceedings for condemnation of the property were instituted, and no resistance was made by the petitioners; that they recognized this as their way of taking private property for a public use by the government in the exercise of its sovereign right of eminent domain. The petition prays compensation. The United States demur to the petition on these grounds: (1) That the petition in itself shows that petitioners are not entitled to the relief prayed, and that the court cannot grant it. (2) That, the works described in the petition being in aid of navigation of public waters, the United States are not liable for consequential damages or other injuries resulting therefrom. (3) That, as a matter of law, plaintiffs can have no private property in the bed of a river described in the petition, inimical to the free exercise by the United States of the right to improve the navigation thereof in the manner described. The demurrer admits that the petitioners are the owners of these beds under the statute of Virginia, and that they were in actual possession of them, planting oysters thereon. It also admits that the United States have set up no adverse title to the beds; on the contrary, that they recognized the ownership of the petitioners therein.

There can be no doubt that this court has no jurisdiction in this case, unless the petitioners can establish a contract, express or im-

plied, between them and the United States. If the government had entered and ousted petitioners, asserting title adverse and paramount to them, it would be in the nature of a tort, not enforceable in this court. *Gibbons v. U. S.*, 8 Wall. 269; *Langford v. U. S.*, 101 U. S. 345; *Hill v. U. S.*, 149 U. S. 593, 13 Sup. Ct. 1011; *U. S. v. Jones*, 131 U. S. 1, 9 Sup. Ct. 669. But, as has been seen, the facts alleged in the petition, and admitted in the demurrer, preclude this idea. Nor is this case one for consequential damage upon property not actually taken by the government, as in *Gibson v. U. S.*, 17 Sup. Ct. 578. The land claimed by the petitioners was actually taken, and itself has been used by the government. We have a case, therefore, of submerged land in the use and possession of the petitioners, which has been taken by the government for the purpose of improving the navigation of the river in whose bed the lands are. Must the government compensate the owner for this taking? Did he hold the lands subject to a servitude in respect to navigation created in favor of the federal government by the constitution? Did this servitude go to the extent claimed in the defense to this action?

The navigable waters of the United States are within their jurisdiction and under their control. Congress can determine what are obstructions to navigation. *Pennsylvania v. Wheeling, etc., Bridge Co.*, 18 How. 421. The maritime jurisdiction of the United States courts extends to all public navigable waters (*The Genesee Chief*, 12 How. 443); that is to say, all waters which are or can be highways of commerce between the states or with foreign countries (*The Montello*, 11 Wall. 411; *Miller v. Mayor, etc., of New York*, 109 U. S. 385, 3 Sup. Ct. 228). But, although the United States have jurisdiction over the navigable streams as highways, the beds of the streams are the property of the state wherein they lie, or of persons to whom the state has granted them. *Knight v. Association*, 142 U. S. 183, 12 Sup. Ct. 258. As the United States have control over their navigability,—that is to say, to their use as highways,—neither the state nor any grantee of the state can erect in navigable streams structures which may obstruct or impede their use as highways. *Shively v. Bowlby*, 152 U. S. 1, 14 Sup. Ct. 548. And, so long as the land is not used for the erection of structures impeding or obstructing navigation, the rights of the landowner cannot be disturbed. The control of the government over the navigable streams gives it the right to improve or protect the navigation of such streams by deepening the channels or by erecting lighthouses. *South Carolina v. Georgia*, 93 U. S. 4. And if, in doing this, incidental injury is done to property below or above the works used for improving the channel, this incidental injury gives no claim for compensation against the United States. *Gibson v. U. S.*, *supra*. But when the government, for the purpose of adding to the navigability of a stream, changes its natural channel, and, in doing so, occupies and assumes exclusive possession of the land of a citizen, it takes private property for a public use, and must compensate the owner for the value of the property thus taken from him. The idea of a servitude is that it must be enjoyed in common with the owner of the servient tenement. The existence of the latter is essential to the co-existence of the former. When

they both become vested in the same person, the dominant tenement becomes extinguished. But when the possessor of the dominant tenement ousts the owner of the servient tenement, and himself assumes exclusive use and enjoyment of the land, which was subject to the servitude, the servitude is extinguished. See Gould, Waters, § 313, and cases cited. The demurrer is overruled.

COMLY v. BUCHANAN.

(Circuit Court, E. D. Pennsylvania. January 15, 1897.)

1. EQUITY—PETITION TO VACATE DECREE—LACHES.

A petition to vacate a decree should be made at the earliest practicable moment. Where the party against whom the decree has been made fails, without cause, to file his petition to vacate it until three months after its entry and the service of an injunction upon him, and a month after the service of notice of a motion of attachment for contempt for disobedience of the injunction, he is guilty of such laches as will debar him from relief even though his case be otherwise meritorious.

2. SAME—INJUNCTION.

An injunction against the leasing of houses in the construction of which a patented invention had been unlawfully used, modified to permit the leasing of the houses upon entering security to pay any sum which might be awarded complainant either on the basis of damages or of profits or both.

3. SAME—ATTACHMENT FOR DISREGARDING INJUNCTION.

Where, upon an application for an attachment for violation of an injunction, it appeared that complainant had suffered no substantial injury therefrom, and that respondent's action was not willful, but due to ignorance, respondent was only required to pay the costs arising from the application.

Complainant brought a bill in equity against the respondent for infringement of a patent reissue No. 11,304, dated February 7, 1893, relative to the construction of dwelling houses.

Respondent filed an answer setting up prior use and other defenses and the cause was put at issue on August 3, 1894. The ordinary rule upon respondent to close his testimony was taken March 25, 1895, but respondent, although the time was repeatedly extended, failed to offer any evidence. His original counsel thereupon withdrew from the case, and, after argument, at which respondent was not represented by counsel, a decree sustaining the validity of the patent and awarding an injunction and an accounting was made on December 9, 1895. The injunction issued on December 11, 1895, and was served on the following day. Respondent thereafter, in disregard of the injunction, granted leases of certain houses owned by him in which the patented construction was used. On February 11, 1896, on motion of complainant an order was granted on respondent to show cause why an attachment should not be issued against him for violation of the injunction. On March 10, 1896, respondent filed a petition to vacate the decree and injunction and for a rehearing, and also a number of affidavits upon the rule for an attachment. The petition set out that respondent, although engaged in a large business, was uneducated and ignorant of the effect of legal proceedings, and that his disregard of the injunction was due to this ignorance; that he had a good defense on the merits as set out in his answer, but that in consequence of injuries received from an accident and of subsequent illnesses he had been wholly unfit to attend to business; and that his failure to produce his evidence was due to these causes. The petition prayed an opportunity to put in the evidence on the merits. The affidavits on the motion for attachment were to the effect that the respondent was mentally irresponsible and incapable of attending to business affairs during 1894 and 1895.

Both applications were referred to Francis T. Chambers, Esq., as master. His reports were filed September 4, 1896. As to the petition to vacate the decree he found that the respondent had suffered from no mental impairment since December 1, 1895; that none of the defenses were set out in the petition as newly discovered or as not available before the entering of the decree; that respondent had delayed filing his petition to vacate the decree from December 12, 1895, to March 10, 1896, without any cause and had not contemplated filing it until after notice of the motion for attachment; that the ignorance he pleaded could not avail him because he stated in his affidavit that all his actions since the filing of the decree had been under the advice of counsel; that if the application had been made at the time the decree was entered petitioner would have been entitled to the relief prayed, but that the defense on the merits could be made in another suit then pending upon the same patent, and that as the petitioner was in contempt in the present proceeding he should not be granted relief at least until purged of his contempt. As to the attachment proceedings, the master found that the violation of the injunction which formed the basis of the application consisted in granting leases of houses containing the patent construction in January and February, 1896; that at that time the respondent was not mentally incapacitated however much he might have been theretofore, and that as he had testified that his action during that period was under the advice of counsel, he must be held guilty of a deliberate contempt, no matter how ignorant he might be of the effect of legal proceedings; and that the attachment should therefore issue.

Exceptions were filed to each report by respondent but were dismissed by the court in the opinions of January 15, 1897.

Respondent, following the intimation contained in these opinions, thereupon filed a petition for such a modification of the injunction as would allow him to lease the houses affected by the injunction, upon his giving security for damages and costs. Upon this petition the order of January 22, 1897, was made.

Horace Pettit, George Harding, and George J. Harding, for complainant.

Jerome Carty, for defendant.

BUTLER, District Judge. The master has found the defendant guilty of violating the injunction; and I think the finding is right. I believe however that his guilt resulted from misinterpretation of the decree rather than a willful disregard of it. He is not an intelligent man and might readily have misunderstood the effect of the court's order. I am satisfied that he did not act under the direction of counsel in this respect, though it might be implied from the general statements in his testimony that he did. The plaintiff suffers no substantial injury from his conduct in renting the house. Indeed it might possibly have been wise to allow him thus to rent all the houses in question, instead of requiring them to be kept unoccupied (or money to be expended in their alteration), and to compensate the plaintiff in profits for such use of them. For the rents that have been obtained or that may be obtained from the lease or leases heretofore entered into the defendant may be held accountable in the final decree. Of course he must abstain from such use of the houses hereafter, unless the court should see proper to amend the injunction upon application made for that purpose. The defendant will be sufficiently punished for his violation of the injunction heretofore by a requirement to pay the costs of this reference, and he will be required to pay accordingly.

An order to this effect may be entered.

(January 22, 1897.)

Before DALLAS, Circuit Judge, and BUTLER, District Judge.

PER CURIAM. The defendant's petition for modification of the injunction issued upon December 11, 1895, has been considered. We think that, under the peculiar circumstances of this case, he should be relieved from the injunction so far as the houses referred to in said petition, being 28 in number, are concerned, but only to the extent of permitting him to lease those houses upon entering security to be approved by a judge of the court in the sum of \$3,000 for payment of any sum which may hereafter be awarded to the complainant with respect to the said houses either upon the basis of damages or of profits or both; and it is so ordered.

GRAND TRUNK RY. CO. v. CENTRAL VERMONT R. CO.

(Circuit Court, D. Vermont. May 22, 1897.)

INSOLVENT RAILROAD COMPANIES—LEASED ROADS—RECEIVERSHIP—FUNDS.

By a covenant in a railroad lease, the lessee company assumed all obligations of the lessor incurred as common carriers, warehousemen, or otherwise, and agreed to indemnify it for all costs, damages, or losses arising from its failure to perform such obligations, or from negligence, accident, or default, and for claims, damages, judgments, or actions arising from the maintenance of the leased road. *Held*, that net earnings of the leased road, accruing in the hands of receivers of both companies, were not chargeable with judgments obtained during the receivership, for losses sustained on that road prior to the appointment of receivers, but such earnings must go to the bondholders under other provisions of the lease.

Wager Swayne, for petitioner.

Benjamin F. Fifield and Charles M. Wilds, for receivers.

WHEELER, District Judge. Since the petition of Charles Parsons, intervenor in this cause, was heard, an additional report has been made by the receivers as to claims alleged to be chargeable upon the net earnings in question: 78 Fed. 690. This report shows several cases in which judgments have been recovered during the receivership against the Central Vermont Railroad Company for losses on the Ogdensburgh & Lake Champlain Railroad Company, occurring before the appointment of receivers, and several others of large amounts still pending for like losses, and also for damages occasioned by the operation of that railroad under the lease from that company to the Central Vermont Railroad Company. These cases are, in aggregate amount, large enough to cover the whole of the fund in question, and, if they could be chargeable upon this fund, the whole of it should be retained till the claims are disposed of. The lease provides, however (article 5):

"That all the gross earnings, income, and receipts of and from the business, traffic, and rents of said railroad and other property, and referred to in art. 2 of this agreement, shall in each year and annually, during the continuance of this agreement, be applied and disposed of by the party of the second part as follows: First, * * * the other expenses of the maintenance, operation,

use, development, and improvement of the said railroad and other property of the said party of the first part; second, to payments of obligations retired and not here at all material; third, to the payment punctually when due and in full of the interest on the bonds issued and to be used by the party of the first part, * * * and known and described in the mortgage executed by said party of the first part to William J. Averell and Stuyvesant Fish, as trustees, * * * dated April 1, 1880, * * * the total issue whereof is limited to three million five hundred thousand dollars, and which interest is at the rate of six per centum per annum, and is payable semiannually on the first days of April and October in each year. * * *

The question arises as to what the Central Vermont Railroad Company, the lessee, and the receivers, standing in their right, were entitled to retain and use for the expenses of the maintenance, operation, use, development, and improvement of the said railroad and other property. Oftentimes damages to others, arising from the operation of a railroad, are treated as a part of the operating expenses, but in this case the lease itself provides, with reference to such damages, that the lessee was "to assume all obligations of the party of the first part that may hereafter be incurred, either by statute or at common law, as common carriers, warehousemen, or otherwise, and indemnify and save harmless the party of the first part from all costs, damages, or loss, by reason of any failure to fulfill said obligations, and by reason of any claim that may be made for any neglect, accident, or default happening upon or in connection with said road or other property of the party of the first part, and from any claims, damages, actions, or judgments arising from the maintenance and operation of said railroad and other property during the continuance of this agreement." According to this stipulation, the liability of the Central Vermont Railroad Company, in the operation of the Ogdensburgh & Lake Champlain Railroad under this lease, was its own liability, to be taken care of by itself, and not in any way to be made chargeable upon any of the gross earnings of the Ogdensburgh & Lake Champlain Railroad. Therefore none of these liabilities, as mentioned in the report of the receivers, can in any way become chargeable upon the net earnings in question, and they cannot stand in the way of the payment of these net earnings over to the bondholders according to the provisions of the lease.

It has been made known that the trustees, Averell and Fish, have commenced suit to foreclose this mortgage in the United States circuit court for the Northern district of New York, and that these receivers here were appointed receivers there of the Ogdensburgh & Lake Champlain Railroad Company; and that, notwithstanding they were under orders here, on the petition of the bondholders, to set apart these net earnings of that railroad until further order, they were there ordered to set apart these net earnings after November 1st, there, and deposit them for the benefit of the bondholders, thus leaving them under the order of each court to deposit the same net earnings in different places. Claims for operating expenses, which had accrued during the time they were to deposit the net earnings under the orders of this court, were not vouched and paid until within the time during which they were to deposit the net earnings in the other place, under the orders of that court, to the amount of about \$25,000; and, as there are other unvouched claims arising

in the course of business, amounting to about 40 per cent. of \$22,000, and still other claims and expenses to some amounts which may be chargeable upon these net earnings, it is deemed proper that enough of these net earnings should be retained here for the payment of whatever may be allowed upon these claims as chargeable upon them. In view of the whole, it seems safe that \$105,000 of these net earnings should be paid over to the bondholders according to the provisions of the lease, to apply on the debt for which their mortgage is being foreclosed, and that the balance be retained in this court. Although it now seems clear that no part of these first-mentioned claims can ever become chargeable upon these funds, still, in this summary order, it seems proper to provide that, in case any part of the sum so to be paid over shall by any possibility be needed by the receivers to discharge any of these claims upon those net earnings, by paying over this sum of \$105,000 the receivers shall stand subrogated to the rights of the bondholders, to whom they are paid under the mortgage, as it may be foreclosed, so far as may be necessary to indemnify them for any sums that may become chargeable thereupon. This reduces the remainder of these net earnings to so small an amount that it seems safe that it be paid over to the receivers to be held by them, but in a separate account from which such further sum as may belong to the bondholders may be paid, subject, however, to the payment of the interest thereon at 5 per cent., in case the funds are used for the purposes of the general receivership; and, if so used, they are to be chargeable as a debt of the receivers upon such funds. Ordered accordingly.

AMERICAN LOAN & TRUST CO. v. SOUTH ATLANTIC & O. R. CO

(Circuit Court, W. D. Virginia. July 22, 1896.)

RECEIVERS—ATTORNEY'S FEES.

Fees earned by attorneys under a contract with a receiver of a state court are not chargeable as a prior lien on the property when in the hands of a receiver appointed by a federal court in an entirely independent suit, and cannot be allowed, even among the claims of general creditors, unless they have been ascertained and allowed by the state court.

Blair & Blair, Geo. H. Towle, and A. H. Blanchard, for claimants.
R. A. Ayres and J. B. Richmond, for defendant.

PAUL, District Judge. This cause was referred to a master to take an account of the assets of the defendant corporation, its liabilities, and the claims of creditors, and their priorities. F. S. Blair, George H. Towle, and A. H. Blanchard, attorneys at law, filed claims before the master (Blair and Towle for \$5,000 each, and Blanchard for \$3,000), claiming the same to be due them as attorney's fees, and that they have priority over the liens of the mortgage bondholders, and asking that they be allowed and taxed as part of the costs in this suit. The master in his report declines to fix the status of these claims, but refers the question to the court. The evidence shows that on the 6th day of August, 1890, these claimants,

as attorneys for Jonas Wilder and others, filed a bill in the circuit court of Washington county, Va., praying the appointment of a receiver of the property now in the hands of this court for administration. That court appointed J. M. Bailey receiver of the property, and Bailey, as such receiver, engaged the services of these three attorneys at an agreed fee of \$5,000 each for Blair and Towle, and \$3,000 for Blanchard. A long litigation ensued as to the regularity and legality of Bailey's appointment as receiver by the state court, and its history is fully given in the evidence taken for the claimants, and in the briefs of counsel. A particular review of that litigation is not necessary to a proper determination of the question before the court. The record evidence shows that the suit in the state court was, subsequently to the appointment of the present receiver in this court, compromised by the parties thereto, and dismissed. It is not pretended that Bailey was ever a receiver of this court, or acted under its orders. On the contrary, this court decided in *Central Trust Co. of New York v. South Atlantic & Ohio R. Co.*, 57 Fed. 3, that Bailey was the receiver of the state court. All the services rendered by the claimants for which they are demanding in this suit payment were rendered for Bailey as receiver in the state court. Over the proceedings in that court this court has no jurisdiction, and it is at a loss to see on what principle it can undertake to fix the compensation of attorneys for legal services rendered a receiver of that court. It is well settled that a court of equity, in settling the account of a receiver of its own appointment, may make him a reasonable allowance for attorney's fees, where the employment has been previously sanctioned by the court; and where not previously authorized, if such expense has been incurred in the exercise of a sound discretion, the same will be allowed. *High, Rec. § 805, S; Stuart v. Boulware*, 133 U. S. 78, 10 Sup. Ct. 242; and numerous decisions to the same effect. The court has carefully examined, as far as the same were within its reach, the many decisions referred to by counsel for claimants on this question of the allowance of fees to attorneys for receivers, and taxing the same as part of the costs in the suit. It finds, without exception, that, where attorney's fees have been allowed to a receiver as part of the costs of the suit, they have been for services rendered in that suit on behalf of the receiver appointed in that cause by the court in which the same was pending. Not a case has been cited, nor does the court think a precedent can be found, where a federal court has authorized its receiver to pay out of the funds in his hands, as part of the costs of the suit, counsel fees contracted for by a receiver of a state court. The receiver of the state court, after the suit is ended, could come into this court and demand compensation for his services in a state court, the clerk and other officers of that court demand their fees, and have all made a first lien on the property in the hands of the receiver of this court, with as much right as attaches to these claims for attorney's fees. The elaborate briefs filed by counsel for the claimants deal with the question before the court as if the professional services for which they demand payment had been rendered on behalf of a receiver of this court. The authorities

on which they rely bear on a case of that kind. They have no relevancy to the costs of a suit in another tribunal. The contention that the fees of attorneys for a receiver in a state court, who has no connection with this suit, can be taxed as part of the costs in this suit, and made a first lien on the property in the hands of the receiver, cannot be sustained, and such claims must not only be rejected, as not being part of the costs in the suit in this court, but cannot even be allowed among the claims of general creditors. Before they could be admitted as general debts against the property in the hands of the receiver of this court, they would have to be ascertained and allowed by the state court for whose receiver the professional services were rendered. Inasmuch as this court can only tax as part of the costs in this suit such attorney's fees as are for services which have been rendered to the receiver of this court, it follows that all other attorney's fees reported by the master can only be allowed as general debts against the property in the hands of the receiver of this court, and all such fees will be so allowed. A decree will be prepared in accordance with these views, and confirming the master's report in other respects.

GREENE v. SOCIETE ANONYME DES MATIERES COLORANTES ET PRODUITS CHIMIQUES DE ST. DENIS.

(Circuit Court, D. Rhode Island. May 17, 1897.)

No. 2,384.

1. RESCISSION OF CONTRACTS — FALSE REPRESENTATIONS — DELAY — CHARACTER OF PROOFS.

A contract of sale of certain merchandise to be delivered in the future was repudiated by the purchasing firm on wholly insufficient grounds, upon discovering that it would involve large pecuniary loss. Seven years later they sought to justify this repudiation on the ground that they were induced to make the contract by false representations, and thereafter sued to rescind. *Held* that, in view of the delay and of the apparent susceptibility to pecuniary bias, the proofs, especially when consisting of testimony of persons interested in the firm, should be most clear and convincing, both as to the making of false representations of fact, and as to the firm's reliance thereon as an inducement.

2. SAME.

Statements of forecast, opinion, or expectation, that are in substance mere matters of inference, cannot be considered false representations, justifying the rescission of a contract.

B. N. Lapham and Herbert G. Hull, for complainant.
Edmund Wetmore and Lawrence E. Sexton, for defendant.

BROWN, District Judge. This is a bill in equity, brought by Henry L. Greene, survivor of the firm of S. H. Greene & Sons, to rescind for alleged fraud a written contract made March 12, 1883, between said firm and the defendant (for brevity called the "St. Denis Company"), a corporation incorporated under the laws of the republic of France, and to enjoin the prosecution of a suit at law begun by the St. Denis Company in this court to recover damages for the breach of said contract. By the terms of the contract, the firm

of S. H. Greene & Sons agreed to purchase from the St. Denis Company alizarine (a dyestuff manufactured from coal tar) to the amount of 1,500 kilogrammes per month, for a period of three years from October 5, 1886. This contract, the complainant contends, was procured by fraudulent representations. The state of facts existing at the making of the contract is material to the issues presented. For some years prior to October 26, 1882, alizarine was manufactured almost exclusively in Germany. A trust or combination existed among the German manufacturers to control the output and price. One of the members of this combination, the Badische Anilin & Soda Fabrik, of Manheim, Germany, represented in this country by the firm of Pickhardt & Kutroff, of New York, was the owner of letters patent of the United States which covered the alizarine product, and had been sustained by the United States circuit court for the Second circuit, as well as in other circuits (*Soda Fabrik v. Cochrane*, 16 Blatchf. 155, Fed. Cas. No. 719). Under these letters patent, which were not to expire until October 5, 1886, an absolute monopoly existed in this country, and the price of alizarine ranged from \$1.05 to \$1.20 per pound, according to brand. S. H. Greene & Sons were manufacturers of calicoes and prints, and the largest consumer of alizarine in the United States, their purchases amounting to as much as \$150,000 per annum. The St. Denis Company conceived the plan of manufacturing alizarine in competition with the German combination, and, in conformity with this plan, its manager, Mr. Naville, visited this country, and opened negotiations with S. H. Greene & Sons, by a letter addressed to them, under date of October 26, 1882, which contained certain statements alleged to be fraudulent and material inducements to the contract. The material portions of said letter are as follows, the alleged false and fraudulent statements being italicized:

"I understand that you are one of the largest consumers of alizarine in this country, and presume it must be of great moment to you to be able to always secure this dyestuff as freely and as cheaply as possible. You now suffer from the monopoly on this article controlled by one house, and I don't think you will be able to help that until the end of 1886. *But you must be aware also that a combination has been made among the German manfrs. in order to monopolize this article for a long time ahead, thus substituting one monopoly for another. One of the features of this combination is the making up of a special fund for the prevention of any new manufactories.* All consumers of alizarine have therefore a great interest in breaking this combination, and promoting the creation of other houses making alizarine. Our company is willing to serve such a policy if we can get an efficient support from consumers, but we are not willing to start in competition with the German combination unless we have some kind of guaranty. We will be satisfied if consumers will bind themselves to take from us, say, a fourth of their wants during three years from the date of expiration of the patent. * * * You will remark that a contract for a fourth of your wants on three years is a small risk for you to take in comparison with the compensation you will have in our putting a check on the combination. Our price would be Frs. 6.50 p. kilo in Paris for 20%, which is a medium price between the lowest quotation before the combination and the present price of the combination. Should our competition bring the combination down to lower prices, the difference on one-fourth of your wants would be a small thing compared with the difference obtained by you through our action on the other three-fourths. I trust you will take this into consideration, and should like after that to be granted a personal interview with you."

Greene & Sons replied to the above letter on November 2d, as follows:

"The subject-matter is one of importance, and should be carefully weighed. A personal interview seems essential. Our opinion now is that should you succeed in obtaining the signatures, of, say, $\frac{1}{4}$ of the largest consumers of alizarine in the country to such a compact, we would become one of the combination. We shall be glad to see you at any time."

On November 4, 1882, Greene & Sons received the following reply from the defendant, which is said also to contain fraudulent statements:

"We are in receipt of your favor of the 2d inst. No doubt, the matter is one requiring much consideration, and we agree with you that a personal interview is desirable. Mr. Naville will probably be in Boston within a few days, and, if so, will take the opportunity of calling upon you on his way. Meanwhile we would say that the suggestion of Mr. Naville that you should contract now for one-fourth or one-third of your consumption during three years from 1886 is the only way, it seems to us, by which the consumers of alizarine in this country can save themselves from the effect of the combination of German makers which is now entered into, to continue the monopoly in the article after the present patent expires. By contracting for a small portion of your consumption, you thereby force down the price of the balance of your wants, by enabling us to manufacture, and so break the German combination. We are quite willing to do this, but, in order to do it successfully, we must have the support of consumers. In other words, if we are assured that we have a market for a certain quantity, we are willing to make it, but without this assurance we would not care to undertake the risk."

The complainant asserts also that the defendant's agent, Mr. Naville, in a personal interview at the office of S. H. Greene & Sons, in River Point, R. I., on November 27, 1882, represented that the German combination would continue in the United States the then-existing high price after the expiration of the United States letters patent; that a special fund had been raised by the combination to prevent competition; and also made the additional statement, not referred to in the letter of the St. Denis Company, that other American consumers of alizarine, namely, Garner & Co., the Merrimack Company, and the Pacific Mills, had made contracts with the St. Denis Company similar to that prepared by Mr. Naville, and finally accepted by S. H. Greene & Sons.

The complainant alleges that, relying upon the foregoing written and oral statements, and believing them to be true, the firm signed a letter written by Mr. Naville, and addressed to the St. Denis Company, the material parts of which are as follows:

"In reply to your letter of 26th of October by Mr. E. A. Naville, and referring to personal interview with him, we have decided to accept your offer, and agree to the following: We send you two selected samples of each kind of alizarine we are using, and give you now an order, subject to you being able to match these samples, for fifteen hundred kilogrammes of 20 per cent. alizarine per month, to be delivered during three years from the date of expiration of the United States patent, at the price of francs 6.55 (six francs fifty-five centimes) per kilogramme, delivered f. o. b. Havre. We leave this order in force until the first day of April, 1883, by which time you must let us know whether you can accept the contract and match the samples."

On March 12, 1883, defendant wrote Greene & Sons that they could match the samples, and on April 17, 1883, Greene & Sons wrote the company:

"We note that you have been able to match both samples of alizarine which we sent you some time since. We are ready to carry out our contract as arranged with you when here, viz. fifteen hundred kilogrammes of 20 per cent. alizarine per month, to be delivered during three years from the date of expiration of the United States patent, at the price of six francs fifty-five centimes per kilogramme, delivered f. o. b. Havre."

About the 14th day of April, 1884, a decision was rendered by the United States supreme court in the case of *Cochrane v. Soda Fabrik*, 111 U. S. 293, 4 Sup. Ct. 455, to the effect that a certain process of manufacture of alizarine was not infringement of the United States letters patent, and immediately thereafter the price of alizarine fell from above \$1 per pound to about 35 cents. Subsequently, the company, in letters to Greene & Sons, in July, 1884, notified them that the company would hold them to the contract. Greene & Sons, on October 11, 1884, wrote the company:

"Would say in reply that the circumstances under which the letter was written have been so radically changed by the recent decision of the United States supreme court on the alizarine patent, and upon which patent our letter was predicated, that the contract, if such it can be called, was canceled by that decision."

Afterwards, on September 23, 1886, the company notified Greene & Sons of its readiness to carry out the contract on and after October 5, 1886, the date of the expiration of the United States patent, and asked for shipping instructions. On September 27, 1886, Greene & Sons wrote, saying they did not recognize that there was any contract existing. Thereafter, and on or about May 16, 1889, the St. Denis Company brought an action at law in assumpsit against Greene & Sons in the United States circuit court, district of Rhode Island, to recover damages to the amount of \$50,000 for the breach of said contract.

Before examining in detail the charges of false representation, an important fact should be noted. The contract which is the basis of the suit which this bill seeks to enjoin was definitely and distinctly repudiated by the complainant company, upon grounds having no relation to those set up in the present bill. About April 14, 1884, a decision rendered by the supreme court of the United States (*Cochrane v. Soda Fabrik*, 111 U. S. 293, 4 Sup. Ct. 455) practically destroyed the monopoly; and on October 11, 1884, Greene & Sons repudiated the contract, upon grounds indefensible in law, namely, as before stated, on account of the radical change of circumstances caused by the decision of the supreme court. Not until the St. Denis Company, on May 16, 1889, after the expiration of the contract period, brought suit for breach of contract, was the claim made by S. H. Greene & Sons that the contract had been procured by false and fraudulent statements. This position was first taken, so far as appears of record, by pleas filed in the action at law, and dated November 28, 1891. The bill therefore asks that the contract be annulled for reasons first advanced more than eight years after its making and more than seven years after its repudiation. The complainant excuses this delay by testifying that the falsity of the statements was first discovered in 1891. This excuse is hardly satisfactory in view of his testimony (afterwards corrected) that knowl-

edge that contracts had not been made with other parties was one of his grounds for repudiating the contract in 1884. But, conceding the claim that actual knowledge was not received until 1891, it yet appears that there was an unwarranted and persistent refusal to recognize the demands of the St. Denis Company for many years, during which the firm of S. H. Greene & Sons had full opportunity to become informed of their legal obligations and of the binding character of the agreement into which they had entered. This conduct, apparently having no other basis than an unwillingness to accept a pecuniary loss, affords so strong evidence of susceptibility to the bias of pecuniary interest that all evidence on behalf of the complainant as to the exact expressions used by the manager of the St. Denis Company in a personal interview 11 years before the taking of testimony, and all evidence as to the materiality and inducing quality of any statements, must be regarded as given under a like bias. It is difficult to believe, in the face of a well-proven predetermination to repudiate a contract without reasons, that when reasons are tardily given, and when the alternative is either to acknowledge error or to furnish new grounds of justification for previous action, there will be satisfactory accuracy in describing personal motives and oral expressions. When an act is done for one reason, and defended upon another, we are justified in requiring the most satisfactory proof of the facts which are the basis of the new reason. Therefore, in determining the questions of whether the statements were such as were acted upon, and whether they were material inducements to the contract, we must be guided by our views of probability, rather than by the statements, however positive in form, of witnesses exposed to the influence of such bias. Nor can we, in determining whether a statement was made by Mr. Naville, the St. Denis Company's agent, as a matter of opinion or as a matter of fact, attach importance to the reiterations of witnesses that certain things were represented as matters of fact, and not as matters of opinion.

The foregoing considerations render it proper, before considering the meaning and accuracy of the statements made in writing, to dispose of the question which rests, not upon documentary evidence, but upon testimony as to an oral interview. We inquire, therefore: Did the defendant's agent, Naville, in an oral interview on November 27, 1882, falsely and fraudulently represent and state to Greene & Sons that the firm of Garner & Co., the Merrimack Company, and the Pacific Mills, or any of them, had made contracts with the defendant similar to that proposed to and finally made with Greene & Sons? It should be observed that the contract finally entered into was a simple contract for the sale, delivery, and acceptance of a certain quantity of alizarine at a certain price. It contains no reference to the making of other contracts, and upon its face the contract is independent of the condition that other like contracts had been or should be made. The testimony of Henry L. Greene, given 11 years after the interview, professes to give only its general purport. It appears from this testimony that Naville expressed the desire and intention of the company to come into the market provided that it

could get encouragement from consumers in America, and stated that the defendant was to erect works provided it could make contracts enough. H. L. Greene expressly states that Naville informed the firm that he was in negotiation with the persons named, and also that Naville stated that he had made contracts with two out of the four, though not disclosing the names, and also says, "We were left to infer that it was two of the four." The testimony of this witness is not clear, nor are his statements entirely consistent with each other, nor with the account of the transaction given by Robert Reoch, the only other witness for complainant as to the transaction. Without attributing to the complainant intentional perversion of fact, it is yet manifest, upon reading his whole testimony, that his actual recollection of the interview is exceeding indistinct. In his narration he obviously has the importance, in this litigation, of the distinction between statements of fact and statements of opinion, much more clearly in mind than the actual language or even the general import of the conversation. In view of the bias of interest, of a previously expressed intention of repudiating the contract for other reasons, and of the lapse of time, his testimony falls far short of the requirement that proof of fraud should be clear and convincing. His testimony, moreover, entirely fails to substantiate the allegation of the bill that it was stated to the firm "that contracts had been made with Garner & Co., the Merrimack Company, and the Pacific Mills." Upon the whole, the testimony of this witness, as opposed to that of the defendant, may be disregarded, save as to the contradiction it gives to the witness Reoch. The testimony of Reoch, who is pecuniarily interested in the firm, and whose testimony must be regarded as subject to the same bias, is more explicit. The testimony was taken after that of Greene, and when the unsatisfactory nature of Greene's testimony was probably apparent. He supports the allegation of the bill that an express statement was made that the concerns named in the bill had made contracts. But, in view of all the circumstances, his testimony, as against the denial of Naville, and considering his disagreement with Greene, fails to establish the making of the statements.

It is urged that complainant's letter of November 2, 1882, supports the view that the obtaining of the other contracts was a material inducement. The language is: "Our opinion now is that should you succeed in obtaining the signatures of, say, $\frac{3}{4}$ of the largest consumers of alizarine in the country to such a compact, we would be one of the combination." It is probably true that, at the time of writing, there was in contemplation of S. H. Greene & Sons a compact or combination. But the idea of making such a combination was abandoned at the time of making the contract. The entire responsibility for carrying on the work was assumed by the St. Denis Company, and, in the face of the contract, the evidence is not satisfactory that the making of other contracts was relied upon as an inducement. There appears no reason for holding it more probable that S. H. Greene & Sons desired a combination for their own purposes than that they were satisfied to make an individual contract, as they in fact did. Even were the statement made, it is

far from clear that it was a material statement. The question of the materiality of the statement, however, is removed by the finding that the statement is not proved to have been made.

Eliminating this branch of the case, we proceed to the representations made in writing:

"But you must be aware also that a combination has been made among the German manfrs. in order to monopolize this article for a long time ahead, thus substituting one monopoly for another. One of the features of this combination is the making up of a special fund for the prevention of any new manufactories. * * * The combination of German makers which is now entered into, to continue the monopoly in the article after the present patent expires."

These representations must be considered in view of the fact well known to Greene & Sons that a powerful German combination existed. Counsel for the complainant contend that the representations were made for the purpose of creating in the minds of S. H. Greene & Sons the belief that a then-existing agreement provided in express terms for the continuance of the monopoly after the expiration of the United States patent. It is then claimed that the untruthfulness of the statements appears from the deposition of the controlling officer of the German syndicate, as well as from the written agreement of the syndicate, showing that no express provision relating to the maintenance of prices in America after the expiration of the United States patent was contained in the written agreement, and that the syndicate agreement therefore did not provide for the substitution of one monopoly for another; and also that the written agreement contained no express provision for a special fund for the prevention of any new manufactories, and that in fact no such special fund had been raised. This contention is not supported by a reasonable or fair interpretation of the language of the written statements alleged to be fraudulent. I am of the opinion, upon all the evidence, that the parties were contracting, not upon the basis of a supposed knowledge of the terms of the syndicate agreement, nor even of its perfected plans, but merely in anticipation of the probable sequence of a present business condition, and that the contract was entered into upon the basis of facts known to both parties, and practically undisputed.

By reference to the syndicate agreement dated September 27, 1881, the general purpose of the syndicate is found to be thus expressed: "The contracting parties agree and engage themselves to fix the quantity of alizarine (alizarine red) to be sold," etc. The quantity is fixed, subject to increase or decrease by further agreement, with the exception of the United States of America, and the provision appears: "The consumption in the United States is supplied without control by the Badische Anilin Soda Fabrik." The main and substantial fact was the existence of a powerful combination. The purpose of the contract between the St. Denis Company and S. H. Greene & Sons was to provide against the control of that combination over prices in the United States after the expiration of the letters patent, viz. October 5, 1886. In making such provision, did the firm of S. H. Greene & Sons proceed upon the belief that the written terms of a completed contract of the German syndicate pro-

vided for a control of American prices after October 5, 1886, and for a special fund for the prevention of competition; or did they proceed in reliance upon their own judgment that an existing combination was so likely to take future action to control the market of the United States that it was sound business judgment to anticipate and provide for such action? Neither the writings in evidence nor the testimony of Greene or Reoch afford support for the former contention. The existence of a written contract controlling the syndicate's action was not mentioned or discussed. The existence of a belief or supposition of the parties that on November 27, 1882, the business policy of the German syndicate for a period beginning nearly four years after, on October 5, 1886, was so definitely fixed as to afford Greene & Sons an actual basis of fact for their judgment as to the advisability of making the contract, is neither proved nor probable. If the provisions of a completed contract of the syndicate were material, it is highly improbable that men of large business experience, themselves the largest American consumers of alizarine, of which their purchases at the time amounted to \$150,000 per annum, would have based their action upon the mere statement of a comparative stranger as to the terms of the syndicate agreement, and upon such indefinite statements as are testified to in the case.

It is apparent, not only from the character of the combination, but from the terms of the syndicate agreement, that its purpose was to monopolize the article for a long time ahead, and that the statement was substantially true. It is only by the unwarranted assumption that the language referred, not to the broad purpose of the combination, but to a special written or perfected agreement, that the complainant is able to argue the existence of any discrepancy between the existing facts and the statement of the St. Denis Company. I am of the opinion that, as urged by defendant's counsel, the statements were of matters of opinion and forecast; that they related to the purpose and intention of the German manufacturers, which could not have been stated by Naville as anything else than a matter of inference, because he could not assert as a matter of fact what could be only positively known by entering the minds of the persons composing the association. It is by no means fair to assume that the parties understood that the syndicate agreement embraced the full scope of the purposes and intention of the members, or that it was a fixed and controlling agreement, and not subject to whatever enlargement or modification the business situation might well call for during the years before the expiration of the letters patent; and it was fair and natural to assume the continuance of the combination so long as it should be profitable. Practically, all that Naville said was that the expiration of the American patent would not break up the trust, and that the trust would control the market in America. It is familiar law that statements of forecast, opinion, or expectation, that are in substance merely matters of inference, cannot be made the subject of a false representation. *Gordon v. Butler*, 105 U. S. 553; *Sawyer v. Prickett*, 19 Wall. 146; *Reeves v. Corning*, 51 Fed. 774.

There remains to consider specially the statement: "One of the features of this combination is the making up of a special fund for the prevention of any new manufactories." I think that little importance can be attached to the word "special" in the foregoing statement. The material part of the allegation was that money was to be provided for preventing competition. If there was money for that special purpose, it is trivial and immaterial to inquire whether it was treated, for purposes of banking or of bookkeeping, as special or otherwise. It is sufficiently proved that various matters involving expense, that may be described, in the language of the syndicate minutes, as "protective measures against new competition," were provided for; that proportional contributions were made for the purchase of a factory for the prevention of competition; and that provision was made by the terms of the syndicate agreement for a proportional contribution for the expense of the control office, and for all expenses caused by the association, which included expenses in carrying out what was one of the main purposes of the combination, —the prevention of competition. It is provided in express terms:

"The amount of the working fund for the control office will be fixed by the president. The contracting parties share in this according to their participation, as fixed in section 1, and have to pay the share in cash to the control within ten days after they get notice to do so."

Employing the language of the brief of the learned counsel for the St. Denis Company, and agreeing with its statement of fact:

"The combination did have such a fund. It was maintained by regular assessments. They did expend it, whenever necessary, in attempts to suppress competition; and to assert that there is any material variation between the general statement that there was a special fund, small or great, available for the purpose named, and the fund actually available and ready and intended to be used for that purpose, is too manifestly unreasonable for serious discussion."

Upon the findings, therefore, that the statements that other contracts had been made is not proved to have been made by Mr. Naville, and that there was no misrepresentation in the written statements or in the oral statements of Mr. Naville relating to these matters, and no material discrepancy between the statements and the facts, I am of the opinion that there is no ground for attributing to the defendant corporation or its agent either bad faith or inaccuracy or recklessness of statement, and that, on the contrary, their good faith and substantial accuracy of statement in the dealings resulting in the contract are satisfactorily established. The injunction is therefore denied, and the bill will be dismissed, with costs.

UNION MILL & MINING CO. v. DANGBERG et al.

(Circuit Court, D. Nevada. May 24, 1897.)

No. 520.

1. WATER RIGHTS—TENANCY IN COMMON—INJUNCTION.

One tenant in common may maintain a suit in equity to restrain infringement of his rights in the water of a stream, without joining his co-tenant.

2. SAME—PARTIES IN EQUITY.

In a suit in equity to determine complainant's right to a specific quantity of the water of a stream, and to obtain a decree against all parties asserting rights therein, to the complainant's injury or damage, persons who use the waters of the stream, but against whom no relief is sought, and who claim no rights adverse to the complainant, are not necessary parties.

3. SAME—JOINDER OF DEFENDANTS.

In a suit in equity to establish complainant's right to a specific quantity of the water of a stream, several persons who divert water from such stream, and claim the right to divert it as against complainant, and whose acts are such as to make their individual diversion injurious to complainant's rights, may all be united as respondents, though they do not claim the water jointly, nor by any common right.

4. PARTIES IN EQUITY—PERSONS BEYOND JURISDICTION.

Persons who, if within the jurisdiction of the court, might be regarded as proper or necessary parties to a suit in equity, will not, when beyond the jurisdiction of the court, be regarded as indispensable parties, so that their absence would defeat the jurisdiction, if the rights of the complainant and of the respondents before the court can be determined without them, and they will not be in any manner affected by the decree.

5. PRESCRIPTIVE RIGHTS—RIPARIAN PROPRIETORS—APPROPRIATION.

No prescriptive right to the use of the water of a stream can be acquired by one riparian proprietor, as against another, by a use of the water at times when such use does not interfere with the latter's use of the water, and when, as often as there is interference, the latter has protested, and sought to prevent the use.

6. WATER RIGHTS—RIPARIAN PROPRIETORSHIP.

The rules and principles applicable to riparian proprietorship discussed and explained.

7. SAME—PRIOR APPROPRIATION.

The rules as to the rights of prior appropriators of the waters of streams, and as to the methods of exercising such rights, stated.

8. SAME—WASTE PROHIBITED—BENEFICIAL USE.

Waste in the use of water is not permissible. To secure protection in the diversion and use of the waters of a stream for irrigation, or any other purpose, there must be an economic, beneficial, and reasonable use thereof, so as to prevent waste. An excessive diversion of water for any purpose cannot be regarded as a diversion for a beneficial use.

9. SAME—APPROPRIATION FOR IRRIGATION.

There is no superiority in rights acquired in the water of a stream for the purpose of irrigating arable land over rights acquired therein for mining or milling purposes.

10. SAME—TITLE OF PRIOR APPROPRIATORS.

Parties failing to connect themselves by title with prior occupants who had appropriated the water of a stream for the cultivation of the land cannot avail themselves of such prior appropriation of the water. Their own appropriation of the water must be treated as the inception of their rights.

11. SAME—RIGHTS OF SUBSEQUENT APPROPRIATORS.

The right of the first appropriator of the water of a stream is fixed by his appropriation, and, when others locate on the stream or appropriate the water, he cannot enlarge his original appropriation, or make any

change in the channel to their injury, but each subsequent locator or appropriator is entitled to have the water flow in the same manner as when he located, and may insist that the prior appropriators shall be confined to what was actually appropriated or necessary for the purposes for which they intended to use the water.

12. SAME—TIME OF APPROPRIATION.

In determining the question of the time when a right to water by appropriation commences, the law does not restrict the appropriator to the date of his use of the water, but, applying the doctrine of relation, fixes it as of the time when he begins his dam or other appliance by which the appropriation is effected, provided his enterprise is prosecuted with reasonable diligence.

13. SAME—EXTENT OF APPROPRIATION.

The true test of the extent of an appropriator's rights in the waters of a stream is the actual amount that is applied, without waste, to some beneficial use, within a reasonable time after he has given notice of his intention to appropriate the water.

14. SAME—CHANGES IN APPLICATION OF WATER POWER.

When water from a stream has been appropriated for the purpose of running a mill, the mill owner is entitled to increase the working capacity of the mill by alterations and improvements in the method of applying or using the water power, provided the amount of water used does not exceed the amount first appropriated.

15. SAME—ECONOMICAL USE.

An appropriator of the water of a stream is required to make an economic use of the water appropriated, for the purpose of the appropriation; and, if the capacity of his ditches is greater than is necessary to provide for such use, he should be confined to the amount necessary for such economic use, though less than the capacity of his ditches.

16. SAME—PLACE OF USE.

The right to water acquired by prior appropriation is not dependent upon the place where the water is used; and one who is entitled to a given quantity of the water of a stream may take the same at any point on the stream, and may change the point of diversion and the character of its use at pleasure, if the rights of others be not affected thereby.

17. SAME—CAPACITY OF DITCHES.

The capacity of a ditch, making due allowance for evaporation, seepage, etc., is the amount of water that it will carry from the point of diversion to the point of use.

18. SAME—EQUITABLE RELIEF WHERE RIGHTS ARE VIOLATED.

Where there is a clear violation of a right, and equitable relief is prayed for, it is not necessary to show actual damage. Every violation of a right imports damage, and this principle is applied whenever the act done is of such a nature as that by its repetition or continuance it may become the foundation of an adverse right.

19. SAME—EFFECT OF FORMER DECREES—RES JUDICATA.

Former decrees which are final and unreversed are res judicata of the subject-matter of the suits as then decided between the parties thereto and their successors in interest, whether the courts base their decrees upon a correct or an erroneous view either of the law or of the facts. They are not conclusive as to matters which might have been decided therein, but only as to such matters as were in fact decided within the issues raised by the pleadings.

20. SAME—INJUNCTION AGAINST DIVERSION—CHANGE OF PLACE OF USE—RES JUDICATA.

A decree awarding to a riparian proprietor, by virtue of his rights as such, an injunction against diversion of the water, so as to prevent its flowing freely to the lands and mill of such proprietor to the extent necessary for his uses in carrying on any lawful business, does not cease to be res judicata as to his rights in the stream because of his abandonment of the particular mill, and removal of his business to other land owned by him on the stream.

21. SAME—RIGHT TO INJUNCTION.

No one having rights in the waters of a stream is entitled to enjoin interference with such waters by others, when the uninterrupted flow of the stream would be insufficient to afford such person any beneficial use of it.

22. SAME—INSUFFICIENT SUPPLY—APPORTIONMENT.

In this case, where several parties were found to have rights in the waters of a stream, the natural flow of which was at certain seasons insufficient to supply the needs of all, *held*, that the use during such season should be so apportioned by the decree as to preserve so far as possible the equities of the several parties, and meet their necessities.

This suit is brought by the complainant, as the owner or part owner of seven quartz mills situated along and upon the banks of the Carson river, in Ormsby and Lyon counties, in the state of Nevada, to wit, the Mexican, Brunswick, Merrimac, Vivian, Santiago, Franklin, and Rock Point, against H. F. Dangberg and about 125 other respondents, comprising all of the farmers residing in Carson valley, in Douglas county, who live above the Mexican mill, and use the water of the Carson river for irrigating lands and for other purposes.

Complainant claims that it and its grantors have owned and used the mills above named, with the dams, ditches, and water power connected therewith sufficient to run the mills, since the following dates, and to the following extent, viz.: The Mexican Mill since March, 1860, with a capacity of 8,640 inches of water on a grade of 1 foot per mile; the Brunswick since April 22, 1861, with a capacity of 9,792 inches of water on a grade of 1 foot in 2,200 feet; the Merrimac since May 12, 1861, and used until 1888, when the mill was partially dismantled, with the capacity of 6,336 inches of water on the grade of the ditch, 3.32 inches to the rod; the Vivian, April 12, 1861, with a capacity of 7,344 inches of water flowing on a grade of 1 foot in 1,220 feet; the Santiago since April 12, 1861, with a capacity of 11,520 inches of water flowing on a grade of 2.2 feet in 1,910 feet; the Franklin since May 7, 1861, with the capacity of 5,184 inches on a grade of 1.6 feet in 1,228 feet; the Rock Point since December, 1859, with a capacity of 4,608 inches of water on the grade of the ditch.

The following table shows the dates of the original surveys of the land upon which the respective mills are situated, with date of recording, also dates when patents were issued to complainant, its associates, or grantors.

Name of Mill.	Date of Survey.	Record of Survey.	Patent.
Mexican.....	June 24, 1861.	June 25, 1861.	Feb. 10, 1865.
Brunswick.....	May 11, 12, 1861.	June 3, 1861.	Sept. 15, 1864.
Merrimac.....			Sept. 15, 1864.
			Oct. 10, 1866.
Vivian.....	April 12, 13, 1861.	Apr. 26, 1861.	Oct. 10, 1866.
Santiago.....	Apr. 12, 13, 1861.	Apr. 25, 1861.	Oct. 10, 1866.
Franklin.....	May 30, 1863.	June 19, 1863.	Dec. 18, 1869.
Rock Point.....	Dec. 14, 15, 1860.	Dec. 21, 1860.	
	Apr. 16, 1861.	May 7, 1861.	
	Oct. 30, 31, 1860.	Feb. 23, 1861.	May 11, 1867.

The bill, among other things, alleges, in substance, that on the 1st day of July, 1889, respondents wrongfully diverted the water, and have wrongfully continued since that time to divert the water, and threaten to continue such diversion, and, unless prevented, will continue, etc., to complainant's injury and damage; that respondents severally take and divert the water by different dams and ditches, and use the same on different parcels of land, claiming a common right to make such diversion; that complainant, in August, 1871,

commenced 11 suits in this court against a portion of the respondents herein (about 40 in number); and that judgments therein were entered for complainant, some on the 8th day of August, and others on the 18th day of August, 1873, for the property described in the complaint as the Merrimac Mill, ditch, and water power, and it was therein adjudged that complainant was entitled to the rights of a riparian proprietor in the waters of the Carson river, and that the respondents were seized and possessed of the land described in the answer, and, as incident thereto, were entitled to the rights of riparian proprietors. These were the only judgments pleaded; but upon the trial it was shown that other similar suits were brought in the state courts, and similar decrees rendered therein, which were introduced in evidence in this case. Several of the respondents made default. Others entered into stipulations as to the character of the decree which they agreed should be entered herein, as against them; and a few others appeared, and answered separately for themselves, but a large majority of the respondents were represented by the same counsel. Their answers set up a joint defense for all the defendants so answering, and a separate defense for each. They alleged that complainant's injury, if any, was not the result of respondents' acts, but was occasioned by the excessive and unprecedented drought of the year 1889; that, as to some of the respondents, they are riparian owners, and, as such, entitled to the water under the prior judgments, pleaded against them, for stock and domestic purposes, and for the irrigation of their lands; that, as to some of the others, they are entitled to the water by prior appropriation; that, as to some of the others, they are entitled to water by prescription. Their answer alleges that complainant's co-tenant is a necessary party plaintiff, and should be brought into court; that there are other persons claiming and using the water who are not before the court; that defendants made no joint diversion or common claim to the use of the water, but diverted, claim, and used it in several and independent rights and uses, and not by virtue or under claim of common right; that, in addition to the joint or common defense, defendants severally plead their several and independent rights to the water, some of them claiming by riparian proprietorship, some by decree of the court, some by appropriation, and some by prescription, and others by right of appropriation and prescription.

The Mexican Mill, as originally built, in 1861, had 12 stamps. It was changed in the spring of 1862 to 44 stamps. The mechanism and machinery of this mill, at the time of the commencement of this suit, as shown from the testimony in this case, consisted of 44 stamps of different weight, 20 amalgam pans, 10 settlers, 2 sulphuret pans, 2 agitators, 19 concentrators, 1 force pump, 1 grinding stone, 1 main driving shaft 160 feet long, 1 line shaft 160 feet long, 1 Archimedian screw elevator, 1 boiler feed pump, 1 dynamo with 48-inch Pelton wheel. The estimated power to run this machinery is given at 360-horse power, by the foreman of the mill. The penstock from the bottom of the petticoat to the surface of the water in the penstock is 29 feet 6 inches. The testimony of all the civil engineers shows that 50 inches of water under a 4-inch pressure equals 1 cubic foot per second. Previous to the commencement of this suit, complainant employed Capt. J. W. Haynie, a practical civil engineer, with many years of experience, as a surveyor, in the construction and operation of ditches and flumes, to measure and calculate the carrying capacity of its several ditches and mill races, and the amount of water flowing at different points in the Carson river. With reference to the quantity of water flowing in the east fork of the Carson river, he testified as follows: "On July 14, 1889, I surveyed a section of 500 feet of the east fork of the Carson river at a point about $\frac{3}{4}$ of a mile above the dam from which water is taken by P. Heitman's ditch from the left bank, and J. Rodenbaugh's ditch from the right bank; * * * the survey being made for the purpose of ascertaining the amount of water passing that point at that date. By careful cross sectioning at 5 equidistant points in the 500 feet, and taking 6 observations of the depth in each cross section, I ascertained the mean sectional area to be 46,525 square feet. The slope of the surface of the water was 0.00712, or at the rate of 37.614 feet per mile. The amount of water flowing was 249.60 cubic feet per second of time, or 12,480 miners' inches, 4-inch pressure." He also made surveys of all the ditches

taking water from the Carson river in Carson valley. In the month of August, 1889, he surveyed a number of artificial waterways or ditches constructed for the purpose of conveying water from the Carson river to supply power to the various quartz mills along that stream, with a view of ascertaining their respective capacities. With reference to the Mexican Mill ditch, he testified that it takes water from a dam in the Carson river, and conveys the same to the Mexican Mill, a distance of 27,380 feet. "The highest point in its bottom is 132 feet below or towards the mill from the head gate. Its total fall from this point to its discharge at the mill is 5.99, or 1.19 per mile. A box flume 427 feet in length, with vertical sides, which forms a section of the ditch, is 12 feet wide and 4.13 feet deep, giving a sectional area of 49.56 square feet, which is not greater than that of the portion of the ditch constructed through earth. Its discharging capacity is 119.776 cubic feet per second, or 5,988 miners' inches, under a 4-inch pressure. The vertical fall of the water at the point of discharge is 28 feet, and the nominal horse power yielded is 379.88, of which 80 per cent., or 303.9, would be realized.

The following table shows the result of the measurements and calculations made by him:

Name of Ditch.	Carrying Capacity in Inches under 4-Inch Pressure.
Mexican.....	5,988
" Final measurement with a nearly full head of water.....	6,808
Brunswick.....	9,115
Merrimac.....	5,220
Vivian.....	7,788
Santiago.....	9,400
Franklin.....	6,455
Rock Point.....	5,908

From January 27 to January 31, 1894, he made further surveys of the Mexican ditch, and testified in relation thereto as follows: "Exceptionally favorable conditions were afforded for securing accurate data from which to compute the capacity of the Mexican ditch. On the 27th, the ditch being empty, I, in connection with H. H. Bence, selected a section of the ditch favorable for the purpose, measuring 900 feet in length, the upper end of which is 611 feet below the head gate, and made three cross sectional measurements, one at each end of the section, and one midway between these. In these measurements, starting from a permanent datum mark, the elevation was taken by means of a telescope leveling instrument and leveling rod for every foot of length of the transverse line, thus securing a very accurate contour line. On the 31st, water was turned into the ditch, filling it to within one-tenth of a foot of a mark on the flume frame near the head gate, which mark is said to have been placed there as a gauge for a full mill head when the mill was worked to its full capacity. The height of the water surface relative to the datum line established at the cross section taken while the ditch was empty was taken by means of a leveling instrument and rod, for the purpose of defining the top of the wet cross section, as was also the fall or slope of the surface in the 900-foot length of section, at intervals of 100 feet." The result of these measurements, as calculated by the use of Flynn's table based on Kutter's formula, was 136.16 cubic feet per second, or 6,808 miners' inches, 4-inch pressure.

On January 31st, immediately after the final measurements above described, a section of 200 feet, the upper end of which was 1,334 feet below the section mentioned above, and 60 feet below the upper end of the rectangular flume in which it is situated, being the second flume above Bland's house, was measured transversely at each end and midway between, and the velocity of the water was taken by means of weighted tube floats, extending from a little above the surface to a depth just clearing the bottom. The width of the flume was 12 feet at each of the sections measured. The result of the measurements

made at this place was 136.54 cubic feet per second, or 6,827 miners' inches, 4-inch pressure. On the same day of these measurements, a section measuring 215.5 feet in length, in the rectangular flume entering the Mexican Mill, was used for the same purpose as the last, and in the same manner, except that only two cross sectional measurements were taken, one at each end of the longitudinal section. The width of the flume was the same at both ends,—11.575 feet; the depth of the water at the upper end 2.64 feet, and at the lower end 2.35 feet; mean depth, 2.495 feet; width of each of the 3 sub-longitudinal sections, 3.8583 feet. Floats were passed through each subsection four times. The result of measurements at this place was a total discharge, in cubic feet per second, 121.095, or 6,054.75 inches, 4-inch pressure. The difference between the mean of the two measurements near the head of the ditch and that of the two at the mill is 757 inches. To quote from the witness: "This must be accounted for by the present large leakage from the three intervening flumes; leakage through holes in the banks made by burrowing animals, and absorption by the ground in the more than 4 miles of channel in earth, both of the last two causes of waste being considerable, owing to the ditch not having been filled to so great a depth for a long time prior to this."

There is testimony in the record to the effect that, at the time these measurements were made, there was not as full a head of water as when the mill was running to its full capacity. Mr. H. H. Bence, who assisted Capt. Haynie in making the measurements, also made several calculations as to the capacity of the ditch at several different points. He testified that, in making his calculations, he disregarded the intervening flumes, for the reason that they were rectangular in shape, and somewhat irregular in grade, while the ditch was trapezoidal in its shape. He therefore took those portions of the ditch constructed in earth and the cross section measured in this section of the ditch as the basis of its capacity, and by careful computations, based on rules and formulæ laid down in one of the earlier editions of Trautwine's Engineers' Pocket Book, obtained the following results: (1) Ditch being empty, he found the capacity of the ditch below the assumed water surface to be equal to a flow of 128.28 cubic feet per second, or 6,414 miners' inches. An addition of $\frac{2}{10}$ of a foot to the assumed water surface first adopted would increase the mean sectional area and velocity, and would give a flow of 139.589 cubic feet per second, or 6,979 miners' inches. After the water was turned into the ditch, other measurements were made, and the calculations with reference thereto, taken from Kutter's tables, give a flow of water equal to 137.3494 cubic feet per second, or 6,967 miners' inches. At the same time, as an experiment, he tested for velocity by means of a surface float, and obtained the following result, making the flow of water equal to 130.92 cubic feet per second, or 6,546 miners' inches. This method of obtaining the mean velocity he states is somewhat uncertain, and is adopted only for the purpose of obtaining an approximation of the flow of water where circumstances and the condition of the stream preclude other methods. He also, at another point, made measurements by means of submerged tube floats, with the result of 135.962 cubic feet per second, or 6,798 inches. To quote from his testimony: "After this, we proceeded to the Mexican Mill, and, by means of a weir which had been constructed in the tail race some distance below the mill, measured the water therein, and found 121.306 cubic feet per second flowing in said tail race, being equal to 6,065.8 miners' inches, after which we measured the water flowing in the flume next above the mill [flume 5] by the same methods employed at flume 2, and found the flow of water therein 121.249 second feet, or 6,062.4 inches, showing a discrepancy of 3.4 inches only between the weir measurements and that of the flume. Finally, from all these measurements and the result obtained thereby, I come to the conclusion, and such is my opinion, viz. that the full capacity of the Mexican ditch is not less than 141 cubic feet per second, or 7,050 miners' inches; that on the 31st day of January, 1894, there was flowing in that portion of the ditch, between flumes 1 and 2, near the upper end of the ditch, 137.349 second feet of water, equal to 6,867 miners' inches."

In the year 1893 the respondents employed L. H. Taylor, a civil engineer, to measure complainant's ditches, and estimate their carrying capacity. The following tables show the result of his testimony:

Name of Ditch.	Carrying Capacity in Inches under 4-Inch Pressure.
Mexican.	
On direct examination.....	3,369
On cross-examination.....	4,110
On further cross-examination.....	4,640
After a second measurement.....	5,446
On further cross-examination; head of ditch.....	6,900
Brunswick.....	8,432
Merrimac.....	3,248
Vivian.....	4,165
Santiago.....	3,680
Franklin.....	2,382
Rock Point.	
Ditch.....	2,635
Flume.....	7,500

The following is an extract from the records of the United States Geological Survey, showing measurements, in cubic feet per second, of the Carson river at Bland's ranch, Nev., and of the so-called "Mexican Flume," for the respective months, as follows:

	Cubic Feet per Second.		
	Carson River.	Flume.	Total.
April 9 to 30, 1890.....	1,446	119	1,565
May, 1890.....	3,360	115	3,475
June, 1890.....	3,021	122	3,143
July, 1890.....	2,037	122	2,159
August, 1890.....	19	125	144

J. W. Powell, Director.
F. H. Newell, Topographer.

The following books, pamphlets, and other works on water rights were admitted in evidence, and marked as exhibits in this case, viz.: Irrigation Canals and Other Irrigation Works, by P. J. Flynn. Practical Treatise on Hydraulic Mining, by Bowie. United States Geological Survey, by J. W. Powell. Hydraulics; Flow of Water through Orifices over Weirs, by Hamilton Smith, Jr. Lowell Hydraulic Experiments, by Francis. Trautwine's Engineers' Pocket Book. Nevada Territory Directory. A Treatise on Hydraulics, by Merriman. James Leffel's Works, 1883, 1888, 1891. Catalogue Milling Machinery; The Risdon Iron Works. Mechanics' and Engineers' Pocket Book, by Haswell. Report of the Director of the Mint. Annual Report of the Nevada State Weather Service.

The testimony of Mr. Samuel Singleton, as to the method of diverting the water from the Carson river over the low lands in Carson valley, referred to in the opinion of the court, is as follows: "Q. Mr. Singleton, you have in connection with almost every ranch about which you testified with reference to the water they used, you have used the word 'cuts' in the bank 'when the water was high' and 'taking out cuts'? A. Yes, sir. Q. Explain more fully just what you mean by taking the water out by cuts in the bank when the water was high. A. We would dig a small ditch or cut in the bank, and let the water out. * * * Q. Is it not true that the river bank was a foot higher at the river's edge than a little ways off? A. Yes, sir. * * * Q. The bed of the river was deeper in those days? A. The river was deeper and narrower. Q. How high above the bottom of the river would these cuts

be where they cut into the bank of the river; how high would the bed of the river be? * * * A. Sometimes it would be three feet, and sometimes five feet. Q. So that, when the water was from 3 to 5 feet deep in the river, the water would run out through the cuts that you made in the banks? A. Yes, and irrigate the grass. Q. If it did not go down low enough to quit running in the cuts, you would fill up the cuts if you wanted to cut your hay? A. Yes; to keep the water from the grass. * * * Q. How was it on your place? A. * * * We dug a ditch there. Q. How long a ditch was it? A. It must have been about 10 or 12 rods long. Q. It was just long enough to get the water through the high land next to the river onto the low land some little distance from the river, as you have described the conditions to exist at that time? A. Yes, sir. Q. How much land did it overflow and spread over? A. It overflowed 160 acres or more from the northwest on the land of Park now. Q. How wide did it spread out after it went through that cut, 10 or 12 rods long? A. It spread a great deal, and by taking a shovel, and assisting here and there, it spread the whole thing. * * * Q. In 1852 did you not find natural meadows that were irrigated by the natural overflow of the river until the blue joint grass grew as high as your head? A. Yes, sir. Q. The first cutting of hay in the valley was from these natural meadows that had been irrigated by the natural overflow of the water when the river was high? A. Yes, the first hay that was cut. * * * Q. About what year did the water commence to come down with a rush? A. After the timber was cut in the mountains. Q. About what year did that occur? A. From 1868 until to-day. * * * Q. Is it not the fact that the early settlers on the west side of the valley next to the foot of the mountain, along the road, took up the land along the road, and used mountain streams for irrigation? A. Yes, sir. * * * Q. Was not all their irrigation in early days either from mountain streams, and where they made cuts in the banks as you have described? A. Yes; that was between 1850 and 1860. Q. And after 1860 how was it? A. It continued that way until the timber was cut off, and the willows cut out, and the grubbing all done. Q. It continued that way until about 1868? A. Yes, until they cut the timber. * * * Q. How much land was cultivated on the Mott ranch as early as 1860 and 1861? A. In 1860 and 1861 I do not think there was any cultivated on the low land; I mean plowed land. The other was grass land, if you call it cultivation by watering it. Q. Prior to 1861 there was no land plowed on the low lands on the Mott ranch? A. I do not think there was any more than ditches. There were several ditches plowed to carry water, and used to irrigate grass land when the water was up. Q. The land that was cultivated by plowing was irrigated by mountain streams? A. Yes, sir. Q. That continued to be the case down to 1862 and 1863? A. Yes, sir. Q. So that prior to 1862 and 1863 there was no land ever cultivated in any manner on the Mott ranch except by mountain streams—except by using the overflow? A. That is all. * * * Q. How much of the Mott land was inclosed with a fence as early as 1861? A. I think the whole thing was pretty much inclosed in 1861 by a wire fence. * * * Q. But you think that as early as 1861 the Mott ranch was inclosed two miles north and south and three miles east and west by a fence? A. Not by a wire fence. It was pretty much all inclosed by a fence. * * * Q. How much rail fence was there in the valley in 1860? A. Mott had 20 acres, and I had 10 acres, and Howard had 10 acres, and Woodford about 20 acres, fenced with cedar posts and cedar rails mortised in, and some of it is there to-day. * * * Q. You say that you cut some ditches yourself on the Mott ranch in 1853? A. Yes, sir. Q. How many ditches did you cut there in 1853? A. May be 20 or 30. Q. The ditches that you cut were mere cuts in the high bank right at the river to let the water out? A. Yes, cuts in the high bank. Q. These 20 or 30 cuts, that you made in 1863, were they all of the same character,—just to cut the bank to let the water out at high water? A. Yes, sir. * * * Q. How much land did Mott plow all told as early as 1860? A. 20 acres, I think. Q. What did he put that in? A. Grain and vegetables. Q. Where did he get the water for that? A. From mountain streams. Q. All other land that he irrigated prior to 1860 and 1861 was by means of cuts in the banks of the river at high water, and spreading the water? A. Yes, sir. * * * Q.

There was plenty of water then? A. Yes; there was plenty of water then. There was plenty of water until the seventies, when it got short. Q. And then you had to make better dams to get water when it was lower? A. Yes, sir. Q. Do you know the ditch running down across the land east of your place, called the 'Big Ditch'? * * * A. Yes; I know the ditch. Q. When was that built? A. In 1860 or 1861; it was dug to drain the bottom land. * * * Q. Let me call your attention to a ditch between the Big ditch and your house; between the Big ditch and the one marked Bull and Park's ditch. When was that built? * * * A. It was built in 1870 or later. * * * Q. Can you show me a ditch on this map from Sheridan to Peter Vansickles' that was built earlier than the year 1860? A. I don't know of any ditch to run from Vansickles' to way up there. * * * Q. Show me where there is a ditch there, built as early as 1860. A. I do not know where there is any particular part of the land where there is a ditch. There are some ditches in this big slough marked Parson's ditch, running off towards my place. Q. Is there a ditch there running from Parson's ditch towards your place that was built as early as 1860? Do you know of any ditches there taken out as early as 1860? A. I cannot recollect. * * * Q. Was there any land in the valley prior to 1860 irrigated by any other methods except by digging those little cuts in the high bank, and letting the water flood the land at high water? A. There might have been dams put in that I did not see. Q. Do you know of any? I am asking, within your own knowledge, if there was any irrigation of land in the valley prior to 1860, except by cutting the banks? A. I do not know, but I put in willow dams before that time. Q. All the grain land and plowed and garden and vegetable land prior to 1861 on the west fork was irrigated by means of mountain streams? A. Yes, most of it on the west side of the valley. * * * Q. All the ditches spoken of as having been taken out near the Job dam were all cuts through the same high bank? A. Yes, cuts right through the bank. Q. How long would those cuts be? A. 10 or 12 rods, and some a little farther, probably. * * * Q. What do you mean by saying that Hiram Mott and you took water whenever you wanted to irrigate, when the water was high? A. When I was there by the river, watching our stock, I would have a shovel, and take it out, and, when he was there, he would do it. Q. When you were watching stock, you would go around with a shovel, and make little cuts in the bank, and get water out, and let it flood the land? A. Yes, trying to make hay. * * * Q. You testified that the Mott ranch had been cultivated from 1853 to the present time. How much do you wish to be understood as saying was cultivated? A. I want to be understood that the grass grew there since I have been there, and a year before I came there. Q. It was growing before you came, and you cut some of it the year you came, and it has been growing ever since? A. Yes, sir. Q. That is just what you desire to be understood as saying? A. Yes, sir. * * * Q. How long was it before anything else was raised on the Mott land except natural grass? A. Way until 1860, and after; nothing but natural grass there until 1860. Q. Just the same as was growing before the white people came to the country? A. Yes, sir. Q. Is that what you mean by saying that the Mott ranch has been cultivated from 1853 down to the present time; that the natural grass which was growing there before the white people came to the country continued to grow the same as if they had not come? A. Yes, sir. Q. How was it in 1859, 1860, and 1861? A. There was plenty of water until we got to the seventies, when it began to get scarce. Q. It was in 1868 or 1870 when the farmers in the valley began to make arrangements to get water out of the river at low stage? A. It was so with me and my neighbors."

The following testimony, in relation to the time when the Virginia ditch was constructed, is referred to in the opinion of the court:

C. N. Noteware, one of respondents' witnesses, on cross-examination testified as follows: "Q. What ditches do you remember to have been built prior to 1863? A. The Virginia ditch was built before that. Q. I wish you would think it over, and see if you have not your bearings a little wrong. Several witnesses have testified that the Virginia ditch was built in 1864, and in 1864 was the time when they first put water through that ditch. A. I am very positive that that ditch was dug long before 1864. Q. The Virginia ditch? A.

Now, I say positive; all that knowledge must be taken with some allowance. It is a great many years ago, but it seems to me that I cannot be mistaken; but other witnesses, more familiar with the facts than I am, swearing it was built in 1864, might make me think I was mistaken. Q. If several witnesses were to say they commenced work on that ditch in the fall of 1863, and did a little work on it that fall, and that in the spring of 1864 a large force of men was put to work on the Virginia ditch, and completed it, and that they also dug the company ditch in 1864, would you think that you were mistaken about it? A. Yes; I think so, because the witnesses might be more conversant with the country than I was. As I stated, most of my business was driving cattle up to 1862, and I was not noticing these things, but it seems to me that I saw on the Lyttle place a ditch before 1863." He was recalled, and upon direct examination testified: "Q. I want to inquire of you more particularly concerning the ditch commonly known as and called, in Douglas county, the 'Virginia Ditch.' When do you remember first to have seen that ditch? A. I do not know when I first saw it, but, as I stated when I was examined before, my impression was that I had seen it as early as 1861; and I was somewhat taken back when I was informed by counsel during my examination that several old residents, who certainly ought to know and remember as well as I would, had testified they had not seen it until 1864; and I have thought over the matter since, to know whether I was not mistaken, and now I still think I was right when I stated I had seen that ditch as early as 1861. I want to explain now what I saw: I saw an excavation for a ditch there as early as 1861, but I have never seen any water in the ditch in my life at any time since. I saw an excavation there, I feel pretty certain. They seemed to have a number of excavations on the line. Q. What is it, if anything, which strengthens your recollection about that, using all the circumstances that you can now think of to confirm your present recollection? A. Prior to and including the summer of 1861, I was driving cattle to the Mono and Aurora Mines pretty much all * * * of each season of 1858, 1859, 1860, and 1861, inclusive; and, in driving my cattle by there, I saw it. I have had no occasion to go up there since then, and I have never been in that locality since 1861. I asked what that ditch was, and the reply was, 'It was Bill Stewart's ditch;' and afterwards they said they were getting water from there. If that remark was made subsequent to 1861, and not in connection with my going there, I might be mistaken. It might have been subsequent that I learned of that ditch, but I have thought the matter over a great deal since I gave my testimony, and it does seem to me that I cannot be mistaken about it. When I saw it, it seemed to have been plowed and scraped out each way, and it might have been only a short distance; but it was a good big ditch, and my cattle used to get in there, and I don't recollect driving cattle that way at all since 1861, and I don't think I can be mistaken." On cross-examination he testified as follows: "Q. Just where was this excavation that you remember seeing on the Virginia ditch in 1861? A. It was some distance from the river, because the line of my travel would take me away from the river. It must have been as far as somewhere between where Jeffries and Banning located; between there and the Twelve Mile House is where I would cross this excavation on the line of my travel. Q. How far from the river would it be? A. I should think it would be from one-half to one mile from the river. * * * Q. How large a ditch was it? A. It was a pretty large ditch,—from bank to bank it might be fifteen feet. Q. That, you said, was Bill Stewart's ditch. Do you know for what purpose Stewart was constructing the ditch? A. I only know from what was said to me. They said the Virginia Company had taken up a ranch, and that was their ditch."

J. H. Martin, called on the part of the respondents, in direct examination testified as follows: "Q. Do you know what is called in this case the 'Virginia Ditch'? A. Yes, sir. Q. When do you remember first to have seen that ditch? A. In 1861, I think in October. * * * I came across where they had been digging a ditch, and there did not seem to be any end to it to cross. They had dug a section of a ditch there, and, when I got to the Twelve Mile House, I said, 'Who is digging a ditch there?' and they said there was a company in Virginia organized to build a ditch and farm the land there. I thought they went in there to make a show of possession." On cross-examination he testified as follows: "Q. Have you not heard also that that ditch was abandoned

at that time, and then taken up and finished early in the spring of 1864? Did you not hear at the Twelve Mile House right then that the ditch was abandoned? A. No; I did not hear it was abandoned, but I heard it was not completed until then, and I understood they made some demonstration of possession there. * * * Q. Did you ever hear of any work being done in 1862 or in 1863 on the Virginia or company ditches? A. No; I never heard of it."

Thomas Wheeler, called on the part of the plaintiff, in rebuttal, testified as follows: "Q. Do you remember anything about the Virginia ditch? A. Yes, sir. Q. When was that ditch first laid out, and work commenced upon it? A. In 1862. Q. Do you know whether it was surveyed by a surveyor and engineer? A. I do not. Q. State how much work was done on that ditch, and at what point it was done in 1862. A. They done the work on the ranch. They started work on the corner of the Virginia ranch, and I have talked with the boys working there several times, and they bought their supplies from father. There was two of them at work there, and they represented there was a company from Virginia City owned the property, and they had taken up a ditch in and about that point to bring water from the Carson river, and that it was a large company. It was to run clear through to some point below Cradlebaugh's. They done some work in there on the line of the ditch, and dug some holes in the summer of 1862 in different places. Q. Where was the work done in 1862? A. Almost north from where Pettigrew lives, I think. Q. How was the work prosecuted? A. They dug some holes, and started a ditch with picks and shovels, and they did not plow, or anything of that sort. Q. How far away from the river would the holes which they dug in 1862 be? A. A mile and a half or two miles from the river. Q. Was the work picked up and continued in 1863? A. No, sir; the work laid over in 1863. Q. Do you know from what cause no work was done on the Virginia ditch in 1863? A. Nothing more than it was said that the company had busted up, or something of that kind. Q. When was there any further work done on that ditch? A. They went in in 1864, and dug it through from where they done this digging, in 1862. They dug it through to the river. Q. Was it a large ditch then? A. They didn't make it as large as the first start. They first started quite a canal, but they didn't make it quite so large. Everybody thought it was going to be a terrible canal. Q. How large was it as they started it north of Pettigrew's house? A. My recollection of it is that it would be six or seven feet wide on the surface. Q. And how deep? A. It would probably be a couple feet deep, and other places not so deep. Q. How large was the ditch that they built from that point to the river in 1864? A. The ditch, I suppose, would be six or seven feet wide on the surface, and it would slope in. That year they put in, I think, about ten or fifteen acres of grain, in 1864. Q. Did they irrigate from the ditch? A. Yes, sir. Q. How? A. They run it over the country, and threw it over the ground with a shovel in places. The boys didn't understand irrigation very well those days. Q. Did you see that ditch yesterday? A. Yes, sir. Q. How does it compare in size with the ditch that you saw dug there in 1864? A. It looks to be several degrees larger. Q. Is it not twice as wide and deep as it was in 1864? A. It is full twice the width, and more than twice the depth."

H. F. Dangberg testified as follows: "Q. How many Virginia ditches are there? A. There is only one ditch at the head, but it branches out at the bridge. Q. Ain't there two ditches at the schoolhouse below? A. Yes, sir. Q. Which was built first? A. The lower ditch. Q. Is that the one that was built in 1863 or 1864? A. Yes, sir. Q. Is it not true that a little work was done on the Virginia ditch in the fall of 1863, and a large force of men put on in the spring of 1864, and the ditch finished? A. Yes, sir; I think so. Q. Ain't what you think about it the truth? A. Yes, sir. Q. Who built the upper Virginia ditch? A. My brother Chris. Dangberg and myself. Q. When did you do that? A. That was done somewhere between 1875 and 1880. Q. How much water would the first Virginia ditch when first built carry? A. * * * Four or five thousand inches."

David Olds, one of the respondents, testified as follows: "Q. All of that time you were somewhat familiar with the valley? A. Yes; I was supervisor of Douglas county for 1864 and 1865 and 1866. Q. You know the country in and about Gardnerville? A. Yes; I knew it then, but it was all sagebrush,

and not settled much. That was the Virginia ranch at that time. Q. Do you know the country from Gardnerville across Pettigrew's, Dangberg's, and Henry Elges' place, and the country irrigated by the Allerman ditch and the company ditches? You knew that country? A. Yes, sir. Q. About what years were those sections of country in there reclaimed and put under cultivation, and water carried on that land by a system of irrigation? A. The most of it has been done since I left there. Q. You cannot say how much had been done before you left there? A. I don't know; water was taken out of the Virginia ditch on the Virginia ranch in 1863 or in 1864. Q. Was not that land first irrigated in 1864? A. I think it was about 1864."

Charles E. Holbrook testified that the Virginia ditch was started in 1863, to the best of his recollection.

The following is the stipulation referred to in the opinion, and was signed by 12 or more of the defendants: "It is hereby stipulated and agreed by and between the complainant above named and the defendants signing this stipulation that complainant may take a decree, without costs, against the said undersigned defendants, as prayed for in its said bill of complaint on file herein, provided that the water right and water in Carson river, which complainant shall be decreed to have and use, shall be limited during the irrigating season of each year to a flow of six thousand (6,000) inches measured under a four (4) inch pressure, or any other flow or measurement which will deliver seven thousand and two hundred (7,200) cubic feet of water per minute of time, said measurement to be made at Cradlebaugh's Bridge, in Douglas county, Nevada, or as near said bridge as is practicable to measure the running water in Carson river, and provided, further, that said defendants signing this stipulation shall at all times, regardless of the amount of water in said Carson river, have the right to use the water of said river for domestic purposes, and to a reasonable use thereof for the purpose of watering stock. It is further stipulated and agreed by and between the parties signing this stipulation, the said defendants, the signers hereof may use during the irrigating season, for the purpose of irrigation upon lands now in cultivation, all of the surplus water in said Carson river over and above the said amount of six thousand (6,000) inches or seven thousand two hundred (7,200) cubic feet per minute. Said water shall be used in an economic manner, and all waste water shall be returned to the river. The complainant hereby releases, waives, and abandons all claims and causes of action for damages resulting, up to date of filing hereof, from any of the acts and injuries complained of in the complainant's bill of complaint herein, as against the defendants who shall agree to and sign this stipulation. But nothing in this stipulation contained shall be taken or construed as being a waiver or release by complainant of its action, or right of action, against any of the defendants not signing this stipulation. It is further stipulated and agreed by and between the complainant and the defendants signing this stipulation that in order to give the said defendants time and opportunity to store the water of Carson river at its head waters, in the nonirrigating season, so as to increase the supply during periods of scarcity, the said defendants, the signers hereof, and none others, may use the waters of Carson river during the irrigating season of A. D. 1890 and 1891 up to the 15th day of July in each of said years, for the purpose of irrigating their lands now under cultivation, but on none other, in order to bring their crops to maturity, even if, by so doing, they encroach upon the right of complainant to the flow of 6,000 inches as aforesaid; but said privilege shall be exercised in an economic manner, and all waste water shall be returned to the river, and said privilege of encroaching upon said flow of 6,000 inches shall not be exercised beyond the year A. D. 1891, and shall not extend to parties not signing this stipulation and agreement. Said flow and measurement of 6,000 inches, measured under a four (4) inch pressure or 7,200 cubic feet per minute of time, shall not be deemed or held to include any water which shall be hereafter stored by said complainant, or purchased by complainant from the state of Nevada or the county of Douglas or the United States or from any other person, party, association, or corporation storing water, but shall be deemed and construed to be 6,000 inches under a four (4) inch pressure, or 7,200 cubic feet per minute of the natural flow of Carson river."

The title to a portion of the lands in Carson valley is by patents. The following abstract shows the amount of land patented by respondent H. F. Dangberg, and the dates when the patents thereto were obtained:

Date of Patent.	No. of Acres.	Date of Patent.	No. of Acres.
Dec. 10, 1864.	120	Sept. 4, 1874.	120
Dec. 20, 1864.	160	April 23, 1874.	40
Nov. 15, 1865.	160	Jan. 25, 1875.	120
Nov. 15, 1865.	160	March 7, 1876.	160
April 1, 1865.	160	July 25, 1876.	160
April 1, 1865.	160	April, 1877.	160
Sept. 1, 1869.	160	Nov., 1883.	160
June 26, 1869.	80		
June 28, 1869.	320	Total.	2,720
Sept. 1, 1869.	320		

Trenmor Coffin and W. S. Wood, for complainant.

S. Summerfield, for respondent H. H. Springmeyer.

Robert M. Clarke, W. E. F. Deal, and D. W. Virgin, for other respondents.

HAWLEY, District Judge (after stating the facts as above). This is a suit in equity to obtain a decree against the respondents for the alleged wrongful diversion of the water of the Carson river, to complainant's injury and damage. The Carson river is a natural water course, having its source or head in the state of California, and running through the Carson valley, in Douglas county, Nev., to the "sink of the Carson," in Churchill county, where its water sinks and disappears. The river has two branches or forks, designated as the "East Fork" and the "West Fork," and there are many tributaries, branches, and sloughs which connect therewith, through which the water flows every month in the year. The headwaters of both of the main branches rise in California, flow into Carson valley, and unite at Boyd's Bridge, and thence flow in a single channel to the sink, a distance of over 100 miles. Above the main junction there are branches and sloughs from the East Fork, which flow into the West Fork.

Complainant claims the right to sufficient water of the Carson river to run its mills (1) upon the ground that it is a lower riparian proprietor upon the river; (2) upon the ground that it is a prior appropriator of sufficient water of the river to propel the machinery of its mills; and (3) as against several of the respondents by reason of the decrees of this court and of the state court decreeing to it and its grantors a sufficient quantity of water for such purposes, and perpetually enjoining such respondents and their grantors from the use of such water, to complainant's injury and damage. The respondents admit the diversion of the water, and claim the right to divert all the water of the river (1) by reason of their being riparian owners along the upper course of the river above complainant's mills; (2) by reason of their being prior appropriators of the amounts of water respectively claimed by them; and (3) by prescriptive use, to complainant's injury, of the respective amounts of water claimed by them for more than five years prior to the bringing of this suit.

The testimony as to the use of the water by the respective parties covers a period of time of over 30 years, during which there has been more or less litigation concerning the rights of the parties. It includes the locations and titles of each of the seven mills of which complainant is the owner or part owner, the size and capacity of its ditches, and the amounts of water necessary for it to use, so as to enable it to properly and successfully run its mills. It also embraces the respective titles to the land of the various respondents, the time when their land was first taken up, when the water was first used for purposes of irrigation, and the amount of water appropriated and required for the beneficial use of irrigating their lands. The testimony includes a history of the whole country from the headwaters of the Carson river to its sink. There is an unusual amount of conflict in the testimony, especially as to the amount of water flowing in the river at various points at different seasons of the year, of the capacity of the different ditches, the amounts of water used by the respective parties when first used, and upon nearly every other material fact in the case. A general idea of the extent of this conflict in the evidence is made manifest by the fact that abstracts made therefrom, and set forth or referred to in the briefs of counsel, for the convenience of the court, cover about 1,000 pages of typewritten matter. From this statement it is apparent that the court, having due regard to the compass of its opinion, and the limits of its own time and patience in preparing it, cannot discuss at length the questions arising from such conflict, and will be compelled, in many instances, to simply state its conclusions upon the facts, and devote most of its time and space to a review of the many intricate, novel, and interesting legal principles, including nearly every question of law pertinent to water rights, which are involved in the decision of this case.

Before proceeding with the discussion of the case upon its merits, there are certain preliminary questions that have been presented and are urged with much force by the respondents' counsel, touching the right of the complainant to maintain this suit on account of the misjoinder or nonjoinder of certain parties, which will be first disposed of.

It is said to be the constant aim of courts of equity to do complete justice, and to settle the rights of all persons interested in the subject-matter of the suit, in order that litigation may not be conducted by halves, and that the same persons may not be harassed by a multiplicity of suits in reference to the same subject-matter. Conceding this to be the aim of all courts of equity, and that their rules of procedure are molded to assist in the accomplishment of this end, it would naturally be expected that fixed and definite rules could be found regulating the conduct of suits by persons having a union of interests, and prescribing that those persons should unite in the prosecution of a common claim. But, instead of discovering such invariable rules, the courts are compelled to concur in the language of Judge Story, in which he reminds his readers of the impossibility of stating any rules which shall be of universal application to the joinder of parties in equity. Mr. Justice Story said:

"The truth is that the general rule in relation to parties does not seem to be founded on any positive and uniform principle; and therefore it does not admit of being expounded by the application of any universal theorem, as a test. It is a rule founded partly in artificial reasoning, partly in considerations of convenience, partly in the solicitude of the courts of equity to suppress multifarious litigation, and partly in the dictate of natural justice, that the rights of persons ought not to be affected in any suit, without giving them an opportunity to defend them. Whether, therefore, the common formulary be adopted, that all persons materially interested in the suit, or in the subject of the suit, ought to be made parties, or that all persons materially interested in the object of the suit ought to be made parties, we express but a general truth in the application of the doctrine, which is useful and valuable, indeed, as a practical guide, but is still open to exceptions and qualifications and limitations, the nature and extent and application of which are not, and cannot independently of judicial decision be, always clearly defined." 1 Story, Eq. Pl. § 76c.

1. It is contended that complainant ought not to be permitted to maintain this suit without making its co-tenants parties thereto. This contention cannot be sustained. It does not affect the jurisdiction of the court, but addresses itself solely to the policy of the court. *Elmendorf v. Taylor*, 10 Wheat. 152, 166. It is not shown either by the pleadings or the proofs herein that any injury will result to respondents by the failure of complainant to make its co-owners in the mills parties to this suit. Complainant's interest is several. There is but a unity of possession. Its estate is capable of being injured, and it is entitled to have it protected from irreparable injury, without regard to the action of its co-tenants. The co-tenant is not an indispensable party to the determination of its rights. *The Debris Case*, 16 Fed. 25, 34; *Railroad Co. v. Ward*, 2 Black, 485; *Hewitt v. Story*, 12 C. C. A. 250, 64 Fed. 524; *Himes v. Johnson*, 61 Cal. 259; *Water Co. v. Perdew*, 65 Cal. 447, 452, 4 Pac. 426.

2. It is claimed that the Comstock Mill & Mining Company, the owner of the Eureka Mill, on the Carson river, ought to have been made a party complainant or respondent, and that all of the farmers diverting water from the Carson river below the Rock Point Mill, and the farmers above the Rock Point Mill and below the Merrimac Mill, and the farmers in Carson valley taking water from the tributaries of the Carson river, should have been made parties respondent, and that this suit cannot be maintained without the joinder of all such parties. This suit is not brought to determine the amount of water which each respondent is entitled to divert and use for the purposes of irrigation. It is a suit instituted for the purpose of determining complainant's rights to a specific quantity of the waters of the Carson river, and to obtain a decree as against all parties who are asserting any right to such waters, to its injury and damage. This being the nature of the suit, complainant is only required to bring such parties before the court as interfere with its rights. The Comstock Mill & Mining Company does not appear to claim any right to the water of the river adverse to complainant. It could not properly have been made respondent, and the attention of the court has not been called to any principle of law which would authorize or compel it to be made a party complainant in order to prevent its commencing any suit against any party who might hereafter interfere with any of its rights. No relief is sought or claimed against any of the farmers on the river below the mills, or be-

tween the mills, or as against the parties using water on the small tributaries for irrigation between complainant's mills and the state line. Where no relief is sought against persons who are not connected in interest with the subject-matter of the suit, they should not be made parties to the litigation.

3. It is argued that inasmuch as the respondents who are made parties to the suit do not claim the water of the river jointly, or by any common right, they cannot be jointly sued, and the complainant is not therefore entitled to the remedy it seeks to obtain in this suit. It is true that the respondents deny that they have entered into any combination to divert any of the waters of the river to complainant's injury or damage, or that they jointly or in common divert or use said water, and allege that they claim individual, distinct, and separate rights independent of each other; but the pleadings and the proofs, without any conflict, distinctly show that the results of respondents' acts are such as to make their individual diversion of the water injurious to complainant's rights, if the complainant is entitled to any prior rights to the water. Their claims are of the same common character, in that they are adverse to complainant. They are therefore all properly united as respondents, because they all divert water from a common source, the Carson river, above the mills, and claim the right to divert it as against the complainant. These conflicting rights, whatever they may be, can be determined by one suit. Complainant might not be able to maintain its suit against them singly, for it may be that no one of the respondents acting individually has deprived complainant of all the water to which it is entitled. Complainant is only entitled, if at all, to a certain amount of the water of the river, and it is by the action of all the respondents that it has been deprived of the water to which it claims to be entitled. Each respondent claims the right to divert a given quantity of water. The aggregate thus claimed so reduces the volume of the water in the river as to deprive complainant of the amount to which it is entitled. To this extent, even if there is no such unity or concert of action or common design in the use of the water to injure complainant, there is certainly such a result in the use of the water by the respondents as authorizes complainant to maintain this suit, upon the ground that the action of all the respondents has produced and brought about the injury of which it complains. Every one who contributes to such injury is properly made a party respondent.

As was said by the court in *Saint v. Guerrerio*, 17 Colo. 448, 453, 30 Pac. 335, 337:

"Interference with the prior right of a party to the use of water for irrigation is unlike most private injury for which relief may be had by injunction. Priority of right to the use of water from a natural stream is a right peculiar to its nature. A party entitled to such priority, unless he can show that he is entitled to all the water of the natural stream, cannot, in the nature of things, identify certain specific water as belonging to himself while the same is running in the natural channel. Being entitled only to a certain quantity of the water, less than the whole; it is only after a proper diversion of such quantity into his own separate ditch or lateral that the prior appropriator can be said to have title, in kind, to the specific water thus diverted. * * * Keeping this principle in view, it follows that if plaintiff had, by priority of appropriation,

actually acquired the better right to the use of the water of the natural stream than either or all of the several defendants, he was entitled to have such priority protected against their acts, whether joint or several, and for that purpose was entitled, if necessary, to join all as defendants in one action. Plaintiff did not claim a prior right to the use of all the water in the natural stream, and the amount diverted by any single defendant might not interfere with plaintiff's use; hence he might not be able to maintain an action against any one of the defendants separately for diverting the water. So, plaintiff might not be able to show that any two or more of the defendants acted jointly in diverting the water; nevertheless, he might be able to show that the result of their several diversions in the aggregate was to deprive him of its use altogether. The joint result of their several acts would, under such circumstances, justify their joinder as defendants."

The following additional authorities sustain the right of complainant to maintain this suit against the respondents: *Blaisdell v. Stephens*, 14 Nev. 17; *Hillman v. Newington*, 57 Cal. 56, 63; *People v. Gold Run Ditch & Min. Co.*, 66 Cal. 138, 4 Pac. 1152; *Miller v. Highland Ditch Co.*, 87 Cal. 430, 25 Pac. 550; *Foreman v. Boyle*, 88 Cal. 290, 26 Pac. 94; *The Debris Case*, 16 Fed. 25; *Woodruff v. Mining Co.*, 8 Sawy. 628, 16 Fed. 25; *Id.*, 27 Fed. 795, and authorities there cited.

4. It is next claimed that the farmers residing in California, who are not within the jurisdiction of this court, and who are diverting the waters from the East and West Forks of the Carson river, in said state, are indispensable parties to this suit. This proposition is untenable. If the parties were within the district of Nevada, where the suit is brought, it might be the duty of the court to compel complainant to bring them into court; but it does not necessarily follow that this suit cannot be maintained without them. They are proper, and perhaps necessary, parties, but they are not indispensable parties. The rights of the complainant and of the respondents before the court can be determined without them, and they will not in any manner be affected by the decree in this suit. This court must deal with the situation of the parties as it finds them, and proceed to determine the rights of the persons within its jurisdiction who have been properly brought before it, where their rights can be determined without bringing in other parties who would oust the court of its jurisdiction.

Equity rule 47 was evidently adopted to bridge over the difficulties that might arise in all cases of this character. It reads as follows:

"In all cases where it shall appear to the court that persons who might otherwise be deemed necessary or proper parties to the suit cannot be made parties by reason of their being out of the jurisdiction of the court, or incapable otherwise of being made parties, or because their joinder would oust the jurisdiction of the court as to the parties before the court, the courts may, in their discretion, proceed in the cause without making such persons parties; and in such cases the decree shall be without prejudice to the rights of the absent parties."

In *Payne v. Hook*, 7 Wall. 425, 431, the court said:

"It is undoubtedly true that all persons materially interested in the subject-matter of the suit should be made parties to it; but this rule, like all general rules, being founded in convenience, will yield whenever it is necessary that it should yield in order to accomplish the ends of justice. It will yield, if the court is able to proceed to a decree, and do justice to the parties before it,

without injury to absent persons equally interested in the litigation, but who cannot conveniently be made parties to the suit. Coop. Eq. Pl. 35. The necessity for the relaxation of the rule is more especially apparent in the courts of the United States where oftentimes the enforcement of the rule would oust them of their jurisdiction, and deprive parties entitled to the interposition of a court of equity of any remedy whatever."

If a case in equity can be completely decided as between the litigant parties, the fact that there are other persons residing in another state who might have been made parties if they could have been reached by process should not prevent a decree as to all parties who are within the jurisdiction of the court. *Joy v. Wirtz*, 1 Wash. C. C. 517, Fed. Cas. No. 7,554; *Abbot v. Rubber Co.*, 4 Blatchf. 489, Fed. Cas. No. 9; *Harrison v. Urann*, 1 Story, 64, Fed. Cas. No. 6,146; *Elmendorf v. Taylor*, 10 Wheat. 152, 168; *Mallow v. Hinde*, 12 Wheat. 193, 197; *Vattier v. Hinde*, 7 Pet. 252, 262; *Shields v. Barrow*, 17 How. 130, 139; *Kennedy v. Gibson*, 8 Wall. 498; *Williams v. Bankhead*, 19 Wall. 563, 571; *Hotel Co. v. Wade*, 97 U. S. 13, 21; *Marco v. Hicklin*, 6 C. C. A. 10, 56 Fed. 549, 553; *Story*, Eq. Pl. §§ 78, 79.

5. Have the respondents acquired any rights to the use of the water of the river as against complainant by prescription? The discussion of this question will, for the first time, bring to light a glimmering of the fact, which, sooner or later, will be made manifest and clear, that the entire controversy as to the right to the use of the water between the respective parties is really confined to a period of about three months in the year, known as the "summer months" or "dry season." In the answer of respondents it is alleged "that continuously, for more than five consecutive years before the commencement of this suit, under claim of right and title thereto, each of the defendants have severally, openly, peaceably, uninterruptedly, and with the knowledge of the complainant, and adversely to the complainant and to all the world, and to the injury of complainant, taken, appropriated, and used for domestic purposes, and for watering their stock, and for the irrigation of their said land and the crops thereon, a portion of the water of said Carson river, and as much as was necessary or required for said purposes." This averment is broad enough to cover the entire time. But the specific contention of counsel in summing up on this point is that respondents "have at all times claimed and used the water adversely to complainant until the middle of July, and for more than five consecutive years before suit, and their claim or right to have such use has been acquiesced in by complainant."

From the mass of testimony introduced upon this point, the court is of opinion that it is clearly shown that complainant never at any time acquiesced in the use of the water by the respondents when it became scarce, or was needed at its mills. Complainant, every year for more than five years prior to the commencement of this suit, employed agents to visit the farmers in Carson valley, with instructions to prevent them from using the water; and such agents did interfere with and interrupt respondents' use every year when the water became reduced in quantity at the complainant's mill, without regard to the month or the day of the month. The truth is that

there were no two seasons exactly alike. Ordinarily, the water begins to diminish in quantity between the 1st and 15th of July. This being the fact, there are several witnesses who state that they have no recollection of making any claim to the water before the middle of July; others fix the date before that time; and all agree that they interrupted respondents' use of the water for irrigating purposes when the water commenced to decrease in quantity. The agents would first notify the respondents that complainant needed the water, and request them to cease using it, then protest against their use of the water from the river, and, if unsuccessful in accomplishing the desired results by peaceful methods, they would cut out or open respondents' dams, tear away their head gates, and fill up their ditches. The respondents were usually as active, persistent, and energetic in making repairs, so as to get the water, as the agents were in trying to prevent their using it. In several instances some of the respondents requested the use of the water for a few days, and all reasonable requests in this regard were granted.

The averment in the answer, if sustained by the proofs, was sufficient to establish a prescriptive right in the respondents' use of the water. But there is no evidence to sustain the averment. The mere fact that respondents were never interrupted in the use of the water until the middle of July in each year, if sustained by the evidence, would not give them a prescriptive right, unless it was also shown that complainant was, by their acts, deprived of sufficient water to run its mills. An adverse use of water for the statutory period must be open, notorious, peaceable, continuous, and under claim or color of right; for, if any act is done by other parties claiming the water that operates as an interruption, however slight, it prevents the acquisition of any adverse right. *Mining Co. v. Dangberg*, 2 Sawy. 450, Fed. Cas. No. 14,370; *The Mining Debris Case*, 9 Sawy. 441, 513, 18 Fed. 753; *Winter v. Winter*, 8 Nev. 129, 135; *Huston v. Bybee*, 17 Or. 140, 20 Pac. 51; *San Jose v. Trimble*, 41 Cal. 536, 542; *Lovell v. Frost*, 44 Cal. 471; *Hayes v. Martin*, 45 Cal. 559; *Cave v. Crafts*, 53 Cal. 135, 138; *Ball v. Kehl*, 95 Cal. 606, 30 Pac. 780. The burden of proving an adverse uninterrupted use of water, with the knowledge and acquiescence of the party having a prior right, is cast on the party claiming it. *American Co. v. Bradford*, 27 Cal. 360; *Gould, Waters*, § 341, and authorities there cited. Any person may obtain exclusive rights to water flowing in a stream or river by grant or prescription as against either riparian owners on the stream or the prior appropriation of the water by other parties. But the right acquired by prescription is only commensurate with the right enjoyed. The extent of the enjoyment measures the right. A mere scrambling possession of the water, or the obtaining of it by force or fraud, gives no prescriptive right; nor can this right be acquired if, during the time in which such right is claimed to have accrued, there has been an abundant supply of water in the stream or river for all other claimants.

In order to enable respondents to maintain a prescriptive right to the flowing water in the Carson river as against complainant, there must have been an uninterrupted enjoyment by them, under claim of

right, for the period of five years. There must have been an actual occupation by the diversion and use of the water, to the knowledge and acquiescence of the complainant, such as to occasion damage and give it a right of action. There must have been such a use of the water, and such damage, as would raise a presumption that complainant would not have submitted to it unless the respondents had acquired the right to so use it. *Dick v. Bird*, 14 Nev. 161; *Dick v. Caldwell*, Id. 167; *Boynton v. Longley*, 19 Nev. 69, 76, 6 Pac. 437; *Water Co. v. Crary*, 25 Cal. 504; *Grigsby v. Water Co.*, 40 Cal. 396, 406; *Anaheim Water Co. v. Semi-Tropic Water Co.*, 64 Cal. 185, 30 Pac. 623; *Water Co. v. Hancock*, 85 Cal. 219, 24 Pac. 645; *Ditch Co. v. Heilbron*, 86 Cal. 1, 12, 26 Pac. 523; *Black's Pom. Water Rights*, § 132; *Kin. Irr.* §§ 293, 294, 297.

In the application of these principles to the facts of the case under consideration, it clearly appears that respondents have not acquired any right to the use of the water of the Carson river by prescription, as against complainant.

6. We are now brought to a consideration of the interesting and important question as to what rights the respective parties have to the use of the water flowing in the river. Are their rights to be determined by the rules and principles applicable to riparian proprietorship, or be governed solely by the laws, rules, and decisions of the courts of Nevada, and of other states in the arid regions on the Pacific coast, touching the doctrines of appropriation of water to beneficial uses and purposes? Should the court follow the suggestion of counsel that some of the parties can claim riparian rights, and others claim the right to divert the water by prior appropriation, and others claim both rights? The difficulty encountered at the threshold of this discussion arises from the character, nature, and extent of the prior decrees entered in this court in *Mining Co. v. Dangberg*, 2 Sawy. 451, Fed. Cas. No. 14,370, and *Mining Co. v. Ferris*, 2 Sawy. 176, Fed. Cas. No. 14,371, in this court and in the state courts. These decrees were based upon the riparian rights of the respective parties. The fact is that, at the time such decrees were entered, the rule of riparian rights was held to be applicable to Nevada. *Vansickle v. Haines*, 7 Nev. 249. Since the rendition of the decrees, that case has been overruled, and the principles of prior appropriation accepted, as applicable to the existing conditions of the soil and climate of this state. *Jones v. Adams*, 19 Nev. 78, 6 Pac. 442; *Reduction Works v. Stevenson*, 20 Nev. 269, 21 Pac. 317. This change is the natural outgrowth of the conditions existing in this state. The climate is dry. The soil is arid. The land is unproductive, without irrigation. When water can be used thereon, it becomes capable of successful cultivation. There are but few streams of water. The benefits accruing to land along the banks of these streams by the mere flow of water in the channel is very slight. The bottom lands that can be irrigated by a diversion of the water, so that it can be turned back into the stream, are of limited extent. A large proportion of the area of land suitable for cultivation would have to remain in its wild and unproductive state, covered only by the natural growth of sagebrush and greasewood, unless the right to

appropriate and divert the water of the streams away from the channel for the purpose of irrigating such lands is recognized and secured. The same conditions exist with reference to the necessity of the use of the water for mining, milling, mechanical, manufacturing, municipal, and other beneficial purposes. These conditions and the growing wants and necessities of the people imperatively demanded that such a change should be made. Riparian rights are founded upon the ancient doctrine of the common law. If the law is a progressive science, courts should keep pace with the progress and advancement of the age, and constantly bear in mind the wants and necessities of the people, and the peculiar conditions and surroundings of the country in which they live. In this connection it has been said to be one of the excellencies of the common law that it admits of perpetual improvement, by accommodating itself to the circumstances of every age, and applies to all changes in the modes and habits of society, and that in this respect it will never be outgrown by any refinements, and never out of fashion, while the ideality of human nature exists. *State v. McClear*, 11 Nev. 66.

7. It may be that the results would be substantially the same under the law of riparian proprietorship as under the law of prior appropriation. The difference would, perhaps, be more in the form of the decree than in the amount of water to which the respective parties are entitled. From any standpoint that may be taken, it is evident that the former decrees could not be successfully enforced. If this were not true, there would not have been any necessity for this suit. The former decrees, which are pleaded and relied upon by complainant as sustaining its superior rights to the water of the river, were based exclusively upon riparian rights; and if, as argued by complainant's counsel, the decrees make the matter in issue *res judicata* so far as the original parties to those suits and all persons claiming under them are concerned, there would be an end of the present controversy as to such parties. The decrees in question did not give to complainant any fixed or definite quantity of water. They did not determine the amount of water which was necessary to enable complainant to propel its machinery at its mills. Under the rules of the common law, the riparian proprietors would all have the right to a reasonable use of the water of the river running through their respective lands for the purpose of irrigation. It is declared in all of the authorities upon this subject that it is impossible to lay down any precise rule which will be applicable to all cases. The question must be determined in each case with reference to the size of the river, the velocity of the water, the character of the soil, the number of proprietors, the amount of water needed to irrigate the lands per acre, and a variety of other circumstances and conditions surrounding each particular case; the true test in all cases being whether the use is of such character as to materially affect the equally beneficial use of the water of the stream by the other proprietors.

In *Mining Co. v. Ferris*, 2 Sawy. 176, 195, Fed. Cas. No. 14,371, the respondents claimed that in a hot and arid climate like Nevada the use of water for irrigation was a natural want; that the upper pro-

prietors on the stream might consume all the water for the purpose of irrigating their land, and that such use would be reasonable. The court, in considering this question, said:

"To lay down the arbitrary rule contended for by the defendant, and say that one proprietor on the stream has so unlimited a right to the use of the water for irrigation, seems to us an unnecessary destruction of the rights of other proprietors on the stream who have an equal need and an equal right."

But the right to use water for the purpose of irrigation was expressly recognized. The court said:

"Irrigation must be held in this climate to be a proper mode of using water by a riparian proprietor, the lawful extent of the use depending upon the circumstances of each case. With reference to these circumstances, the use must be reasonable, and the right must be exercised so as to do the least possible injury to others. There must be no unreasonable detention or consumption of the water."

When it is said that such use must be made of the water as not to affect the material rights of other proprietors, it is not meant that there cannot be any diminution or decrease of the flow of water; for, if this should be the rule, then no one could have any valuable use of the water for irrigation, which must necessarily, in order to be beneficial, be so used as to absorb more or less of the water diverted for this purpose. The truth is that under the principles of the common law in relation to riparian rights, if applicable to our circumstances and conditions, there must be allowed to all, of that which is common, a reasonable use. But, if prior appropriation is to prevail, then different rules must be applied. Under the principles of prior appropriation, the law is well settled that the right to water flowing in the public streams may be acquired by an actual appropriation of the water for a beneficial use; that, if it is used for irrigation, the appropriator is only entitled to the amount of water that is necessary to irrigate his land, by making a reasonable use of the water; that the object had in view at the time of the appropriation and diversion of the water is to be considered in connection with the extent and right of appropriation; that, if the capacity of the flume, ditch, canal, or other aqueduct, by means of which the water is conducted, is of greater capacity than is necessary to irrigate the lands of the appropriator, he will be restricted to the quantity of water needed for the purposes of irrigation, for watering his stock, and for domestic use; that the same rule applies to an appropriation made for any other beneficial use or purpose; that no person can, by virtue of his appropriation, acquire a right to any more water than is necessary for the purpose of his appropriation; that, if the water is used for the purpose of irrigating lands owned by the appropriator, the right is not confined to the amount of water used at the time the appropriation is made; that the appropriator is entitled, not only to his needs and necessities at that time, but to such other and further amount of water, within the capacity of his ditch, as would be required for the future improvement and extended cultivation of his lands, if the right is otherwise kept up; that the intention of the appropriator, his object and purpose in making the appropriation, his acts and conduct in regard thereto, the quantity and character of land owned by

him, his necessities, ability, and surroundings, must be considered by the courts, in connection with the extent of his actual appropriation and use, in determining and defining his rights; that the mere act of commencing the construction of a ditch with the avowed intention of appropriating a given quantity of water from a stream gives no right to the water unless this purpose and intention are carried out by the reasonable, diligent, and effectual prosecution of the work to the final completion of the ditch, and diversion of the water to some beneficial use; that the rights acquired by the appropriator must be exercised with reference to the general condition of the country and the necessities of the community, and measured in its extent by the actual needs of the particular purpose for which the appropriation is made, and not for the purpose of obtaining a monopoly of the water, so as to prevent its use for a beneficial purpose by other persons; that the diversion of the water ripens into a valid appropriation only where it is utilized by the appropriator for a beneficial use; that the surplus or waste water of a stream may be appropriated, subject to the rights of prior appropriators, and such an appropriator is entitled to use all such waters; that, in controversies between prior and subsequent appropriators of water, the question generally is whether the use and enjoyment of the water for the purposes to which the water is applied by the prior appropriator have been in any manner impaired by the acts of the subsequent appropriator.

These general principles are of universal application throughout the states and territories of the Pacific coast. They have, in one form or another, been declared, upheld, and maintained by a uniform current of decisions in this state. *Loddell v. Simpson*, 2 Nev. 274; *Mining Co. v. Carpenter*, 4 Nev. 534; *Proctor v. Jennings*, 6 Nev. 83; *Barnes v. Sabron*, 10 Nev. 218; *Simpson v. Williams*, 18 Nev. 432, 4 Pac. 1213. The same rules prevail in California: *Kelly v. Water Co.*, 6 Cal. 106; *Ditch Co. v. Vaughn*, 11 Cal. 143; *Kimball v. Gearhart*, 12 Cal. 28; *Ortman v. Dixon*, 13 Cal. 34; *Kidd v. Laird*, 15 Cal. 161; *Weaver v. Lake Co.*, 15 Cal. 274; *McKinney v. Smith*, 21 Cal. 374; *Hill v. Smith*, 27 Cal. 476; *Davis v. Gale*, 32 Cal. 26; *Water Co. v. Powell*, 34 Cal. 109; *Nevada Co. v. Kidd*, 37 Cal. 283; *Osgood v. Water Co.*, 56 Cal. 571; *Mitchell v. Mining Co.*, 75 Cal. 482, 17 Pac. 246; *Ramelli v. Irish*, 96 Cal. 214, 31 Pac. 41; *Barrows v. Fox*, 98 Cal. 63, 32 Pac. 811. In Colorado: *Coffin v. Ditch Co.*, 6 Colo. 443; *Sießer v. Frink*, 7 Colo. 149, 2 Pac. 901; *Wheeler v. Irrigation Co.*, 10 Colo. 583, 17 Pac. 487; *Hammond v. Rose*, 11 Colo. 524, 19 Pac. 466; *Reservoir Co. v. Southworth*, 13 Colo. 111, 21 Pac. 1028; *Platte Water Co. v. Northern Colorado Irrigation Co.* (Colo. Sup.) 21 Pac. 711; *Strickler v. City of Colorado Springs*, 16 Colo. 62, 26 Pac. 313; *Combs v. Ditch Co.*, 17 Colo. 146, 28 Pac. 966; *Ft Morgan Land & Canal Co. v. South Platte Ditch Co.*, 18 Colo. 1, 30 Pac. 1033. In Oregon: *Kaler v. Campbell*, 13 Or. 596, 11 Pac. 301; *Simmons v. Winters*, 21 Or. 35, 27 Pac. 7; *Speake v. Hamilton*, 21 Or. 3, 26 Pac. 855; *Hindman v. Rizer*, 21 Or. 112, 27 Pac. 13. In Utah: *Munroe v. Ivie*, 2 Utah, 535; *Irrigating Co. v. Moyle*, 4 Utah, 327, 9 Pac. 867; *Salina Creek Irr. Co. v. Salina Stock Co.*, 7 Utah, 456, 27 Pac.

578. In Montana: *Woolman v. Garringer*, 1 Mont. 535. In Idaho: *Conant v. Jones*, 32 Pac. 250. See, also, *Atchison v. Peterson*, 20 Wall. 507; *Basey v. Gallagher*, Id. 670; *Broder v. Water Co.*, 101 U. S. 276; *Hewitt v. Story*, 12 C. C. A. 250, 64 Fed. 516; *Krall v. U. S.*, 24 C. C. A. 543, 79 Fed. 241; *Gould, Waters*, § 228 et seq.; *Kin. Irr.* § 150 et seq.; *Black's Pom. Water Rights*, § 15 et seq.

8. To these general principles, which are of universal application, it will only be necessary to notice a few others as we proceed, that have a direct bearing upon the special facts of this particular case. The character of this suit, as before stated, is not such as to require the court to determine the amount of water to which each of the respondents is entitled for the proper irrigation of his land. Their rights, as against each other in this respect, are in no wise involved in this litigation. But, in order to obtain a correct understanding of the question of the alleged wrongful waste of the water, it is necessary to give at least a general outline of the claims made by the respondents concerning the quantity of water to which they are respectively entitled, and the manner in which it has been used by them.

The testimony shows that the aggregate amount of land owned by the respondents, in round numbers, is in the neighborhood of 15,000 acres; that the aggregate amount of water claimed by them is 51,200 inches, making an average of about $3\frac{1}{2}$ inches of water to the acre. There is no uniformity among the respondents in this particular. The lowest claim made is 1 inch to the acre, by Chris. Larsen; the highest, $7\frac{1}{2}$ inches to the acre, by H. F. Dangberg, one of the largest landowners in the valley.

Upon the cross-examination of L. H. Taylor, a witness introduced by the respondents, he testified, in answer to questions upon this subject, as follows:

"Q. About how much water does it take, on an average, to irrigate an acre of land in Nevada, during the irrigating season, if properly handled, and handled with reason and economy and proper regard for the rights of others? A. I will state in a general way that it is my opinion, with a good distributing system, and the use of economy in applying the water, that ultimately you can count on a duty of about 150 acres to each cubic foot per second, or a third of an inch to the acre. There will be places that will require more, and others that will require less, depending on the soil, climate, character of crops, etc. * * * Q. So far as you have had opportunity to examine this subject in Carson valley, are you able to say that a cubic foot of water per second in that valley will irrigate 150 acres? A. It is my opinion that it would and will ultimately do so. Q. Would it do so now with a proper system of ditches, well regulated, and no water wasted? A. I think it would, but, with the system of irrigation they have there now, they could not do it."

T. B. Rickey, a witness on behalf of respondents, testified as follows:

"Q. How much land in that country will 1,500 inches of water irrigate? * * * A. If I owned all the water and all the land, I could irrigate 3,000 acres of land with 1,000 inches of water; but if I owned one piece here, and another man owned a piece there, the water is wasted and used up. Q. Assuming that two branches of the Virginia ditch are large enough to carry 8,000 inches, and that 1,000 or 1,500 inches are put out through those ditches upon the lands belonging to Chris. and H. F. Dangberg, using the water as they can use it with their experience, how much land could they irrigate? A. I think a quarter of an inch to the acre is abundant."

It thus appears that their system of irrigation results in a great waste of the water. So far as the testimony shows, there are only three of the respondents (H. H. Springmeyer, C. C. Henningsen, and C. M. Henningsen) who have provided any adequate means for returning the water to the river. An examination of the testimony also shows that a much greater amount of water has been habitually diverted on the East Fork of the Carson river, at the upper end of the valley, through what is known as the Allerman, Buckeye, Virginia, and Ezell ditches, than is required to irrigate the lands supplied by water from these ditches. These ditches have been so constructed as to carry the water away from the Carson river, and the Martin slough and Buckeye creek, through which the water formerly ran, have been dammed and bulkheaded, so that the waste water, instead of flowing down the creek to the river, is turned away across a sandy and gravelly plain west of what is known as "Desert Station," and, if any portion of this water ever reaches the river, it is through a slough near Cradlebaugh's bridge, at a point from 12 to 15 miles from where it was diverted from the river. Substantially the same conditions prevail on the West Fork and at several other points in Carson valley.

The thought is here suggested from the reading of the testimony in the record upon these points that if a system of economy in the use of the water had been adopted, and more care taken that no water should have been allowed to run to waste, the occasion for the present litigation would probably have never arisen. The time is near at hand when greater attention must be given to these matters, and greater care and caution be exercised, to prevent parties from loss and damage which are or may be occasioned to other parties having equal right to the waters of the river. An excessive diversion of water for any purpose cannot be regarded as a diversion to a beneficial use. Water in this state is too scarce, needful, and precious for irrigation and other purposes, to admit of waste. No person, whether an appropriator or riparian proprietor, should be allowed to "be extravagantly prodigal in dealing with this peculiar bounty of nature." *Combs v. Ditch Co.*, 17 Colo. 146, 154, 28 Pac. 966, 968. The maxim of the law which he is bound to respect, while availing himself of his right, is, "*Sic utere tuo ut alienum non laedas.*" *Tyler v. Wilkinson*, 4 Mason, 397, Fed. Cas. No. 14,312; *Ferrea v. Knipe*, 28 Cal. 340, 344; *Gibson v. Puchta*, 33 Cal. 310; *Shotwell v. Dodge*, 8 Wash. 337, 341, 36 Pac. 254. Every year the area of land for which water is needed is increasing, and the supply is constantly diminishing.

The following quotation from *Kinney on Irrigation* (section 30) is directly applicable to the facts of this case:

"It has been the policy of legislatures and courts, as far as possible, to suppress all wastefulness or wasteful methods in the use of waters. In the early days a prior appropriation was esteemed to cover all water in sight, whether it was needed or not. But the principle of 'beneficial use,' as the population increased, soon put an end to that conception. More stringent regulations may still be made in places, which will benefit not only those who have at present water rights in a certain stream, but also those desiring to divert water from the same. There are many appropriators who still demand the

amount of water claimed by them at first, although that amount is many times more than is actually needed by them for the purpose to which they apply it. Having no knowledge whatever of the proper use of water as an aid to agriculture when they first made the appropriation, and there being at that time an entire absence of any written authority on the subject from which they could learn, and water then being plentiful, it followed, as a matter of course, that settlers adopted very wasteful methods in the use of it. Many of them still keep up those methods, notwithstanding the fact, demonstrated by practical experience, that by so doing they are raising smaller and poorer crops than they could raise by using the water more sparingly. In many places it has been shown that from a given stream five or six times as much land could be irrigated as had been thought possible in early days. But, even with the present various enactments for the prevention of these wasteful methods, the natural flow of streams is becoming daily more and more inadequate to meet the demand; and finally it has become apparent that, if the progress of the irrigation development is not to be seriously checked, more stringent measures will have to be enacted, or other sources of supply must be sought."

See, also, sections 165 and 166; Black's *Pom. Water Rights*, § 142; *Peregoy v. McKissick*, 79 Cal. 572, 21 Pac. 967; *Barrows v. Fox*, 98 Cal. 63, 32 Pac. 811.

9. An earnest argument is made on behalf of the respondents to the effect that the agricultural interests of Carson valley are of paramount importance to those of the mill owners on the Carson river; that the necessities of life are produced by the farmers, and cannot be successfully brought forth without the use of water for the irrigation of their crops. But of what general use, independent of the wants and necessities of themselves and their families, would the products of their farms be, unless the other industries which furnish a market for the crops were equally protected in their rights? The money necessary to be obtained in order to enable the farmers to sell their crops with profit must be obtained from other sources,—from other avenues of industrial and business pursuits. The prospector and capitalist, laborer and miner, searching for the precious metals that lie imbedded in the earth in the mineral regions of the state, have certain rights that need protection, as well as other classes. When these discoveries are made, the metalliferous ores cannot be at all times successfully reduced without the aid of expensive machinery, the building of mills to be propelled by water power, etc. Water for this purpose is as much a want or necessity of the community as it is for the purpose of irrigating the land. The mining industry of this state has always been considered of as great importance as the agricultural interests. The right to the water of a stream for any beneficial use should always be protected and encouraged. The only exception that has ever been made arises solely from necessity, and that is to give to every person, in whatever business he may be engaged, the absolute right to a sufficient supply of the water for household and domestic purposes, watering his stock, and raising vegetables sufficient to supply the wants of himself and family. In *Gould, Waters*, § 205, the author, in relation to this exception, says:

"Each riparian proprietor has a right to the ordinary use of the water flowing past his land, for the purpose of supplying his natural wants, including the use of the water for the domestic purposes of his home or farm, such as drinking, washing, or cooking, and for his stock. For these natural uses,

by the weight of authority, he may, if necessary, consume all the water of the stream. This right is his only, and is strictly confined to riparian land. He has also the right to use it for any other purpose, as for irrigation or manufactures; but this right to the extraordinary use of the water is inferior to the right to its ordinary use, and, if the water of the stream is barely sufficient to answer the natural wants of the different proprietors, none of them can use the water for such extraordinary purposes as irrigation or manufactures."

See also, Black's Pom. Water Rights, § 140.

Without dwelling at any length upon the arguments that have been made upon this subject as to the extent of the rights of individuals in this regard (as they are not, in my opinion, necessarily involved in this case), we confine the discussion to the general doctrine advanced, as to the superiority of rights acquired for the purpose of irrigating arable lands as against rights acquired for mining or milling purposes. Upon this point, keeping in touch with the principles which have from time to time been announced in the state and national courts of this district, it is enough to say that there is no general distinction to be made. The general rights of each stand upon the same plane. Both are entitled to the equal and due protection of the law. Both must be protected, and both governed by the general principles of law pertaining to water rights which have been clearly established and defined. The rule upon this subject is correctly stated in Gould, Waters, § 233, as follows:

"Whether the appropriation is for mining, as originally it was solely, or for mills, for irrigation, or for agricultural, horticultural, domestic, or municipal purposes, the rights thereby acquired now stand upon the same footing, and an appropriation or use of the water for one of these purposes is not justifiable when it interferes with a prior appropriation or location for another purpose."

10. A point is now reached where it becomes necessary to digress, and take up other questions, less interesting, but of equal importance, in order to ascertain the facts as to the time when the rights of the respective parties were first acquired, and the amount of water used by them. One can naturally understand that lapse of memory comes with lapse of time, and that any man, however conscientious or honest, may be mistaken as to events that transpired 40 or more years ago; and the truth of such matter, as to the time of any given transaction, can often only be solved by comparing the testimony of the witnesses with known and uncontradicted facts as to the date of other events which all concede occurred at or about the same time. One can also readily understand the uncertainty, and sometimes, if not always, the unreliability, of the testimony of witnesses who attempt to give with any degree of precision the amount of land under irrigation, or the exact amount of water flowing in a river, stream, cut, canal, or ditch, by merely looking at it. But the court is not able to fully comprehend the cause of the conflict in the testimony of witnesses who have been accustomed to measure and determine with accuracy the grade of a ditch or flume, their exact size and dimensions, and the amount of water that will flow therein to the full extent of their capacity, when they have within their reach and at their command tables prepared upon this subject, which have for many years been accepted and acknowledged as giving a true and cor-

rect standard by which the truth can be approximately, at least, ascertained. Absolute exactness may not always be reached. The character of the soil through which a ditch is constructed, and other conditions not mentioned in such tables, may have to be taken into consideration. As was said in *Combs v. Ditch Co.*, 17 Colo. 147, 154, 28 Pac. 966, 968:

"It may not be practicable to attain mathematical exactness in measuring the flow of water, but a reasonable approximation to substantial accuracy should be aimed at in determining controversies relating to water supply."

If parties, in litigating their rights, are actuated solely by a desire to get at the truth, they generally do, and always should, have their witnesses on the ground at the same time and place, so that the measurements and calculations could then be made by each in the presence of the other. Then, if it were claimed by either that the conditions were not favorable or proper, the other party could suggest other places where the measurements would be nearer an average as to the capacity of the flume or ditch, and both parties would have the opportunity of discovering what means were used by the other in making such measurements. The duty devolved upon the court, of determining the truth where the testimony is conflicting, is always unpleasant, and oftentimes difficult; and especially is this true in a case like the present, where all of the testimony was taken before an examiner, and the court is deprived of the opportunity of observing the character of the witnesses, their degree of intelligence, their manner, demeanor, and bearing on the witness stand, their interest, their prejudices, if any, and all the peculiar circumstances surrounding the giving of their testimony, as well as other matters which always give more or less value and weight. In this case the question is presented as to which of the witnesses, on behalf of complainant or respondents,—apparently of equal credit,—had the better opportunity to ascertain, or which was most likely, on account of his interest, position, circumstances, or surroundings, to remember, the facts. It does not necessarily follow that, because there is a conflict in the testimony, one or the other of the witnesses have testified falsely, and that the court must take the whole statement of one, and reject the entire testimony of the other. It is the duty of the court, in weighing such testimony, to ascertain whether or not it can be harmonized, upon any given state of facts, theories, or conditions, before any part thereof should be rejected. Keeping these rules constantly in mind, the court is compelled to take the record as it finds it, deprived of the opportunities it would have had if the testimony had been given in court, and determine therefrom, as best it can, by the use of the scales of justice, and all other judicial means within reach, what the facts are as established by the weight of the evidence.

The first settlements were made in the valley in the "early fifties," when the country was a part of the territory of Utah and subject to its laws. The settlements were made by persons who might be denominated as "squatters" on the public land of the United States, without any title thereto save such as the custom of the locality recognized, or in some few instances such as might be acquired under the

various provisions of the laws of Utah. They raised cattle, that roamed at large, and in many places they cut the natural grasses which grew at that time in great abundance all over the river bottom. The early emigrants that "crossed the plains" traveled along the Carson river from its "sink" up the cañon, and across the valley to the mountains, on their way to the gold excitement then prevailing in the new state of California. At Genoa, now the county seat of Douglas county, there was what was then called a "Mormon station,"—a log cabin situate on the land now owned by S. A. Kinsey, one of the respondents herein,—where the emigrants always stopped to rest and refresh themselves before ascending the rough and rugged road which wound its way over the steep declivities of the rocky mountain sides, and often remained for several days to allow their cattle and horses to roam at large, or picket them out to graze upon the natural grasses which then grew of sufficient height to almost hide the stock from view, and was as free and open to all comers as the air that wafted its gentle breeze through the valley from the mountains, the tops of which were covered by the snow that had fallen during the winter season. The writer of this opinion was one of the sojourners who made that trip in the year 1852, and the reading of the record in this case brings to his mind vivid recollections of the joy and hope, courage and confidence, inspired in the breast of every pilgrim, of the bright future which he then thought awaited him when he reached the golden regions of the "Eldorado of the West." There were at that time a few cabins,—very few,—at remote distances apart, in the valley. The testimony in this case shows that the early settlers that came into the valley prior to 1860 or 1862, with but few exceptions, which will be hereafter noticed, did not cultivate their lands, in the sense that the term "cultivation" is generally understood. They built cabins or put up tents in which they lived, and owned stock that ranged at will. Some of them had a garden spot, or small tract of land, from 1 to 20 acres, near their houses, where they raised such vegetables as were necessary for their own domestic use, and cut the natural grass growing on their own range. The water during this period continued to flow into various sloughs, and spread over all the land at high water. There were, as a general rule, no specific appropriations made of the water. No dams were built, no ditches constructed, or other means used by them for the purpose of diverting the water from the main channel or forks of the river, except as hereinafter stated. They made no efforts to acquire any title to the land occupied by them. Some of them only located in the valley for the purpose of selling or trading their stock to the emigrants whose teams, cattle or horses, were worn out, or considered to be too jaded or exhausted to stand the hard trip of crossing the mountains. Some of them remained but a short period, and voluntarily left and abandoned the land, free to the occupancy of the next comer who concluded to settle thereon. Others traded their rights, whatever they were, for a horse or wagon, or anything of value, no matter how insignificant it might be. No conveyances were made. One party would leave; the other party would come upon the land, and stay until he got ready to move elsewhere. A

brief review of the testimony as to the manner in which these settlers made use of the water in the valley prior to 1861 will shed considerable light upon the history of the times, and tend to explain some of the contentions made by the respective parties. With knowledge of the conclusions hereinafter reached, as to all cases where the respondents have not connected themselves by title with the settlers, it is unnecessary to attempt to make any estimate of the amount of land that was irrigated prior to 1861. It would indeed be a difficult task to accomplish, especially in the light of the fact that nearly all of the testimony of the witnesses for respondents is given upon the theory that all the land, any portion of which was covered by the overflow of water at times of high freshets in the river, was irrigated land. To illustrate: C. E. Holbrook testified as follows:

"Q. In your testimony, do you call everything irrigated that naturally overflows at high water? A. Yes, sir; grass would not grow without the overflow. Q. When you testified * * * as to the amount of land irrigated, you counted all the land that was overflowed at high water as irrigated land? A. Yes; I mean by the overflow and otherwise that the land was irrigated so as to raise crops. Q. That is what you mean by counting the land that was naturally overflowed at high water, as well as the land that was irrigated by means of ditches; you estimated that there were so many acres of land irrigated on the different ranches that you have named and described? A. Yes, sir; all the land that was overflowed I considered irrigated, because the grass would not grow without it."

The testimony of D. R. Jones, upon which great reliance is placed, and from which copious extracts were made in the brief of respondents' counsel, is substantially based upon the same theory, and guessed at, to the best of his present recollection, as to the amount of land irrigated, and the quantity of water used. His testimony as to the appropriation made by Mr. Wheeler in 1860 is as follows:

"Q. How much did he farm? A. I should think 200 acres. Q. How much did he farm in 1860? A. He did not farm all of it then. Q. How much do you think he farmed then? A. Probably half of it. * * * Q. How much water did he take out in 1860, and irrigate his land with? A. There was a ditch there in 1860, and there was a large stream, of three or four hundred inches,—400 or 500 inches."

The son of Mr. Wheeler, upon the same point, testified as follows:

"Q. When did your father go to the East Fork? A. In 1859. Q. What time in that year did he come? A. In the fall. Q. Did he locate a place and build a house that year? A. Yes, sir. Q. Did he keep a station on the Aurora road at that time? A. Yes, sir. Q. What was that station called? A. The '12-Mile House.' Q. When did you first go there? A. It was in September, about the 15th, in 1860. Q. When you got to your father's place, * * * what did you find there? A. He had a small ditch, and had in about six or seven acres of land that he put in in 1860. * * * Q. What did he put in the 6 or 7 acres that he cultivated in 1860? A. Grain."

Again, Mr. Jones testified as follows:

"Q. What do you mean by 'cultivation'? You say all this land described was cultivated since 1865, etc. What do you mean? A. I mean cutting hay on it, raising grain and vegetables, etc. Q. Did they cut hay on all the land that you have talked about? A. On portions of it. Q. Do you mean by 'cultivation' that if a man fenced a large tract of land, and fed stock on it, that he cultivated the land? A. Yes; it is making use of the land."

The entire testimony of this witness is of the same general character. It covers about 250 typewritten pages.

The same theory is applied to the ditches that existed prior to 1861. In respondents' brief it is claimed that the testimony shows that:

"Before 1860 there were perhaps 50 main ditches, many of them with capacity to carry every drop of water flowing in both forks of the river between July 1 and September 11, 1889. Of Fred Dangberg's ditches alone, the Island ditch would carry 1,500 inches of water; the Mast ditch, 1,200; the Slough ditch would carry 1,500 to 2,000 inches. * * * Of the ditches in existence prior to 1860, the following may be mentioned: Singleton and others constructed a ditch in 1858, 4 feet wide, 15 inches deep, a mile or a mile and a half long."

It is true that Singleton upon his direct examination testified as stated by counsel, but upon his cross-examination it will be discovered what he meant:

"Q. You testified about taking out a ditch, and carrying it on the banks of a slough one and a half miles. Do you mean that the water ran that far, or that you dug a ditch that long? A. I didn't take out any ditch that long. It must have been the water that went that far. Q. If you testified that you took out a ditch along the banks of a slough one and a half miles long, it was wrong, and you only meant that the water went that far? A. Yes; that was wrong. Q. What you meant was that you made a cut through that high bank of the river, and that the water ran through that cut one and a half miles after it got through the cut? A. Yes; that is what I meant. Q. The water would run over the low land and spread out? A. Yes; that is where the mistake is."

From a somewhat extended examination of all the testimony in this case, it may fairly be stated that the respondents, during the years mentioned, only irrigated their lands by the natural overflow of the river, or by making cuts through the high banks of the river to let the water out when it was not bank full, and several small ditches, taking water from these cuts, and from the sloughs and other low places, so as to lead the water off to other portions of the land. From the flood of testimony upon this point, the cross-examination of Samuel Singleton, a witness introduced on behalf of the respondents, who has no interest in the present litigation, is set out at some length in the statement of facts. It is similar in character to that of the great mass of testimony relating to this point. It would not accomplish any useful purpose to pursue this matter further, because, as before intimated, the law is well settled that the respondents cannot avail themselves of the rights of these early settlers, with whom they have in no manner connected themselves by title. In *Lobdell v. Hall*, 3 Nev. 507, 522, where the defendants acquired the possession of a dam or ditch for the diversion of water from an Indian by mere verbal sale, Judge Lewis said:

"Section 55, Laws 1861, p. 18, declares that 'no estate or interest in lands other than for leases for a term not exceeding one year, or any trust or power over or concerning lands, or in any manner relating thereto, shall hereafter be created, granted, assigned, surrendered or declared, unless by act or operation of law, or by deed or conveyance in writing, subscribed by the party creating, granting, surrendering or declaring the same, or by his lawful agent thereunto authorized in writing.' This is substantially the Utah law, which prevailed in the territory of Nevada at the time of the transaction in question. That the right to the enjoyment of the dam, and to have the water flow through the ditch in question, is an interest in land, is fully supported by the following authorities: * * * The defendants do not pretend to claim as lessees; hence, there being no deed or conveyance in writing, as required by the statute, they acquired nothing from the Indian."

In *Chiatovich v. Davis*, 17 Nev. 133, 136, 28 Pac. 239, 240, the court, in considering this question, said:

"The plaintiff testified that early in the year 1876 he appropriated all of the waters of the creek. Before that time these waters had been used to irrigate plaintiff's land, but, as he has not in any wise connected himself in interest with those who first cultivated the land and appropriated the water, his own appropriation in 1876 must be treated as the inception of his right."

To the same effect, see *Salina Creek Irr. Co. v. Salina Stock Co.*, 7 Utah, 456, 27 Pac. 578; *Smith v. O'Hara*, 43 Cal. 371; *Burnham v. Freeman*, 11 Colo. 601, 606, 19 Pac. 761; *Gould, Waters*, § 234; *Black's Pom. Water Rights*, § 60; *Kin. Irr.* § 253.

With reference to the exceptions heretofore referred to, it will only be necessary to notice one. Respondents H. F. Dangberg, D. R. Jones, A. P. Squires, and Benjamin Palmer, and perhaps a few others, prior to 1860, resided upon a portion of the lands they now occupy. Palmer's land is not on the river. The others' are. Dangberg located upon his land in 1857, upon the part now known as his "home ranch." The facts concerning his right to the water are certainly as strong, and in many instances stronger, than any of the other respondents. With reference to his early acquisition of lands, the record shows that on July 30, 1857, one P. A. Jackman executed a bill of sale in favor of Charles E. Holbrook, Benjamin Mast, and H. F. Dangberg, for 320 acres of land, known as lot 1 in block 4, for the sum of \$30; that on October 30, 1858, Thomas Anderson and others conveyed by bill of sale to Dangberg and Mast 280 acres for \$100; that on May 7, 1860, Dangberg and Henry Luhman located a piece of land under the laws of the territory of Utah (number of acres not given, but, from description, judged to be in the neighborhood of 320); that on May 20, 1862, A. Dangberg conveyed to H. F. Dangberg, by bill of sale, 320 acres for \$3,000; that on July 7, 1863, James Dove and others conveyed to Dangberg, by bill of sale, 160 acres, for \$1,000. H. F. Dangberg testified as follows:

"Q. When did you first settle in Douglas county, where you now reside? A. In the year 1857. Q. Have you resided there ever since? A. Yes, sir. * * * Q. Did you assist the water in any way to spread over your land in those early times? A. Yes, sir. Q. How? A. By damming the sloughs and depressions, and by cutting the banks, and by digging ditches and leading the water over the land. Q. Did you make any cuts in the banks of the river to let the water out when the water would fall, and did you put obstructions in the river to assist the water in rising, and getting it on your land? A. Not the first year, but I did prior to 1861. I done all that prior to 1861. Q. How many acres of your land that you claim now was flooded prior to 1861? A. * * * The land I owned at that time, my home ranch, * * * was all flooded prior to 1861, with the exception of 15 or 20 acres around about the schoolhouse,—where the schoolhouse is now. I could not get the water on that at that time. * * * Q. How much land was in your home ranch at that time? A. Very near the same as now. Q. State about the number of acres. A. * * * About 1,500 acres. * * * Q. What did you do to aid the distribution of the water over your land? A. I dammed the low places and cut the high places in the banks of the river, and let the water out, and I made ditches in 1859. I took water out in two places by ditches in 1858; one place in particular."

The Coral ditch, constructed in 1858, the Island ditch and the Mast ditch, constructed in 1859, referred to by respondents' counsel as having a carrying capacity of between three and four thousand

inches of water, are all situated upon the lands then owned by Dangberg and others, and now owned by Dangberg. The Coral ditch is also known as the "Slough Ditch," and did not convey the water from the river at all, but ran from a slough in the valley, so as to spread the water out over other land. The testimony clearly shows that these three ditches were so constructed that the water therefrom could not have irrigated over 640 acres of land, or thereabouts. The record shows that the lands acquired by Dangberg by possessory or other titles prior to 1864 did not exceed 960 acres. On August 31, 1864, the respondent H. F. Dangberg, in the district court of Ormsby county, Nev., filed a verified answer in the suit of H. F. Rice et al. (Merrimac Mill Co.) v. Dangberg, in which he alleged, among other things, that:

"On the — day of —, 1857, he, this defendant, his associates, and those through and with whom he claims title, were the owners of, and as such owners were in the possession of, a tract of agricultural, grazing, and meadow land, situate on both banks of the East Fork of said river, about 20 miles above the plaintiff's said mill in Douglas county, in this territory, containing about 600 acres."

He further alleged that he—

"Now is, and ever since the — day of March, 1860, has been, the owner in his own right, and in the possession, of so much and such part of said tract of land as is now known and described by the government survey as the northeast quarter of section 36 in township 13 north, of range 19 east, containing 160 acres; also, the northwest quarter of same section."

He then claimed a sufficient amount of the water of the river to irrigate the lands mentioned in his answer. In the present case the amount of land claimed is 6,900 acres, and it is alleged in the answer that the amount of water required for the purpose of irrigating his land is 21,000 inches, under a 4-inch pressure.

Conceding to all of the respondents who have, in any manner recognized by law, connected themselves with the early settlers by any title to the land, or to the use of the water of Carson river for irrigating the same, it still follows that, if such use of the water was prior in date to the appropriations made by complainant's grantors, it would not materially interfere with the rights subsequently acquired by complainant. The respondents, having appropriated a portion of the water of the river, and diverted it by cuts in the high banks and by ditches, as before stated, only acquired the right to appropriate and use said portions of the water to the extent necessary to irrigate the amount of land they then owned. Giving to such rights the broadest scope to which any judicial sanction has ever been extended, it would not impair the rights of the complainant, who subsequently acquired a right to the then surplus water of the river in its bed or banks to an extent that would not interfere with such rights as respondents had previously acquired. When the right of the complainant attached and became fixed, the respondents could not in any manner encroach upon or interfere with it by afterwards extending and enlarging their own rights beyond their first appropriation, by the acquisition of additional land, and the construction of ditches or other means to convey additional quantities of water away from said river to any portion of their subsequently acquired lands. No rule of law is better settled, oftener applied, more rigidly enforced, or

based upon stronger principles of equity, justice, and right, in regard to the beneficial use of water, and the rights acquired by a priority of appropriation. The right of the first appropriator is fixed by his appropriation, and when others locate upon the stream, or appropriate the water, he cannot enlarge his original appropriation, or make any change in the channel, to their injury. Each subsequent locator or appropriator is entitled to have the water flow in the same manner as when he located, and may insist that the prior appropriators shall be confined to what was actually appropriated, or necessary for the purposes for which they intended to use the water. In other words, a person appropriating a water right on a stream already partly appropriated acquires a right to the surplus or residuum he appropriates; and those who acquired prior rights, whether above or below him, on the stream, can in no way change or extend their use of the water to his prejudice, but are limited to the rights enjoyed by them when he secured his. *Lobdell v. Simpson*, 2 Nev. 274; *Proctor v. Jennings*, 6 Nev. 83; *Barnes v. Sabron*, 10 Nev. 217, 244; *Ditch Co. v. Vaughn*, 11 Cal. 143, 153; *Ortman v. Dixon*, 13 Cal. 34, 38; *McKinney v. Smith*, 21 Cal. 374; *Water Co. v. Powell*, 34 Cal. 109, 118; *Edgar v. Stevenson*, 70 Cal. 286, 290, 11 Pac. 704; *Byrne v. Crafts*, 73 Cal. 641, 15 Pac. 300; *Mitchell v. Mining Co.*, 75 Cal. 464, 483, 17 Pac. 246; *Mining Co. v. Hayes*, 6 Mont. 31, 9 Pac. 581; *Rominger v. Squires*, 9 Colo. 327, 12 Pac. 213; *Salina Creek Irr. Co. v. Salina Stock Co.*, 7 Utah, 456, 27 Pac. 578; *Gould, Waters*, § 231.

Under the law of riparian proprietorship, an upper riparian proprietor is entitled to make a reasonable use of a portion of the water of a river to irrigate his riparian land, but he does not have any right to take the water away from the river to irrigate other lands, that are not riparian. *Kin. Irr.* § 284; *Gould v. Stafford*, 77 Cal. 66, 18 Pac. 879. During the years from 1860 to 1864 the raising of hay on the natural meadow lands was the principal and most profitable business carried on by the farmers in the valley. Some of the witnesses testified that during those years they sold hay to the mill men and teamsters for from \$75 to \$100 per ton, and that they sold hay to parties directly and indirectly connected with the mills as early as 1861 and 1862. It is the diversion of the water from the river to the outside, high, sagebrush lands, since 1864, in connection with the wasteful use of the water hereinbefore referred to, that has caused the shortage of water which interferes with complainant's rights. The quantity of water to irrigate the sagebrush lands is greater than would be required to irrigate the lands in the river bottom, or low lands throughout the valley. Prior to 1864 there were experiments made in the irrigation of small quantities of sagebrush land; but annually since 1864 additional quantities of such land have been taken up, and additional amounts of water appropriated for the irrigation thereof. The Virginia and Klauber ditches were among the first appropriations made for the purpose of diverting the water away from the river at low stages. The Klauber ditch was located and constructed in 1864. This fact is gleaned after a careful comparison of all the conflicting evidence in regard thereto, and a reference to the testimony affords a clear illustration of the uncertain

and unsafe recollection of many of the early settlers, whose honesty of purpose is not questioned, but whose testimony as to dates is often "away off" and "wide from the mark." It verifies the truth of what has already been said as to the unreliability of the testimony of witnesses as to the dates of events that occurred so many years ago, and for which due allowance should always be made, without any reflection upon the character of witnesses. It also conveys a slight idea of the labor involved, and time necessarily taken up by the court, to arrive at the truth, when there is a conflict of testimony. Charles E. Holbrook, a witness on behalf of the respondents, testified with reference to this ditch as follows:

"Q. Who first settled the Klauber ranch? A. It was first settled by brothers named Greenleaf in 1857. * * * Q. Was there any ditch constructed on that land in 1858? A. Not that I know of. * * * Q. What kind of a ditch was there in 1859? A. It was a large ditch in 1859. It must have been $3\frac{1}{2}$ or 4 feet in width, and $2\frac{1}{2}$ feet in depth. Q. Has that ditch been enlarged since then? A. No, sir; I don't think so."

Henry Eppstein, who was one of the owners, and had charge of the Klauber ranch from 1860 to 1867, and Henry Vansickle, who lived near it since 1855, and who owned it for many years, both testified that the Klauber ditch was built about 1864. Several other witnesses testified to the same effect. During the time the testimony was being taken the original contract for the construction of the Klauber ditch was discovered, and introduced in evidence. This contract was made and entered into January 11, 1864, and the ditch was to be excavated of the following dimensions, viz.:

"2 feet deep, $2\frac{1}{2}$ feet wide at the bottom, and $3\frac{1}{2}$ feet wide at the top, and to be 417 rods in length; * * * the party of the second part also contracting and agreeing that they will commence said work within three (3) days after this date hereof, and fully complete and finish the whole of the same by or before the first day of April next."

With reference to the irrigation of sagebrush lands, Henry Eppstein testified as follows:

"Q. When was irrigation first commenced or carried on by means of diverting water from the main stream on the Klauber ranch, and the adjoining ranch of Fred Dangberg, or any of the ranches in the valley along the Carson river, by means of water diverted from the Carson river? A. As near as I can recollect at the present time, we built dams on the river, on what we called the 'Middle Fork,' as early as, perhaps, 1861 or 1862. It was for the purpose, however, of regulating the water, in order that we should not have too much water in one place, and not enough in another. It was done for the purpose of irrigating some of the high places on the lower land, where we had a natural growth of grass, and we regulated the water, also, to keep it from the lower ponds and lower places. We did this by putting dams in the river, and by cutting the banks lower down the river, to turn the water back in the channel. The banks of the river are always a little higher than the land adjoining, but for the purpose of cultivating new land, which we termed 'sagebrush land,' that was not done until later on. We did not endeavor to irrigate sagebrush land until later on. Q. How much later on? A. As near as I can recollect, the value of the sagebrush land was not known, and there was a difference of opinion amongst ranchers as to whether anything could be raised on sagebrush land or not, and there were experiments made on a small scale in 1861, '2, '3, to cultivate sagebrush land. Q. On how large a scale were those experiments made? Would you say on two or three acres, or on a hundred acres? A. Oh, only a few acres. And it was shown that the land could be made productive, and then there was more work done,

but that was done later. Q. When was more work done to show that sagebrush land could be made productive? A. Not earlier than 1864, and to a limited extent. Q. To what extent, about, in acres? A. On small tracts of 10 or 15 acres at a time, because labor was very high and hard to get, and, as it was only a matter of experiment, they could test it with a few acres as well as with large tracts of land. Q. As early as 1862, '3, '4, how many people do you know of in the Carson valley trying these experiments to see whether sagebrush land would produce or not? A. I think the most extensive work done in that direction was done by Dangberg, * * * and there was some people above him, too. * * * Q. Do you think of Frevert? A. Yes; and Peter Lyttle and others, and Madison; but they made their improvements after that. Q. Do you say that Dangberg made his improvements later? A. No; Frevert. Q. About how much later? A. I do not think they started before the latter part of 1864, or early in 1865, in the cultivation of sagebrush land. Q. Would you say that Frevert, Dangberg, and yourself, for Klauber, made any experiments to cultivate sagebrush land earlier than 1862 or 1863? A. I do not think we made any experiments as early as 1862. We did not make such experiments on sagebrush land earlier than 1863, and then only on a few acres. Q. In 1863, how extensive were the experiments made,—about how many acres of sagebrush land were cultivated in the aggregate in the valley, or by each one? A. * * * I should judge, between 250 and 300 acres on the Klauber, Frevert, and Dangberg ranches, altogether. * * * Q. Was there any other land anywhere in the valley, except the natural grass land and meadow land, cultivated prior to 1864, than the two or three hundred acres you have mentioned? A. Not to any extent. I know there was some improvements made as low down on the river as Cradlebaugh's ranch, and they talked about digging ditches. That was all done on a small scale."

The date when the Virginia ditch was constructed cannot be as definitely ascertained as the Klauber ditch, owing to the fact that there is no written contract as to the time of its commencement. It is claimed by the respondents to have been built in 1861, while the complainant contends it was not built until the fall of 1863, or spring of 1864. The testimony, which is quoted in the statement of facts, leaves the question in doubt, and it can only be approximately determined. It is too vague, uncertain, and unsatisfactory to base any rights upon it prior to the fall of 1863, which is long subsequent in date to the appropriation made by the complainant. All ditches constructed subsequent to the time when complainant acquired its rights are subject thereto, and need not be further noticed.

11. With reference to the time when the complainant's rights were first acquired, the record shows that the Vivian Mill was built in the winter of 1859-60, was washed away in 1861, and rebuilt in 1862; that the Rock Point Mill was built in the fall of 1860, or early in 1861, and was completed and put in operation in the fall of 1861, or early in 1862; that the Merrimac Mill was constructed in the summer or fall of 1860, and the ditch completed in August, 1861; that this ditch was about 10 feet on the bottom, 12 feet on top, and 4 feet deep, with the usual slope; that it took nearly all the water power in the ditch to run the mill with all its pans; that the Brunswick Mill was completed in 1864; that the other mills were built in 1861. The first notice of the mill site and water privilege for the Mexican Mill reads as follows:

"We, the undersigned, claim this mill site and water privilege, with the banks and sufficient land to form a pond that may be so formed by the backwater caused in building a dam 20 feet in height across said river [Carson

river], and appurtenances thereunto belonging, for the purpose of driving machinery, and milling purposes.

C. P. Patterson.

"March 20, 1860.

Wm. H. Mead."

"Situate at eastern end of the cañon on Carson river; the mouth of said cañon being opposite in an easterly direction from Penrod's house, and mouth of where Clear creek empties into Carson river.

"Filed for record May 5, 1860. Carson County Records, U. T. Now in office of the secretary of state of Nevada."

The second notice reads as follows:

"River Claim.

"The undersigned claim the waters of Carson river at a point $4\frac{1}{2}$ miles above Dutch Nick's, or a sufficient amount of the waters of said river to fill a ditch 8 feet wide on the bottom, 14 feet wide at the top, and 3 feet deep. Said ditch will be built and the waters taken out on the north side of the river, and said water used and returned into said river at or near Dutch Nick's (Empire).

"Carson City, May 1st, 1861.

J. H. Atchinson & Co.

"Filed for record May 1st, 1861."

The mill was built in 1861, was destroyed by fire the same year, and immediately rebuilt. Work was commenced on the Mexican ditch in the fall of 1860, or spring of 1861, and fully completed in 1862. W. Cook, who owns land through which the Mexican ditch runs, testified that "from the summer of 1860, until the ditch was completed, in 1862, the work was prosecuted without interruption until it was finished." From the time of the completion of the several mills and ditches, up to the time of the commencement of this suit, they have, with the exception of temporary suspensions by floods in the river, occasional scarcity of ore, and lack of sufficient water in the summer or fall months, and other causes, been continuously in operation; and the complainant and its grantors have made a beneficial use of the water of the river, to the full extent of the carrying capacity of the ditches, races, etc. The water to propel the machinery for the various mills, after use, flows back into the river, and is used in the ditches and races of the other mills lower down on the river. It will thus be seen that complainant's rights to the water for the Mexican Mill were acquired as early as March, 1860, some others prior to 1861, and for all except the Brunswick prior to 1862. In determining the question of the time when a right to water by appropriation commences, the law does not restrict the appropriator to the date of his use of the water, but, applying the doctrine of relation, fixes it as of the time when he begins his dam or ditch or flume, or other appliance by means of which the appropriation is effected, provided the enterprise is prosecuted with reasonable diligence. *Mining Co. v. Carpenter*, 4 Nev. 534, 544; *Irwin v. Strait*, 18 Nev. 436, 4 Pac. 1215; *Kimball v. Gearhart*, 12 Cal. 28; *Canal Co. v. Kidd*, 37 Cal. 283, 311; *Osgood v. Mining Co.*, 56 Cal. 571, 578; *Sieber v. Frink*, 7 Colo. 149, 154, 2 Pac. 901; *Woolman v. Garringer*, 1 Mont. 535; *Kin. Irr.* §§ 160, 161; *Black's Pom. Water Rights*, § 55.

The averment in the complaint concerning the Mexican ditch, viz. "that said ditch will carry 8,640 inches of water flowing on the grade thereof, to wit, 1 foot to the mile," is not sustained by the evidence. The testimony in relation to this ditch covers a wide range, and is in many respects unsatisfactory, owing principally to the fact that the witnesses measured the ditch at different times and places, and

under different conditions and surroundings. The quantity of water appropriated is generally to be measured by the capacity of the ditch or flume at its smallest point; that is, at the point where the least water can be carried through it. *Barnes v. Sabron*, 10 Nev. 217, 244. In other words, the capacity of a ditch, making due allowance for evaporation, seepage, etc., is the amount of water that it will carry from the point of diversion to the point of use. *Water Co. v. Standart*, 97 Cal. 477, 32 Pac. 532; *Black's Pom. Water Rights*, § 86 et seq. The true test of the extent of an appropriator's rights in and to the waters of a stream, in all cases, is the actual amount that is applied, without waste, to some beneficial use within a reasonable time after he has given notice of his intention to appropriate the water. These general principles are to be kept in view in weighing the testimony as to the capacity of any of the complainant's ditches. Some of the testimony in relation thereto is set out in the statement of facts, but there are other matters proper to be noticed in connection therewith. As therein stated, the testimony of all the civil engineers is to the effect that 50 inches of water, under a 4-inch pressure, equal 1 cubic foot per second. From the record it appears that H. H. Bence, a civil engineer and surveyor, was employed by Mr. Newlands in 1889 to survey certain reservoir sites, and make estimates on the holding capacity of such reservoirs, and, in connection therewith, to ascertain the amount of water used at the Mexican Mill, without reference to this litigation. He testified that he calculated the measurements, which were approximately accurate, by the formulæ in Trautwine's former editions, and found the amount of water flowing in the flume at the mill to be 133.66 cubic feet per second, or 6,683 miners' inches, under a 4-inch pressure. Mr. Taylor, the chief witness on behalf of respondents, was asked on his cross-examination if he could estimate the quantity of water that would pass through the turbine wheel at the Mexican Mill with 28 feet of water in the penstock, when the guides of the wheel were fully opened, and the wheel working to its full capacity, making 130 revolutions to a minute. He replied that there were formulæ given in different works from which such calculation could be made. He was requested by complainant at different times to make such calculation, but declined to do so on the ground that he had not been furnished with sufficient data from which to make the calculation. The following offer was made by counsel for complainant:

"I now offer to provide a carriage to counsel and Mr. Taylor, and take them to the Mexican ditch and mill, where Mr. Taylor can make the measurements for himself, and know that they are accurate."

Counsel for respondents said:

"I consent that Mr. Taylor may go any time to make such measurements as he desires."

Counsel for complainant:

"I now offer to place the entire Mexican mill, ditch, and wheel at the disposal of defendants' engineers and counsel, so far as its inspection and survey of the same may be concerned."

For some unexplained reason, neither Mr. Taylor nor respondents' counsel ever availed themselves of this offer, which was certainly fair

upon its face, and must be accepted as having been made in good faith.

Eugene May, by occupation and profession a practical mechanic and millwright, who had been engaged at the Mexican Mill for 23 years, and is the foreman of the same, gave a full description of the Leffel double turbine 56-inch wheel used at the mill, with all the mechanism and machinery connected therewith, and verified the tables of Mr. Leffel as being correct. On this point he testified as follows:

"I would rather take his tables, if I were planning a mill or wheel or a penstock, in preference to consulting a civil engineer, to develop a certain amount of power with a given amount of water and fall. I consider his works reliable."

Mr. Taylor was recalled for further cross-examination. Hypothetical questions were propounded to him, based upon the testimony of Mr. May, given thereafter, as to the facts, and the tables of Leffel as to the calculations. Among other portions of his testimony upon this point is the following:

"Q. Examine plaintiff's Exhibit No. 20, on page 37, and the table where Leffel gives the amount of water that will pass through a 56-inch turbine wheel measured in the tail race after it has left the wheel, with 28-foot pressure in the penstock, and reduce to cubic feet per second, and inches, under a 4-inch pressure, the table giving the quantity of water and cubic feet per minute. A. That gives 129.15 cubic feet per second, or 6,457½ miners' inches, measured under a 4-inch pressure. Apparently he takes the actual discharge as being 60 per cent. of the theoretical discharge, taking the 60 per cent. as the coefficient for velocity and contraction combined. I figured that here a few moments ago, and used 60 per cent. as the only coefficient for discharge occasioned by contraction in passing through the tubes and friction, and by the retarding effect of the revolution of the wheel, and I got a discharge, instead of 129 cubic feet per second, 133 cubic feet per second. [That would be 6,650 inches, miners' measure.] Q. You figured that more water would pass through the wheel than Leffel does? A. Yes, sir; using a coefficient that he uses, it gives a difference of 4 cubic feet per second; using a coefficient that you state he uses, the difference is less than 3 per cent."

I am of opinion that in a case like this, where a certain state of facts has been testified to on behalf of the complainant, and the respondents are given a fair opportunity and afforded every facility, and requested, to visit the spot and ascertain the truth or falsity of such testimony, and they decline to go, and offer no excuse for their failure so to do, they ought to be estopped from denying the truth of the testimony. Everything is clear that can be made clear, and the court has the right to assume that respondents would have shown the testimony to be false, by actual measurements made by a reliable witness, if it could have been done. Taking the measurements of the water in the flume at the mill as above stated, we have as a result a self-evident, convincing fact, which needs not the evidence of any civil engineer, or a comparison of the scientific tables from standard works, that when a given quantity of water, flowing from the head through the ditch, is found at the lower end where it is discharged into the penstock of the mill, it is conclusive evidence that the ditch, throughout its entire length, must have had at the time the measurements were made a carrying capacity equal to the amount of water found at the place of delivery. This being true, it would be but an

idle ceremony, and waste of time, to discuss the question as to the conflict in the evidence as to the measurements made in other portions or sections of the ditch or flumes. It is, however, proper to state that after a full, careful, lengthy, and exhaustive review of all the testimony concerning the carrying capacity of the Mexican ditch, the testimony of Capt. Haynie—a portion of which is embodied in the statement of facts—is found to be substantially correct.

Just as soon as one fact is disposed of, another question is presented, upon which there is another conflict, that must be likewise solved by the court. It is zealously, earnestly, and confidently asserted by respondents' counsel that the Mexican ditch, since its construction, has been repeatedly enlarged, and that complainant is not entitled to have its rights established herein by the present carrying capacity of the ditch. Every page of the testimony is suggestive of matters that ought to be discussed, and the temptations to quote from the record become greater as we proceed; but, if the end is ever to be reached, the admonition of the court as to the necessity of only giving conclusions must be adhered to. An outline of the general testimony upon this point will alone be given. Great reliance is placed upon the testimony of G. R. Dobbs, who had charge of the workmen engaged in cleaning out and repairing the ditch and flumes in the year 1862, after a heavy flood which occurred either in January or February of that year. This flood washed away one side of the dam at the head of the ditch, and some portions of the ditch and flumes. The dam was rebuilt, and the ditch thoroughly repaired. Most of the flumes along the line of the ditch had to be replaced, but the testimony does not show that all of them were. A number of men were employed for two or three months before the entire work was fully completed. The opinion of Mr. Dobbs is to the effect that the result of this work was to materially enlarge the capacity of the ditch, because the sediment in the flume was thrown upon the lower bank, increasing its height, and in some places the sides of the ditch were widened. But he never measured the ditch before or after the repairs were made, and, at best, his testimony is only guesswork, from memory. The same witness testified that the ditch was again repaired in 1865, and at that time there was some blasting of rock on the upper side of the ditch, above Cook's ranch. At that point there were big rocks that had fallen into the ditch, and caused eddies in the water, that broke the ditch; and these rocks and other overhanging rocks were blasted out, and thrown upon the lower side of the ditch, and from this fact it is claimed the ditch was again enlarged. The truth is, in order to obtain the supply of water to the extent of the capacity of the ditch, it is necessary to clean it out every two or three years, or oftener, and for this reason it is argued that the ditch has been constantly enlarged. The testimony on behalf of the complainant is to the effect that the repairs never increased the amount of water flowing through the ditch; that the banks, projecting points at curves, and the sides of the ditch that were cut away, were only done for the purpose of making the flow more regular; when the ditch was first constructed, the grade was not even, and when the repairs were made there were some places

where the bottom of the ditch was made a few inches lower in order to make the grade more even and regular; that the flumes on the line of the ditch were never enlarged, and some remained as originally constructed. In Black's Pom. Water Rights, § 87, the author, in discussing the question as to the true capacity of a ditch, said:

"The ditch might be so imperfectly constructed, with irregular and improper grades, and with incomplete excavation, that it could not actually carry so large an amount of water as its general plan and size rendered it capable of carrying, and as its proprietor had intended to appropriate. Under these circumstances, unless the use of the ditch had continued so long a time as to show an intention of the appropriator to adopt it in its existing imperfect condition, the proprietor would be entitled to perfect his ditch by removing obstructions, improving the grades, and the like, so that it could actually carry the amount of water indicated by its general size and character, and originally intended to be appropriated; and the increase in the actual flow of water thus caused would not be an invasion of the rights of subsequent appropriators, although their rights accrued before the improvements were made."

The weight of the testimony is, when thoroughly examined in its entirety, to the effect that the carrying capacity of the ditch, as it now stands, is no greater than when originally built. The Mexican Mill, after the flood in 1862, was enlarged from 12 to 44 stamps, but it is not shown that any greater amount of water was needed to run the mill after it was enlarged than the amount appropriated by the capacity of its ditch when first constructed. Complainant, under these circumstances, was entitled to enlarge its mill within a reasonable time so as to use the whole amount of water to the capacity of its ditch, upon the same principle that an agriculturist who diverts a given quantity of water to irrigate his lands is not confined to the amount of land irrigated by him the first or second year after his appropriation. The object had in view at the time of his diversion of the water must always be considered in connection with the actual extent of his appropriation. *Barnes v. Sabron*, 10 Nev. 217, 244, and other authorities cited in applying the doctrine of relation. The working capacity of some of complainant's mills, especially of the Mexican, has been materially increased, not by any increase of water, but by cutting down the tail races and increasing the vertical fall of water on the wheels, discarding the old-fashioned wooden overshot and breast wheels, and substituting the latest improved turbine wheels and other machinery. The complainant, as well as the respondents, should be required to make an economic as well as a reasonable use of the water. If the capacity of the ditch is shown to be greater than is necessary to enable complainant to make such an economic and reasonable use, then it should be confined to the amount necessary for such use, although it is less than the capacity of its ditches. This principle applies to the mills as well as to the agricultural lands. The weight of the testimony clearly shows that the Mexican ditch has a carrying capacity of 130 cubic feet per second, equal to 6,500 inches of water, under a 4-inch pressure. It is, of course, a matter of common knowledge that persons build their ditches with a view to the quantity of water needed. Slight testimony is therefore usually sufficient to show that the full capacity of the ditch was used. *Faulkner v. Rondoni* (Cal.) 37 Pac. 883. But,

in considering all the facts, the court is not convinced that the amount actually required by an economic use to propel the machinery at the Mexican Mill exceeds 120 cubic feet of water per second, which is equal to 6,000 inches, miners' measure, under a 4-inch pressure, which amount is hereby declared to be necessary and reasonable for the purpose of enabling the complainant to successfully run its mills by water power. The rights of the complainant are not confined to the Mexican Mill or to the Mexican ditch. These properties have been selected for illustration and discussion because the greater portion of the testimony, and of the arguments of counsel, relates thereto. This is perhaps owing to the fact that these properties are situate highest up on the river. But complainant's rights to each of the seven mills, and of the ditches and races conveying water thereto, must not be overlooked. The principles involved herein apply to all, and, if either have a prior or better right to the water of the river than respondents, then, to the extent of such right, it is entitled to a decree. The rights of the Merrimac Mill were acquired prior to 1862. In the suit of Mining Co. v. Dangberg, A. N. and S. R. Elsworth testified that the Merrimac ditch was 14 feet on top, 10 feet on bottom, and 4 feet deep, with a fall of $\frac{1}{8}$ inch to the rod. Their testimony in that case was introduced in evidence in this. H. H. Bence testified in this case that a ditch of that size and dimensions, assuming the ditch to be in fair condition, would carry 6,562.8 miners' inches. In making this calculation, the witness used Kutter's tables, found in Trautwine. It will thus be seen that the Merrimac Mill was entitled to the same amount of water as the Mexican; but it is claimed that the Merrimac Mill was abandoned in 1888 or 1889, prior to the commencement of this suit, and that the complainant is not entitled to recover for any rights it had in connection with that mill prior to that time. The testimony fails to show that the property has been abandoned. It does show that it is in a state of "innocuous desuetude." The mill was partially dismantled prior to the commencement of this suit. The ditch and turbine wheel were used occasionally until some time in 1893, when the dam was washed out, and the ditch placed in a bad condition. The arrastres were cleaned up and torn out; the machinery of the mill removed. The complainant, at the time the testimony was taken, admitted that it would not rebuild until the questions concerning the water rights in this suit were settled and determined. Such nonuse of the mill and water power, not having continued for five years, cannot affect the complainant's rights to recover in this action, if it is otherwise entitled so to do. It would be entitled to recover on the Merrimac title alone, although no actual damage to that property has been shown. In *Barnes v. Sabron*, 10 Nev. 217, 247, the court said:

"The rule of law is that in cases for the diversion of water, where there is a clear violation of a right, and equitable relief is prayed for, it is not necessary to show actual damage. Every violation of a right imports damage. And this principle is applied whenever the act done is of such a nature as that, by its repetition or continuance, it may become the foundation of an adverse right."

See authorities there cited; *Mining Co. v. Dangberg*, 2 Sawy. 450, 454, Fed. Cas. No. 14,370; *Hatch v. Dwight*, 17 Mass. 289; *Webb*

v. Manufacturing Co., 3 Sumn. 189, Fed. Cas. No. 17,322, and authorities there cited; Kin. Irr. § 329.

Under the rules of riparian proprietorship, the right to the use of the water in its natural flow is not a mere easement or appurtenance, but is inseparably annexed to the soil itself. It does not depend upon appropriation, or presumed grant from long acquiescence on the part of the other riparian proprietors above and below, but exists, *jure naturæ*, as parcel of the land. It is not suspended or destroyed by mere nonuser, although it may be extinguished by the long-continued, adverse enjoyment of others. It is not affected by the use to which the water has been or may be applied. Use does not necessarily create the right, and disuse cannot destroy or suspend it. Kin. Irr. § 59; Gould, Waters, § 204; Lux v. Haggin, 69 Cal. 255, 10 Pac. 674. The right to water acquired by prior appropriation is not dependent upon the place where the water is used. A party having obtained the prior right to the use of a given quantity of water, is not restricted in such right to the use or place to which it was first applied. It is well settled that a person entitled to a given quantity of the water of a stream may take the same at any point on the stream, and may change the point of diversion at pleasure, and may also change the character of its use, if the rights of others be not affected thereby. Hobart v. Wicks, 15 Nev. 418; Kidd v. Laird, 15 Cal. 162, 180; Davis v. Gale, 32 Cal. 26; Junkans v. Bergin, 67 Cal. 267, 7 Pac. 684; Ramelli v. Irish, 96 Cal. 214, 31 Pac. 41; Coffin v. Ditch Co., 6 Colo. 444; Sieber v. Frink, 7 Colo. 148, 2 Pac. 901; Strickler v. City of Colorado Springs, 16 Colo. 62, 68, 26 Pac. 313; Woolman v. Garringer, 1 Mont. 535; Kin. Irr. §§ 233, 248; Black's Pom. Water Rights, § 69; Gould, Waters, § 237. If there was any loss of complainant's rights at the Merrimac, it might be necessary to examine the rights of the complainant in the other mills lower down on the river. They are all involved in this litigation. From a cursory examination of the testimony in relation thereto, the court is satisfied that the same results would be produced, and, as it is of opinion that complainant has lost none of its rights at the Mexican or Merrimac, it declines to enter into any of the details as to the other mills.

From this lengthy review of the facts, and enunciation of the legal principles applicable thereto, it follows that complainant is entitled to a decree against the respondents for a wrongful diversion of the water of the Carson river to its injury and damage, whether the right of riparian ownership or prior appropriation is to be applied. This result has been reached without any special discussion relative to the prior decrees in this court or in the state court, but these decrees cannot be ignored. Their effect must be determined before the court can order any decree to be entered herein. The records in the former suits brought by the complainant or its grantors against some of the same parties for the same purpose, and the decrees obtained therein, were admissible in this case as against all of the respondents who were parties in the former suits. It is claimed by respondents' counsel that the former decrees should not be treated as *res judicata*, for the reason that the issue joined in the former

suits touching appropriation was never decided; that complainant has reopened the proofs, and compelled respondents to again litigate their rights as appropriators; that since the former suits the rule of appropriation has become the law of this state; that many of the respondents' rights in this suit, and the rights of the complainant as to all its mills, except the Merrimac, are different, and were in no manner involved. Why should the respondents, who were by the former decrees adjudged to be riparian proprietors, now desire to destroy the binding force of those decrees? They certainly have as great, if not greater, rights thereunder as any rights acquired by prior appropriation would give them. Their contention in this respect was evidently based upon the erroneous theory that they were entitled to all the rights of the early settlers in the valley, without having connected themselves with such rights by any title to the land occupied by such settlers, because it is only upon that theory that they could possibly be benefited by any decision declaring the decrees to be of no binding force. It is true, as stated by counsel, that "the court is at liberty to take the facts, and apply the law as it understands it to be, and render its decision according to the rights of the parties and principles of justice." It is also true that there are certain settled principles of law and equity that this court, having due regard to the rights of both parties, as well as of its own duty, is compelled to obey. To what extent, if any, are the former decrees binding on this court? The general principle that a judgment of a court of competent jurisdiction, between the same parties and upon the same issues, is, as a plea, a bar, or, as evidence, conclusive, is too well settled to require discussion. Such a judgment is not only conclusive of the right which it establishes, but of the facts which it directly decides. Whenever a cause has been once fairly tried and finally decided by a competent tribunal, the same questions, as between the same parties, ought not to be tried over again. They should be considered as forever settled. This rule is necessary for the repose of society. It is in the interest of the public that there should be an end of litigation. It is easy to understand the beneficial results which flow from a strict observance of this principle, and to realize the injury which might arise by any relaxation of the rule. In a proper case for its application, courts of justice ought not to permit the rule to be called in question by any supposed hardship which might exist in any particular case, but should inflexibly adhere to it, regardless of consequences. *McLeod v. Lee*, 17 Nev. 110, 112, 28 Pac. 124. The decrees in the former suits, being final and unreversed, are *res judicata* of the subject-matter of the suits as then decided, between the parties thereto and their successors in interest. This is true whether the courts based their opinions and decrees upon a correct or an erroneous view, either of the law or of the facts. They are not conclusive as to matters which might have been decided therein, but only as to such matters as were in fact decided, within the issues raised by the pleadings. *Russell v. Place*, 94 U. S. 606; *Last Chance Min. Co. v. Tyler Min. Co.*, 157 U. S. 683, 687, 15 Sup. Ct. 733, and authorities there cited; 1 *Freem. Judgm.* § 249, and authorities there cited; *McDonald v. Mining Co.*,

15 Cal. 145; *Kidd v. Laird*, Id. 162, 182. In the prior suit of *Mining Co. v. Dangberg*, the court decided that the complainant was entitled to a decree against all the respondents in that suit except E. Lyttle—"Perpetually restraining them from diverting the waters of Carson river, upon their lands or elsewhere, so as to prevent the same from flowing freely to the lands and mill of plaintiff, to the extent necessary for the lawful uses and purposes of plaintiff in carrying on upon its said premises the business of reducing metalliferous ores, or other lawful business in which it may now or hereafter be engaged."

Similar decrees were entered in the other suits referred to in the statement of facts. It is claimed that under these decrees—rendered upon the riparian rights of the parties—the complainant is confined in its rights to the locus in quo of the Merrimac Mill at the time the decrees were rendered, and that, inasmuch as no water was used at that point when this suit was commenced, the former decrees ought not to be considered as *res judicata*. The decrees in question are not susceptible of such a narrow or limited construction. It will be noticed that it was not confined solely to the business of "reducing metalliferous ores," but the right to engage in any "other lawful business" is expressly mentioned. It was because its lands and mill were on the bank of the river that it became entitled to the decrees under riparian rights, and not because of the particular spot on which the mill was erected. The Merrimac Mill could have been torn down, and complainant could have built a flour mill on the opposite side of the river, or used the water power at the Mexican higher up, or at any other of its mills lower down, on the river, if it owned the land, without any loss of its original rights obtained under the prior decrees. The material parts of the decrees are found in that portion which enjoined and restrained respondents from any diversion of the water of the river to the extent necessary to enable complainant to conduct its business. To that extent the respondents were required to allow sufficient water to flow freely down the Carson river to enable complainant to run its mill by water power. In *Ditch Co. v. Heilbron*, 86 Cal. 1, 18, 26 Pac. 523, the point was made by appellant that the plaintiff was estopped by matter of record from claiming or diverting any of the waters of Cole slough, or interfering with the free flow thereof. This point was sustained by the court. Substituting Carson river for Cole slough, its application to this case is apparent. It appeared that in a prior suit, entitled "*Heilbron et al. v. Last Chance Water-Ditch Co.*," where the waters of Cole slough were involved, judgment was duly given and made, forever enjoining the Last Chance Water-Ditch Company, the defendant therein—

"From digging out, enlarging, or lowering the channel of Kings river at and immediately below the head of Cole slough, and from erecting or maintaining any dam or other obstruction in or across the channel of said Cole slough at or near its head, and from doing any act or thing which shall interfere with, or in any manner prevent, the free flow of water into or down the channel of said Cole slough."

The court, after making this quotation, said:

"This judgment has become final. Respondent insists that this judgment does not work an estoppel in this case, for the reason, as it claims, that the

trespasses then complained of and enjoined were those, and those only, at the head of Cole slough. We do not so read either the complaint or the judgment in that case. The locus in quo was a mere incident of the cause of action or the relief sought. The substantive wrong complained of was the prevention of the water from flowing into and down the channel of Cole slough, and into the head of the ditch of plaintiffs in that case. The judgment restrained, not only the acts at the place complained of, but any act which would have the effect of preventing the water from flowing into or down the channel of said Cole slough. The injunction therefore ran, not alone as to the head, but as to the entire length, of Cole slough, and in doing so it did not exceed the relief warranted by the allegations and the prayer of the complaint. The effect of the judgment in the present case is to restrain and enjoin these defendants [the plaintiffs in the former case] from interfering with such trespasses of the plaintiff herein [defendant in the former case] as are committed in violation of the former injunction, and are intended to, and do, defeat its purpose. In other words, the effect of this judgment is to enable the plaintiff to deprive the defendants of the fruits of the former judgment rendered in their favor, and still remaining in full force. The right to have the water flow, according to the course of nature, through the channels of Cole slough, from end to end, not only might have been, but, as we read it, was, within the purview of that former action, both in respect to matters of claim and defense, and was there adjudicated and determined. That determination is *res judicata* as between these parties."

What decree is complainant entitled to? If its rights were to be based solely on prior appropriation, it would be entitled to a decree as against all of the respondents who are subsequent in time to the appropriation made by it in the spring of 1860. It has not enlarged its rights since then. The same water is used over and over again, but there is no increase in quantity. All of the respondents who stand in the same situation as H. F. Dangberg and others heretofore mentioned, who connected themselves in interest with the early settlers prior to the time of the acquisition of complainant's rights, would be entitled to a decree of priority for the amount of water necessary to irrigate all the lands owned by them prior to the spring of 1860, when complainant's rights attached, but complainant would be entitled to a decree against them as to the water appropriated by them on their subsequently acquired lands. If riparian proprietorship is to prevail, then all of the respondents who are owners of riparian lands would be entitled to a reasonable use of the water in common with the complainant as a riparian proprietor. Their rights as to such lands are the same now as then. They were heard, settled, and determined in the former suits, and are binding upon them and all parties privy thereto, unless the changed conditions are such as will justify the court in departing therefrom, so as to make a new decree applicable to the present, existing situations and surroundings. The quantity of water flowing in the Carson river is dependent, not only on the amount of snow which falls upon the mountains and in the cañons from which the river draws its supply, but also upon the time of the year when it falls, and further upon the amount of rain that comes in the spring or summer season of the year. The truth is that in some years, in every month thereof, there is more than water enough to meet and supply all the demands of the farmers and of the mill owners, and that in seasons of extra drought, for a few months in such years, there is scarcely enough for either. The real controversy between the respective parties is con-

fined to a period of time ranging from July 1st to November 1st of each year, during which there is always liable to be an insufficient quantity of water flowing in the river to enable the parties to make a reasonable use thereof both for irrigating and for milling purposes at the same time. The difficulty in arriving at a proper decree is apparent. The power of regulating or controlling the amount of rain or snow is beyond the jurisdiction of courts. No decree can be framed, which is based either upon riparian rights or of appropriation, or of both, which overlooks the uncertainty of the season, or the necessities of the various litigants, so as to meet the demands of justice and of right. It would be unjust and inequitable to compel the farmers in the valley to allow the water to run down to the mills when the quantity of water was wholly insufficient, to enable the complainant to run its mills with water power. There must be a beneficial use before any protection can be invoked. No provisions should be contained in the decree which would result in depriving one party of the use of the water when the other party could make no beneficial use of it. This would amount to a destruction, instead of a protection, of the rights of the parties. In the appropriation of water, there cannot be any "dog in the manger" business by either party; to interfere with the rights of others, when no beneficial use of the water is or can be made by the party causing such interference. The same rules govern riparian rights. No riparian proprietor can dam up or withhold the use of the water of a river simply because the river is on his land, or so use it as to prevent its flowing down the channel to others having an equal right thereto, and entitled to an equal and beneficial use thereof, when such use could be made of the water except for such wrongful acts. A practical view ought to be taken of all the conditions, surroundings, and situations. The rights of all parties must be protected by the decree. The difficulty of enforcing it without the necessity of bringing independent suits should be avoided, if possible. Certainty in its terms, positiveness in its requirements, justice in its conclusions, will materially aid in the accomplishment of such a purpose. No theory is complete or practically efficient which does not recognize two distinct sources and objects of the equity jurisdiction, namely, the primary rights, estates, and interests which equity jurisprudence creates and protects, and remedies which it confers. Complainant would be compelled to resort to numerous actions in order to obtain complete redress, or be subject to numerous actions by its adversary party, unless the court of equity interferes and decides the whole matter, and gives final relief by one decree. "The fundamental principle of equity in relation to judgments is that the court shall determine and adjust the rights and liabilities concerning or connected with the subject-matter of all the parties to the suit, and shall grant the particular remedy appropriate in amount and nature to each of those entitled to any relief, and against each of those who are liable, and finally shall so frame its decree as to bar all future claims of any party before it which may arise from the subject-matter, and which are within the scope of the present adjudication." 1 Pom. Eq. Jur. § 115. These requirements of the law could readily

be complied with by this court in a suit brought for the purpose of establishing the rights of all the parties, unhampered by any former decrees. But the character of this suit, and the effect to be given to the former decrees, render it exceedingly difficult to accomplish this desired end. Reference has been made to the fact that the former decrees were difficult of enforcement. A mere repetition thereof would substantially leave the parties as we found them at the time of the commencement of this suit. If the decrees are strictly adhered to, this result would follow, with but the single exception that in this suit the court has fixed the quantity of water necessary to constitute an economic and reasonable use thereof to enable complainant to run its mills by water power. Naturally it might, and probably will, at first blush, be supposed that the court ought to take another step in the same direction, and positively fix the amount of water that would be required to make an economic and reasonable use of the water per acre for the purpose of irrigating respondents' lands; but unfortunately the character of this suit, as stated in the outset and repeated at the close of this opinion, is not such as authorizes this court to determine this important question. The former decrees in this court settled but one question, viz. the respective parties thereto were riparian proprietors, and as such were equally entitled to make a beneficial use of the water. Nothing else was determined. The court declined to pass upon any other question. The result was that, when the parties were brought before it for a violation of the decrees, the court was virtually powerless to enforce it. The decrees established the rights of the parties, but the remedy given was inadequate. The court, in its opinion, said:

"When we come to consider the terms of the decree, we find it impossible, however desirable such certainty may be, to measure out to the defendants a specific quantity of water, in cubic inches, flowing under a given pressure, as reasonable, or to designate a certain number of acres of land which a defendant may at all times reasonably irrigate, and restrict him to that quantity of water or number of acres."

This court must follow its former decrees, in so far as they were based on riparian proprietorship. It clearly appears from the testimony that the complainant, at the time of, and since, the commencement of this suit, has not been able to continuously run its mills,—all or any of them,—on account of the scarcity of ore. It has no other use for, and makes no other claim to, the water of the river, except for the purpose of propelling the machinery at its mills by water power for the reduction of metalliferous ores. On the other hand, the testimony shows that respondents, who are equally entitled, as riparian owners, to a reasonable use of the water, have, during a small portion of the dry season, been unable to use the same for irrigating purposes without practically using all the water, or at least leaving an insufficient quantity to flow down to complainant's mills. The respondents cannot be compelled to supply any given quantity of water which the elements fail to furnish. It is easy enough for the courts to say that each riparian proprietor is only entitled to use, for the purpose of irrigating his own land, that portion of the water of the stream which is in excess over the amount

thereof to which all the other proprietors are equally entitled for the purpose of making a like beneficial use of the water. This rule is sound enough and just enough, if there is water enough to go round. But what is to be done when there is no excess? If the legislature of the state fails to act, are the courts compelled to simply declare the rule, and let the parties act under their own interpretation of it? In all cases where the flow of water is varying, where the amount at certain seasons of the year falls far short of furnishing a constant, or any, excess over and above the needs of a portion of the proprietors, the rule above stated furnishes only an imperfect, impracticable, and unsafe guide. In fact, it amounts to nothing, and cannot be enforced without it is supplemented or aided by some positive legislation, or by the agreements and stipulations and good faith of the parties, or by the courts ingrafting into it an additional element for the purpose of meeting the emergencies of the different cases as they arise. A court of equity ought to have power by its decree to reach the ends of justice. In many cases where similar facts existed, the courts, in the application of riparian rules, have solved the difficulty by decreeing that, inasmuch as both parties require the full flow of the stream at certain periods of time in order to make a reasonable use of the water, their rights could be declared, preserved, and made beneficial by decreeing to the respective parties the use of the full flow of the stream during different periods of time. Why should not such a rule be followed in the present case? A decree of this character would certainly have a tendency to promote peace, protect the rights of all parties, prevent further and unnecessary litigation, and substantially reach the ends of justice, without any material injury to either of the respective parties. The endless complications that have arisen in this case, the exigencies and necessities of the parties, as well as the number of parties involved, justify this court in adopting this rule. It only remains to fix the time. This, in the nature of things, must be, to some extent, arbitrary. In view of all the facts, my conclusion is that the complainant is entitled to a decree against all of the respondents, perpetually enjoining them, and each of them, from diverting the waters of the Carson river upon their lands, or elsewhere, so as to prevent complainant from having the full and free flow of 6,000 inches of water, miners' measure, under a 4-inch pressure, for use at its mills, except from July 1st to October 1st of each year, and should be enjoined from making any other than an economic, beneficial, and reasonable use of the water, without waste, from July 1st to October 1st of each year, and be required to return the surplus of the water, after such use, back into the river, whenever the complainant can make a beneficial use of such surplus. Subject to these rights of the complainant, the respondents are entitled to a decree allowing them at all times to make an economic, beneficial, and reasonable use of the water, without any waste, and, from July 1st to October 1st, to the extent of taking all the water in the river, when, and only when, all of it is absolutely required, owing to the scarcity of water in the river, to enable them to make such use of the water in irrigating their riparian lands without waste. The decree against unnecessary and

unreasonable waste should be made strong, clear, and positive. The respondents are also entitled to a decree allowing them, and each of them, at all times, to take and use a sufficient quantity of water from the river for their household and domestic purposes, and for watering their stock. Decrees will, of course, be entered in accordance with the respective stipulations as to all parties who signed the same. In the light of these conclusions, the decree should further provide that each of the respective parties herein should pay his own costs. These suggestions as to the form, taken in connection with the views expressed in this opinion, are deemed to be sufficiently explicit to enable counsel to prepare a decree covering all points entitled to be embodied therein. Let a decree be entered in accordance therewith.

NEWMAN et al. v. UNITED STATES.

(Circuit Court, W. D. Virginia. February 10, 1897.)

1. **CONTRACTS WITH GOVERNMENT—ROAD CONSTRUCTION—ESTIMATES AND MEASUREMENTS OF ENGINEER.**

Where contractors engaged in road building for the United States have agreed by the terms of their contract that the engineer in charge shall determine the classification of the excavations, the grading of the ground, the depth and foundation of the culverts, and that he shall have general supervision, with power to accept or reject any portion of the work, such contractors are conclusively bound by the engineer's estimates, and cannot recover beyond what he has allowed them, in the absence of fraud, or of such gross mistake as would imply bad faith on his part.

2. **SAME—ESTOPPEL—RECEIPT IN FULL.**

Where contractors with the government, after the completion of their work, have received the balance due them according to the accounts of the engineer in charge, and have given a receipt in full without protest or objection, such receipt precludes them from a further recovery in a suit against the government under the act of March 3, 1887.

W. E. Craig, for plaintiffs.

A. J. Montague, U. S. Atty.

PAUL, District Judge. This is a petition filed by the plaintiffs against the United States under the provisions of the act of congress passed March 3, 1887, entitled "An act to provide for the bringing of suits against the government of the United States" (24 Stat. 505). The petitioners claim that the government owes them the sum of \$7,846.61, as an unpaid balance on a contract made on the 29th day of December, 1890, between the United States and the petitioners for the construction of a road from the city of Staunton, Va., to the National Cemetery, near that city. The contract made for said road was authorized by an act of congress passed April 9, 1890, appropriating \$11,000 for that purpose.

The petition alleges:

"That, as provided in their said contract, they entered upon the building of the said roadway according to the plans and specifications set forth in the contract, they furnishing the material, labor, and all other things necessary for the carrying out of their said contract; that the United States furnished a

superintendent to supervise the work, and to see that it was done according to contract; that this superintendent dealt so harshly and unjustly with your petitioners, depriving them by his reports of compensation for work which they did according to contract, and refusing to recommend for them compensation for extra work done, and for work done in a different way from that specified in the contract, so that before the completion of the work it broke up your petitioners financially, and they were compelled to abandon the work, and let other contractors finish it, much to their damage and injury."

The petition makes an exhibit of the statement of settlement made by the war department of the work done, and prices of the same. The petition further alleges that:

"This statement of settlement did very gross injustice to your petitioners, depriving them of nearly one-half of what was justly due them. The following is a statement of the account which should have been rendered, and by which they should have had a settlement for this work. This statement shows that the superintendent in charge of the work on the part of the United States did not properly classify the work done, he classifying hard-pan excavation as earth excavation, not allowing sufficient solid-rock and loose-rock excavation; not allowing for the construction of valley guttering when the contract called for lateral guttering; not allowing for curbing at all; not allowing sufficient macadam for foundation, both from material obtained in excavation of the road and for material brought from the outside; and for other errors, misstatements, and disallowances as shown by this statement of the account."

Then follows a statement of the account between the parties as the petitioners claim it should be.

Upon the evidence the court finds the following facts: (1) That the petitioners, William W. Newman and D. Newton Wilson, citizens of Augusta county, Virginia, as partners under the firm name of Newman & Wilson, on the 29th day of December, 1890, entered into a contract with the United States for the construction of a roadway leading from the city of Staunton, Virginia, to the National Cemetery, near that city. (2) That preliminary to the signing of said contract by the parties thereto, G. B. Dandy, deputy quartermaster general, U. S. army, advertised for proposals for the said roadway. (3) That the curbing mentioned in the advertisement for proposals for the construction of the roadway, and in the proposal of the claimants, is not embraced in the contract, and that the curbing was done independently of the contract; that the price of the curbing was fifteen cents per lineal foot; and that the same was included in the engineer's report of solid rock removed, and paid for in the amount allowed the claimants for solid rock in the final statement made by the war department. (4) That the gutter called for in the contract was a lateral gutter, and that the one constructed by claimants is what is known as a valley gutter; that the latter was adopted and constructed with the tacit, if not expressed, consent of the claimants; that there was no agreement between the engineer in charge of the work and the claimants that the price to be paid for this kind of gutter was to be other than that named in the agreement for the lateral gutter; that no authority was given by the United States to the engineer to make any other contract for the gutter than that stated in the contract, nor did the United States sanction any other; that the guttering was reported by the engineer in his final estimate at the price named in the agreement, and the same was paid to the claimants without objection on their part. (5) That the item in the claimants' demand

designated "100 cubic yards water excavation in culvert at \$1.00 per yard" was embraced in the contract in the work to be done designated under the head of "Culvert"; that the same was included in the engineer's final estimate and report, and has been paid for. (6) That the item in claimants' demand designated "Regrading hill west of cemetery, \$100," is embraced in the contract under the head of "Grading," as stated in the specifications; that it was included in the final estimate and report of the engineer, and the same has been paid for. (7) That the engineer in charge and supervising the work, as provided in the contract, was W. L. Whitmore; that it is not alleged in the petition, nor shown by the evidence, that there was any fraud or gross mistake on his part, such as would imply bad faith toward the claimants in the discharge of his duties in making measurements and classifications of the material excavated, nor that there was any failure on his part to exercise an honest judgment in the discharge of his duties. (8) That on October 31, 1890, W. L. Whitmore, the engineer in charge of the construction of the roadway, made his report to the war department that the roadway was completed, accompanying said report with a statement of the work done and the amount due thereon to the claimants, Newman & Wilson; that the amount was paid to Newman & Wilson and receipted for in full.

The following are the report and receipt, which are made part of this finding:

"Staunton, Va., National Cemetery, Staunton, Va., October 31st, 1890.

"I hereby certify that I have this day inspected the work performed and material furnished by Newman & Wilson, contractors, on the construction of roadway at the Staunton, Va., National Cemetery, as per statement attached. I further certify that the work done and material used are satisfactory, and in accordance with the requirements of the contract, and I estimate that there is due therefor to the said Newman & Wilson, contractors, the sum of nine thousand three hundred and sixty-nine and ⁵²/₁₀₀ dollars, less previous payments, work completed and accepted.

"William L. Whitmore, Civil Engineer & Inspector, Q. M. Dept."

"I certify that the above account is correct and just; that the services were rendered as stated; that they were necessary for the public service, and are borne on my report of persons, etc., for the month of October, 1891.

"G. B. Dandy, Deputy Qr. Mr. General, U. S. Army."

"Received at Washington, D. C., the 9th day of November, 1891, of Lieut. Col. Geo. H. Weeks, deputy quartermaster general, United States army, the sum of twenty-four hundred and thirty-five (2,435) dollars and fifty-seven (57) cents, in full of the above account.

"[Signed in duplicate]

Newman & Wilson."

"Depot Quartermaster General's Office,

"Washington, D. C., November 9th, 1891.

"Newman & Wilson, Box 381, Staunton, Va.—Gentlemen: Inclosed herewith please find check No. 280,616 on the assistant treasurer U. S., New York, N. Y., payable to your order, for the sum of \$2,435.57, in payment of your account for construction of roadway to National Cemetery, Staunton, Va., final payment. Please date and sign the receipt at the foot of this letter and return the same to this office at your earliest convenience.

"Very respectfully, your obedient servant,

"6,043. D. Q. M. O. 1891. Geo. H. Weeks, Depot Quartermaster."

"Nov. 11th, 1891.

"Received this day the check above mentioned.

Newman & Wilson."

Conclusions of Law.

From the foregoing findings of fact the court ascertains as conclusions of law:

1. That the plaintiffs are conclusively bound by the estimates made by the engineer, Whitmore. The petition does not charge, nor does the evidence show, any fraud or such gross mistake as would imply bad faith or failure by the engineer to exercise an honest judgment in the duties which the government and the plaintiffs in their contract agreed he should perform. The proposal for the contract, which is made part of the contract, provides:

"The work will be under the charge of a civil engineer or other agent of the United States, to be designated by the contracting officer. All materials and work will be subject to his inspection, and must be approved by him. All cases where classification is doubtful will be decided by the engineer in charge. All materials will be measured in excavation alone."

The contract for the work provides:

"Art. 3. That all work done and material furnished under this contract shall be under the direction of, and subject to inspection and rejection or acceptance by, the party of the first part, or by an engineer or other agent of the United States, to be designated by him, and all materials shall be thus inspected and accepted before being used in the work."

Article 4 of the contract provides:

"That the contractor shall keep such a force of men and teams and such supply of materials on the work as, in the judgment of the engineer in charge, will insure the completion of the work within the time allowed in the contract."

Article 6 of the contract provides:

"It is further provided that partial payments on the work performed and materials furnished under the contract may, in the discretion of the party of the first part, be made from time to time, on the certificate of the engineer or agent in charge, as the work progresses satisfactorily, provided that on all such payments twenty per centum of the estimated value of such work and materials shall be withheld until completion of the entire work as required, and acceptance of the same by the contracting officer, or by the engineer or agent specially designated by him to make the final inspection thereof."

By these provisions in the contract the plaintiffs agreed that the engineer in charge should determine the classification of the excavations, the grading of the ground, the depth and foundation of the culvert, and that he should have general supervision of the whole work, with power to accept or reject any portion or all of it according to his honest judgment.

All the materials were measured in excavation as required by the contract, and there is no evidence offered by the plaintiffs to show that these measurements were not accurately made by the engineer. His estimates of the excavations and their classification are based on actual measurements, made at the time the excavations were made, and the material removed. The plaintiffs endeavor to show by the testimony of expert civil engineers that this is not the proper and usual method of measuring and classifying excavations; that the proper method in making classifications is to take the total amount of yards excavated on the whole work, and estimate by percentage,

as nearly as may be, what proportion each classification should be given. It is on this method of measurement that the plaintiffs base their estimates filed with their petition, and for which they claim extra compensation. The estimates and classifications made by the engineer in charge were made from actual measurements, and not by percentages. He testifies that he has been engaged in civil engineering for 15 years on government, city, county, and railroad work, and that this is the method where measurements are made in excavations. The different methods of measurement—that of the engineer in charge of the work and of the civil engineers who testify in behalf of the plaintiffs—leave the testimony conflicting as to the quantity of each of the several classifications of the material moved. Any question raised by this conflict of testimony is settled by the terms of the contract under which the plaintiffs undertook to perform the work. By the terms of the contract the work was to be under the charge of an engineer or other officer designated by the government, and all materials and work were subject to his inspection, and to his acceptance or rejection. All materials were to be measured in excavation, and all cases where classification should be doubtful were to be decided by the engineer in charge. These contractors, in view of their stipulations with the government, are conclusively bound by the estimates of the engineer, and cannot recover beyond what he has allowed them, in the absence of fraud or of such gross error or mistake in judgment as would imply bad faith on the part of the engineer. *Kihlberg v. U. S.*, 97 U. S. 398; *Railroad Co. v. Price*, 138 U. S. 185, 11 Sup. Ct. 290; *Railway Co. v. Gordon*, 151 U. S. 285, 14 Sup. Ct. 343; *Railroad Co. v. March*, 114 U. S. 549, 5 Sup. Ct. 1035; *Ogden v. U. S.*, 9 C. C. A. 251, 60 Fed. 725; *Mundy v. Railroad Co.*, 14 C. C. A. 583, 67 Fed. 633; *Condon v. Railroad Co.*, 14 Grat. 302.

2. The court ascertains as a conclusion of law that by the terms of the receipt executed by the plaintiffs to the government on the 9th day of November, 1891, they are precluded from a recovery in this suit. That receipt was given after the completion of the work and its acceptance by the government on account rendered the contractors for a balance due them of \$2,435.57. This amount was received by the plaintiffs, and a receipt given in full of the account. They received the money without protest or objection, and without any claim or intimation that the same was not as much as was due them, or not in full satisfaction and payment of the amount due them as expressed in the receipt. Nor were any steps taken by the plaintiffs calling in question the correctness of the settlement until the commencement of this suit, two years after the receipt was given.

In *De Arnaud v. U. S.*, 151 U. S. 483, 14 Sup. Ct. 374, where a receipt had been given, as in this case, in full of the account, the supreme court said:

"In the absence of allegation and evidence that this receipt was given in ignorance of its purport, or in circumstances constituting duress, it must be regarded as an acquittance in bar of any further demand."

It is not alleged in the petition, nor is there any evidence, that the plaintiffs gave the receipt in full to the government in ignorance of

its purport, or under constraint of any kind. The evidence shows no just foundation for this claim against the government, and it must be disallowed. The petition of the claimants will be dismissed, with costs.

ASHUELOT NAT. BANK V. LYON COUNTY, IOWA.

(Circuit Court, N. D. Iowa, W. D. June 1, 1897.)

MUNICIPAL CORPORATIONS—VALIDITY OF BONDS—EXCESSIVE ISSUES.

Bonds of a municipal corporation, which are void because in excess of the constitutional limit of indebtedness, are not to be counted in estimating the indebtedness of the corporation, with reference to the validity of another issue of bonds, either because they were not repudiated, but were paid with the proceeds of another void issue, which were subsequently repudiated, or on the ground that the indebtedness originally paid by the proceeds of the void bonds could be enforced by the holders of such bonds by subrogation, or on the ground that a suit might have been maintained by the purchasers of the void bonds to recover back the money paid, no such suit having ever been brought.

Action on bonds and coupons issued by the county defendant under date of November 12, 1880. Tried to court.

A jury trial having been duly waived in writing, signed by the parties litigant, the evidence was submitted to the court, from which the court finds the facts to be as follows:

(1) The plaintiff corporation is a national bank created under the laws of the United States, having its principal place of business at Keene, in the state of New Hampshire.

(2) The defendant county is a municipal corporation created and organized under the laws of the state of Iowa.

(3) That the value of the taxable property within Lyon county, the defendant, for the year 1880, as shown by the state and county tax lists for that year, was the sum of \$1,066,707.

(4) That on the 12th of November, 1880, the total amount of indebtedness in any form and for any purpose which the defendant county could on that day be liable for or assume was the sum of \$53,335 in the aggregate; that being 5 per centum on the value of the taxable property of the county as shown by the last state and county tax lists then existing.

(5) That on the 12th day of November, 1880, the defendant county issued four negotiable bonds for the sum of \$500 each, and four negotiable bonds in the sum of \$100 each, all of the bonds becoming due and payable on November 12, 1890, with interest coupons attached, providing for the payment of interest semiannually at the rate of 7 per cent. per annum; that the issuance of these bonds was authorized by a resolution adopted by the board of supervisors of the defendant county adopted April 5, 1880, and when issued the bonds were duly signed by the proper officers of the county; the signature thereto being genuine, and being the signature of the chairman of the board of supervisors and of the county auditor of Lyon county, Iowa.

(6) That these bonds of November 12, 1880, aggregating the amount of \$2,400, were issued for the purpose of taking up and providing means for paying outstanding floating warrants against said county of Lyon; that the bonds were sold to the plaintiff bank for full value, and the money paid therefor by the bank was used by the county in taking up outstanding warrants of the county.

(7) That on the 12th of November, 1880, when the bonds sued on were issued, and when the same were purchased by the plaintiff bank, the defendant county was indebted as follows:

For bonds then outstanding:

Issue of June 4, 1878.....	\$ 5,200
“ “ February 19, 1879.....	1,400
“ “ June 4, 1879.....	1,400
“ “ January 8, 1880.....	600
“ “ May 12, 1880.....	11,600
“ “ June 14, 1880.....	6,800
	<hr/>
	\$27,000 00

For judgments as follows:

E. T. Kirk, July 24, 1873.....	\$2,204 23
J. H. Wagner, April 21, 1874.....	672 06
A. J. Harmon, April 21, 1874.....	381 42
Perkins Bros. Aug. 22, 1874.....	815 05
Wilson & Van Sane Co., May 5, 1875.....	3,850 34
L. J. Gage, Oct. 16, 1875.....	4,460 56
C. H. Smith, Nov. 13, 1876.....	233 00
E. T. Drake, May 14, 1878.....	462 67
Swan & Fawcett, May 14, 1878.....	603 00
A. H. Andrews & Co., May 14, 1878.....	107 45
T. O. Thompson, May 14, 1878.....	304 00
Chase & Taylor, May 14, 1878.....	479 10
	<hr/>
	15,772 88
For warrants outstanding.....	2,400 00

Total \$45,172 88

(8) That under date of July 1, 1879, Lyon county issued a series of refunding bonds in the sum of \$100,000, which are known as the "Shade Bonds" which were sold in the market, and the proceeds thereof were used to pay off in full \$55,000 of judgment bonds issued in 1872 and 1873, and \$47,300 of funding bonds previously issued, and then remaining unpaid.

(9) That the taxable value of the property in Lyon county, as shown by the proper state and county tax lists for the year 1878, was \$889,757.85, and for the year 1879 was \$915,133.28.

(10) That the series of bonds issued July 1, 1879, and known as the "Shade Bonds" largely exceeded in amount 5 per cent. upon the taxable property of Lyon county as the same was shown upon the proper state and county tax lists, when the bonds were issued, and the said issue of bonds was void, and not enforceable against the county.

(11) That this series of bonds of July 1, 1879, amounting to \$100,000, was taken up and paid from the proceeds of the sale of a series of refunding bonds issued by Lyon county under date of May 1, 1885, the series amounting to the sum of \$120,000, and the same being sold to different parties and corporations.

(12) That when this last series of bonds of May 1, 1885, was issued, the taxable value of the property situated in Lyon county, as shown by the last state and county tax lists, was the sum of \$1,558,043.00, and the issue of \$120,000 therefore largely exceeded 5 per cent. upon the total taxable value of the county, as shown by the tax lists, and the bonds were void, and not enforceable against the county.

(13) That the county of Lyon denies liability on the issue of bonds of May 1, 1885, and in 1890 the Aetna Insurance Company brought suit in this court upon coupons belonging to said issue of bonds of May 1, 1885, against Lyon county, and the county made defense thereto on the ground that the bonds in question were issued in violation of the provision of the constitution of the state of Iowa, limiting municipal indebtedness to 5 per cent. upon the taxable property of the municipality, and this court held that, the bonds being clearly in excess of the constitutional limitation, a recovery thereon could not be had at law, and the remedy, if any, could be had only in equity.

(14) That in 1896 a suit in equity was filed in this court by the Aetna Insurance Company and other parties, purchasers of the \$120,000 of bonds issued by Lyon county, under date of May 1, 1885, against the defendant county, in which the complainants seek to hold the county liable for the money received

by the county from the sale of said bonds, which suit is now pending and undetermined.

(15) That on November 12, 1880, when the bonds sued on were issued, and when they were sold to plaintiff, the valid and enforceable indebtedness of the county of Lyon did not exceed the sum of \$46,000, leaving out of computation the Shade bonds, and any liability based upon the payment to the county of the money paid therefor.

J. M. Parsons, for plaintiff.

N. T. Guernsey, A. Van Waganen, H. C. McMillan, and Simon Fish, for defendant.

SHIRAS, District Judge (after stating the facts as above). From the foregoing findings of fact it appears that the only question for determination is whether on the 12th day of November, 1880, when the bonds now sued on were issued, the defendant county was indebted in any form or for any purpose in an aggregate amount so large that, if added to the amount of the bonds then issued, it would cause the indebtedness of the county to exceed 5 per cent. of the then taxable property of the county; that being the limit fixed by the constitution of the state of Iowa upon the debt-creating power of the county. If the issuance of the bonds caused the indebtedness of the county to exceed the constitutional limit, then the bonds are void, and cannot be made the basis of a recovery against the defendant county. *Doon Tp. v. Cummins*, 142 U. S. 366, 12 Sup. Ct. 220. The facts show that on the 12th day of November, 1880, the total indebtedness which could be lawfully created by the county could not exceed the sum of \$53,335, and the question is whether the facts show that the issuance of the \$2,400 of bonds now sued on was illegal because the county was then liable to an indebtedness which reached or exceeded the legal limit, or approached it so nearly that the issuance of the bonds caused the total indebtedness to exceed the limit. According to the evidence, there was on the 12th of November, 1880, valid indebtedness existing against the county as follows: For bonds, \$27,000; on judgments, \$15,772.88; and on warrants, \$2,400; or, in the aggregate, a total of \$45,172.88. In addition to this sum, there was in existence the series of bonds issued under date of July 1, 1879, known as the "Shade Bonds," amounting to the sum of \$100,000, and the crucial point in this case is whether these bonds can be held to be a liability of the county, which must be considered in determining the amount of indebtedness existing against the county on the 12th of November, 1880.

The constitutional limitation which is relied on as defense in this case is intended to prevent the overburdening of property within the municipalities of the state by debts created by the corporate authorities, and the prohibition of the constitution extends to all forms of indebtedness, and the true inquiry in each case is whether, at the given date, there exists indebtedness in any form up to the limit for which the municipality can be held liable at law or in equity. Whatever the form of the indebtedness may be, if it can be enforced by a court of law or equity, it certainly comes within the constitutional provision; but, on the other hand, claims which cannot be thus enforced, and which are not binding upon the mu-

nicipality, do not come within the meaning of the term "indebtedness" as used in the constitution of the state. Under the facts existing in this case it is shown that when the Shade bonds were issued, in July, 1879, the series was issued in contravention of the constitutional limitation, and hence under the ruling of the supreme court in *Doon Tp. v. Cummins*, 142 U. S. 366, 12 Sup. Ct. 220, these bonds could not be enforced at law or in equity against the county, and hence it is clear the bonds, as such, did not, in fact, create a burden of indebtedness upon the property of the county. It is urged in argument that the county, however, never repudiated these bonds, but paid them, in 1885, from the proceeds realized from the sale of the series of bonds for \$120,000 dated May 1, 1885. If this last series of bonds was valid or enforceable, or, if the county had paid the Shade bonds out of money realized from the property of the taxpayers of the county, there might be equity in the contention, but the evidence shows that the Shade bonds were paid from the money realized from the sale of another series of void bonds, which the county now repudiates, and refuses to pay. Even if it be held that practically, though not directly, the Shade bonds were merged in or exchanged for an equal number of the bonds of May 1, 1885, the latter, being also void, did not create an indebtedness against the county, and the county, when sued thereon, by the holders thereof, successfully defended against them. The invalidity of the Shade bonds was not obviated by merging them, directly or indirectly, in the series of May 1, 1885, because the latter series was in itself a void issue, and none of the bonds of these two series created any valid or enforceable indebtedness against the county. It is, however, further contended that the invalidity of these two series of bonds does not necessarily destroy all remedy against the county for the indebtedness which was in law paid off by the money realized from the sale of these void bonds; that relief might be sought in forms other than by suit on the bonds, and that it may, therefore, be true that a liability exists against the county, it being further claimed that a suit in equity is now pending in this court, on behalf of the parties purchasing the series of bonds dated May 1, 1885, in which it is sought to hold the county liable for a large sum. In the case of *Louisiana v. Wood*, 102 U. S. 294, the supreme court held that where a city, having authority to borrow money, issued bonds and sold them, but the bonds were illegal and void because not properly registered, a suit to recover back the money paid for the bonds, in the nature of an action for money had and received, could be maintained. If it be assumed that the principle recognized and enforced in the case just cited is applicable to the recovery of money paid for the whole or a part of a series of bonds, which are void because in excess of the constitutional limit, strict regard must be paid to the cause of action which it is sought thus to enforce. In that class of cases it is the payment of money by one party and the receipt of it by another, upon a consideration which fails, that give rise to the implied promise or duty to repay or restore that which was received without consideration, which implied promise is the basis of the action. In the case at bar, when the Shade bonds were issued and

sold, and the proceeds were used in paying pre-existing bonded and judgment indebtedness of the county, the utmost that could be claimed on behalf of the purchasers of these void bonds would be that, having been induced to part with their money without consideration, they were entitled to recover back the money paid by them up to the constitutional limit of indebtedness. These purchasers could not be subrogated to the rights of the creditors of the county, whose debts were paid by use of the money realized from the sale of the bonds. These debts were absolutely paid, and no longer constituted claims against the county, and the bond purchasers were not entitled to be subrogated to the position held by these creditors prior to the payment of the claims due them. They did not pay the claims due these creditors, but bought the bonds of the county, paying the money to the county; and the debts paid off by use of the money were not liens or claims which could have been used to the detriment, in any sense, of the bond purchasers in case they had not bought the bonds of the county. The bond purchasers, so far as these pre-existing claims are concerned, were purely volunteers, and could not, therefore, be subrogated to the rights of the creditors whose debts were extinguished by use of the money paid to the county by the parties taking the bonds. *Insurance Co. v. Middleport*, 124 U. S. 534, 8 Sup. Ct. 625. The sole remedy, if any exists, in favor of the purchasers of the Shade bonds, was the bringing a suit at law or in equity as the situation might require, to recover back the money by them paid for the void bonds. In fact these parties did not bring such an action in any form, and their bonds were afterwards paid off by money realized from the sale of the void series of bonds dated May 1, 1885. The purchasers of this last series of bonds cannot be held entitled to subrogation to the rights of the purchasers of the Shade bonds, for the reason that they did not purchase them, and as to them they must be held to be mere volunteers within the ruling of the supreme court in *Insurance Co. v. Middleport*, just cited. If any right against the county can be successfully asserted by the purchasers of the series of \$120,000 of bonds issued in 1885, it can only be based upon the implied promise or duty arising out of the payment by them of money to the county, in the expectation of receiving valid bonds, and the failure on part of the county to deliver valid bonds. This liability, as it now exists, had no existence in any form until in 1885, and its creation in that year cannot be relied on to defeat indebtedness evidenced by bonds issued in 1880. The burden of proving the facts necessary to sustain the defense relied on in this case, to wit, that when the bonds sued on were issued and sold the indebtedness of the county was so great that the issue of the bonds carried the amount beyond the constitutional limit, is upon the defendant. The bonds themselves do not amount to a sum in excess of the limit, thereby charging the purchasers with notice of the invalidity of the series, as was the fact in *Doon Tp. v. Cummins*, supra.

To maintain the defense pleaded in this case, it must be made to appear that when the bonds sued on were issued and sold the indebtedness existing against the county equaled or exceeded the sum

of \$50,935, and, as already stated, the indebtedness of the county did not equal or approach this amount, if the Shade bonds and the money realized therefrom be excluded from the computation, and hence to maintain the defense it must be shown that an enforceable liability existed against the county by reason of the issuance of these bonds, or by reason of the receipt of the money received by the county from the sale thereof. The facts show that the bonds themselves were void, and hence created no indebtedness on part of the county. The contention on part of the defendant is that a claim might have been asserted against the county for money had and received, but this claim would also be subject to the defense that it could not be enforced without creating an indebtedness in excess of the 5 per cent. limitation, for the constitutional prohibition is operative against all forms of indebtedness, including those based on implied promises as well as those arising upon express contracts. Therefore the mere fact that the county received \$100,000 in money from the sale of the Shade bonds did not create an indebtedness against the county, in view of the constitutional prohibition.

In the equity case of *Aetna Ins. Co. v. Lyon Co.*, now pending in this court, a recovery is sought on behalf of the purchasers of the \$120,000 of bonds issued in 1885 upon the grounds that the money was paid for the bonds in reliance upon the promise of the county to give valid bonds therefor; that the bonds issued are void because in excess of the 5 per cent. limitation; that the duty rests upon the county of repaying the money received by it upon sale of the void bonds; that this duty can be enforced subject to the constitutional limitation that the county indebtedness cannot exceed 5 per cent. of the taxable valuation of the property in the county; that in ascertaining the amount for which the county can be lawfully held, the court can ascertain what sum of pre-existing valid indebtedness was paid off by the money received from the sale of the invalid bonds, and this sum will not be counted as an existing indebtedness when ascertaining the sum for which the county can be held liable. The defendant county in that case is resisting the claim thus asserted, but in this case it takes the position that in 1880 the purchasers of the Shade bonds might have asserted a similar claim, and, therefore, the amount received from the sale of the Shade bonds must be held to be an indebtedness against the county in 1880, and therefore is to be computed in determining the amount of existing indebtedness due and owing by the county when the bonds now sued on were issued and sold. The difficulty with this position is that, so far as this case is concerned, it is based upon mere possibilities and surmises. No claim of the kind has been asserted on behalf of the holders of the Shade bonds. If it had been, it cannot be known whether the claim would have been sustained, nor for what amount.

It never was asserted in any form, and therefore, in fact, no enforceable burden of indebtedness has resulted therefrom upon the property of the county. It cannot be the law that a claim which never was asserted, which cannot now be asserted, and which has cast no burden upon the property of the county, can be held to be an indebtedness within the meaning of the constitutional provision.

As shown in evidence, the Shade bonds were paid off by money realized from the sale of the \$120,000 of bonds issued in 1885, and the county has since successfully resisted the collection of these bonds on the ground that they are void, and do not constitute a valid indebtedness from the county. The facts do not make a case wherein the county had recognized the Shade bonds as valid, and had paid them off in such a mode as to thereby create a burden upon the property of the county. In such a case, it might well be that the burden thus cast upon the property of the county should be deemed an indebtedness, even though the bonds thus paid were void, and a defense thereto might have been maintained.

The purpose of the constitutional limitation is to prevent the property of the municipality from being burdened at any one time with an indebtedness exceeding 5 per cent. upon the taxable valuation thereof, and therefore that which results in fastening upon the property of the county a claim which can be enforced must be held to be an indebtedness within the meaning of the constitution, while, on the other hand, that which cannot be enforced at law or in equity against the county, and which has not been so treated or dealt with by the county, as to subject the property thereof to the burden of payment cannot be held to be indebtedness within the constitutional provision. The evidence in the case shows that the Shade bonds were invalid and void when issued in 1879, and therefore, when the bonds now sued on were issued in November, 1880, the Shade bonds, being void, created no indebtedness on part of the county, and therefore cannot be computed as an indebtedness in determining what amount the county then owed; and the fact that subsequently these void bonds were paid off by money obtained from the sale of another series of void bonds which the county has since repudiated cannot be availed of as a defense to the bonds now sued on, for the reason that such mode of payment did not create a valid indebtedness against the county, nor fasten upon the property of the county any burden or liability whatever. Under these circumstances it must be held that the county has failed to show that on November 12, 1880, when the bonds sued on were issued, it was then indebted in a sum which prohibited it incurring a further indebtedness to the amount of \$2,400, and has, therefore, failed in showing a good defense to the action. Judgment will therefore be entered for the plaintiff for the sum due upon the bonds sued on.

NEWSOM'S ADM'R V. NORFOLK & W. R. CO.

(Circuit Court, W. D. Virginia. July 22, 1896.)

MASTER AND SERVANT—PERSONAL INJURIES—RAILROAD FENCING LAWS.

The Virginia statute requiring railroad companies to fence their tracks through all inclosed lands except within the limits of cities or towns, and except where the landowner has been compensated for maintaining his own fences (Code 1887, §§ 1258, 1259), and which provides that in cases of injury to "property" on any part of the track not so inclosed the claimant need not prove negligence, etc. (section 1261), is not intended for the protection of railroad employes, and, though the death of an employé results

from an accident caused by a failure of the company to fence, a recovery cannot be had without proving negligence.

This action was trespass on the case, brought by Edward Newsom's administrator against the Norfolk & Western Railroad Company to recover damages for causing the death of the said Edward Newsom.

J. C. Wysor and Longley & Jordan, for plaintiff.

Fulkerson, Page & Hurt and Bolling & Stanley, for defendant.

PAUL, District Judge. This is an action of trespass, brought by the plaintiff to recover damages of the defendant for causing, through negligence, as the declaration alleges, the death of the plaintiff's intestate, who, at the time of his death, was an employé of the defendant railroad company. The main ground on which the plaintiff bases his right to recover damages for the death of his intestate is the failure of the defendant company to inclose its roadbed with lawful fences, as required by the provisions of section 1258 of the Code of Virginia of 1887; that by reason of such failure on the part of the defendant to fence its roadbed cattle strayed on its track, whereby one of its railroad trains was derailed, and plaintiff's intestate, an employé thereon, was killed. Section 1258 of the Code of Virginia of 1887 is as follows:

"Sec. 1258. To Enclose Roadbeds with Fences; Cattle-Guards.—Every such company shall cause to be erected along its lines and on both sides of its roadbed, through all enclosed lands or lots, lawful fences as defined in section two thousand and thirty-eight, which may be made of timber or wire, or of both, and shall keep the same in proper repair, and with which the owners of adjoining lands may connect their fences at such places as they may deem proper. In erecting such fences the company shall not obstruct any private crossing, but on each side thereof, across its roadbed, shall construct and keep in good order sufficient cattle-guards with which its fences shall be connected. Such cattle-guards may be dispensed with by consent of the owners of such private crossings, the company, in lieu of cattle-guards, erecting and keeping in good order sufficient gates."

All of the evidence for the plaintiff and for the defendant company being introduced, the defendant requests the court to give the jury the following instruction:

"The court instructs the jury that the duty imposed by the statute upon railroad companies to fence their roadbeds is a duty only to the public and to the owners of the cattle of the inclosed lots or lands through which the railroad runs; and an employé of the company, receiving a personal injury in an accident consequent upon a failure to maintain proper fences, cannot recover damages of the railroad company for such injury without showing negligence other than the failure to fence. And unless the jury shall believe from the evidence that the plaintiff in this case has shown that his intestate, Edward Newsom, was killed through some other negligent act of the defendant, its agents or servants, than the neglect to fence its roadbed at this point, they will find for the defendant, although they may believe from the evidence that the defendant was bound, under the statute, to fence its roadbed at this point, and had failed and neglected to fence the same."

The plaintiff objects to this instruction on the ground that the section quoted imposes on the railroad company, where it has failed to fence its roadbed as required by the statute, a liability for injury to an employé of the railroad company consequent upon its failure to fence its roadbed. The defendant contends that the statute makes

the railroad company liable alone for damages done to stock by reason of the failure of the railroad company to fence along its line where the same runs through inclosed lands and lots, and not to injuries to persons. These conflicting views as to the scope of the statute present the question which the court must determine. The statute in question is an innovation on the common law as to the duties of a railroad company to protect its lines against trespassing animals. "At common law, a railway company is not bound to maintain fences sufficient to keep cattle off its line." Whart. Neg. § 886. "Where there exist no statutory regulations defining the duties of railway companies in respect to fencing, they are under no obligations to make or maintain fences between their roads and the adjoining lands. They come within the common-law rule, and at common law the owner of the land is not obliged to fence against the cattle of his neighbor." *Id.*, note. "Further, as a rule of exposition, statutes are to be construed in reference to the principles of the common law; for it is not to be presumed that the legislature intended to make any innovation upon the common law further than the case absolutely required. The law rather infers that the act did not intend to make any alteration other than what is specified, and besides what has been plainly pronounced; for, if the parliament had had that design, it is naturally said, they would have expressed it." Dwar. St. p. 185. "The same rule of interpretation is adopted by our courts, federal and state; reference is had to the common law in force at the time of their passage. * * * Chancellor Kent says: 'This has been the language of courts in every age, and when we consider the constant, vehement, and exalted eulogy which the ancient sages bestowed upon the common law as the perfection of reason, and the best birthright and noblest inheritance of the subject, we cannot be surprised at the great sanction given to this rule of construction.'" *Id.*, note 7. Apart from the requirements of section 1258 of the Code of 1887, there is no obligation in Virginia upon a railroad company to fence its roadbed. The enactment of this statute had its origin in the frequent injuries done to stock where railroads ran through inclosed lands, and in the consequent litigation arising from the damage done the owners of the stock. The question whether the injury was due to the negligence of the railroad company or to that of the owners of the stock in allowing it to trespass on the railroad bed, being the source of much litigation, with no satisfactory rule of law by which the responsibility for acts of negligence could be fixed, induced the legislature to pass the fence law.

Taking this legislation as we find it in the Code of Virginia of 1887 (chapter 52), we find no provision as to injuries done to persons by reason of the failure of a railroad company to fence along its line through inclosed lands. As to injuries to property, section 1261 is clear and explicit in fixing the liability of the railroad company for negligence for its failure to fence as required by the provisions of section 1258, for it (section 1261) provides that:

"In any action or suit against a railroad company for an injury to any property on any part of its track not enclosed according to the provisions of this chapter, it shall not be necessary for the claimant to show that the injury was caused by the negligence of the company, its employés, agents, or servants."

Section 1259 provides:

"Sec. 1259. Qualification of Preceding Section.—The preceding section [section 1258], so far as it relates to fencing, shall not apply to any part of a railroad located within the corporate limits of a city or town, nor within an unincorporated town for the distance of one quarter of a mile either way from the company's depot, nor to any part of a railroad at a place where there is a cut or embankment with sides sufficiently steep to prevent the passage of stock at such place; nor shall it apply to a company which has compensated the owner for making and keeping in repair the necessary fencing, but the burden of proving such compensation shall be on the company, and no report of any commissioners shall be received as proof thereof unless it shall plainly appear on the face of the report, or from other evidence in connection therewith, that an estimate was made by such commissioners for the fencing and the expense for the same entered into and constituted a part of the damages reported and actually paid."

In this section we find that the legislature was dealing with the subject of property, and not of persons. Again, it is to be especially noted that section 1258 shall "not apply to a company which has compensated the owner for making and keeping in repair the necessary fencing." If the legislature, in section 1258, intended to provide against injuries to persons by requiring the railroad company to fence its line through inclosed lands, and to make it liable for injuries to persons by its failure to do so, it has embarrassed us with a strange inconsistency in exempting the railroad company from all liability for personal injuries arising from animals trespassing on its track if the railroad company has paid the owner of the land for keeping up his own fences, whether he keeps them up or not. The court cannot gather from this chapter the intention of the legislature to embrace within its provisions injuries to persons from a failure of a railroad company to fence its lines. But, in order to extend its provisions so as to embrace persons as well as property, the court is asked to construe this statute in the Code in connection with the original act of 1883-84 (Acts Va. 1883-84, p. 703). The title of that act embraces three subjects of legislation, viz.: "To lessen the danger of traveling on railroads, and to require them to erect depots, and to fence railroad beds." Section 1 of that act provides:

"(1) Be it enacted by the general assembly of Virginia, that in order to prevent the frequent occurrence of accidents on railroads, and the consequent destruction of life and property, and in order to lessen the danger to the traveling public and the officers and hands engaged in running the trains over the said railroads, it shall be the duty of all railroad companies chartered by the state of Virginia, and now doing business in the state, and such as may hereafter be constructed under charters already granted, or which may hereafter be granted, to establish at depots on their respective lines, not more than ten miles apart, telegraph offices, to be operated by competent persons in the employ of such railroad company, whose duty it shall be to telegraph the arrival and departure of each and every train so soon as the same shall leave the depot, to the office of the master of trains or other persons in charge of the running of the same; or if there be no such person, then to the telegraph station nearest thereto in the direction in which such train is going, and the person in charge of the running of the trains shall forthwith issue such orders or give such notification by telegraph as may be necessary to prevent any collision: provided, however, that the board of public works may grant to any such company permission to have such telegraph stations in any special case at a distance from each other greater than ten miles but not more than fifteen miles, and such stations may then be erected in accordance with such permission."

Counsel for the plaintiff contend that the preamble to this section is to be applied to the provisions of the section (1258) requiring the railroad companies to fence their roadbeds. But the court thinks the preamble is confined to section 1, in which it is found, which provides for establishing telegraph offices at depots not more than 10 miles apart, unless the board of public works grants permission for a greater distance, not exceeding 15 miles. This is the only provision in the act that has for its object the protection of passengers and employes. Section 2 of the act begins a new subject of legislation,—the protection of owners of inclosed lands from loss by reason of injuries to their stock by railroad companies running their trains through their lands,—and this section and those following it are substantially the same as in the present Code. If the legislature meant to make a railroad company responsible for injuries to persons occasioned by its failure to fence its line, it is inconceivable how, in so important a matter as the preservation of human life, it should have failed to express clearly its intention. The insertion of a word or phrase might have given the statute the effect contended for by counsel for the plaintiff. It has not chosen to make this addition, and the court is not at liberty to interpolate it by a strained and unauthorized construction.

Counsel on both sides have cited authorities, chiefly from text-books, to show the construction given by the courts of other states to the statutes of such states establishing fence laws. These, as presented here, are conflicting in their conclusions, and have been of little aid to the court. Of course, these decisions are based on the statutes of the several states. We have not before us these statutes, and are unacquainted with their provisions. Whether they require a railroad company to fence along its whole line, or only along a part of it, whether they make exceptions and reservations as contained in the Virginia statute, the court cannot say. The instruction asked by the defendant correctly states the law, and the court will give the same to the jury.

CARROLL v. PRICE et al.

(District Court, D. Alaska. April 25, 1896.)

1. PUBLIC LANDS IN ALASKA—PARAMOUNT TITLE.

The paramount title to all lands in Alaska is in the United States.

2. SAME—POSSESSORY RIGHTS THEREON.

Citizens of the United States have the right to go upon the public lands of the United States in this district, and possess, occupy, use, and improve the same. This right has been so often and so repeatedly acceded to by the general government that it has now become the settled policy of this country, and in this district the right is expressly recognized by congress in the first proviso of section 8 of the act providing a civil government for Alaska. 23 Stat. 24; Supp. Rev. St. (2d Ed.) p. 433.

3. SAME—PRIOR POSSESSION CARRIES WITH IT THE PRIOR RIGHT.

Where two persons claim adversely to each other the possession of any piece or parcel of government land, the one having the prior possession has the prior right. This rule, which universally prevails in the Western states, has also met the approval of congress in the proviso to section 12 of chapter 561, St. 1891 (26 Stat. 1100), relating to public lands in Alaska.

4. SAME—PRIOR POSSESSION A QUESTION OF FACT FOR THE JURY.

Priority of possession between two contending claimants to the same piece of government land is a question of fact for the jury, and, while no notice of location, such as is customary in case of mining claims, is necessary, still, where such location notice is made on nonmineral lands, it may be received in evidence, and considered by the jury as tending to show possession in the locator, together with any other acts indicating possession, such as actual occupation of the ground, making improvements of any nature thereon, tilling the soil, clearing the land from trees and stumps, fencing and placing structures thereon, or other acts which tend to show a bona fide intention to occupy and hold the land.

5. SAME—POSSESSORY RIGHT CAPABLE OF CONVEYANCE BY INSTRUMENT IN WRITING.

The possessory right in and to government lands, when once acquired, may be conveyed from one person to another, and instruments in writing making such conveyances are admissible in evidence, and may be considered by the jury as tending to establish this right in the last grantee.

6. SAME—ABANDONMENT.

A party having acquired possessory rights in government lands may lose or forfeit the same by removing therefrom or abandoning his claim, and in such case the land becomes restored to its original status in the public domain, and is subject to occupancy and possession by any other citizen of the United States; but, if the original occupant resumes possession before any other party has acquired possession thereof, the rights of such original occupant become thereby restored and re-established.

7. SAME—TOWN-SITE SURVEY AS A PERMANENT MONUMENT.

The official survey and plat of any town site located on government lands, and the lots and blocks thereof, are permanent landmarks, and may be considered as such by the jury for the purpose of establishing the exact locus in quo of adjoining lands outside the town site, and in this case may be so considered with reference to the piece of ground in dispute.

8. SAME—TIDE-LANDS.

Where the title to tide-lands along the shores of a state is vested in such state by virtue of its sovereignty, and tide-lands along the shores of any territory are held in trust by the general government for the future state, nevertheless the rule now is that during the territorial period the United States holds the permanent title to tide-lands, and may make grants thereof.

9. SAME—POSSESSORY RIGHTS ON TIDE-LANDS.

Where the right of navigation is not impaired, possessory rights to tide-lands here will be determined by the rules of law governing similar rights to up-lands until "future legislation by congress" concerning such up-lands, and, as to the tide-lands, until the ultimate sovereign, whether state or federal, shall otherwise provide.

10. SAME—EJECTMENT.

This court will entertain an action of ejectment for the purpose of determining the right of possession to either up-lands or tide-lands in this district between two contending parties claiming the same piece of ground. (Syllabus by the Court.)

This is an action of ejectment.

Johnson & Heid, for plaintiff.

J. F. Maloney and John Trumbull, for defendants.

DELANEY, District Judge (orally charging jury). This is an action of ejectment, brought by the plaintiff to recover possession of a piece of ground described as follows: "Beginning at the northeast corner thereof, whence an iron bolt establishing the southwest corner of lot number 1, in block number 2, of the town of Juneau, according to the official survey of said town made by the deputy United States surveyors, and approved by the trustees of said town site, bears north,

57 degrees 52 minutes east, 34 feet; thence south, 44 degrees east, 35 feet; thence south, 46 degrees west, 50 feet; thence north, 44 degrees west, 35 feet; thence north, 46 degrees east, 50 feet to place of beginning." The plaintiff alleges that these premises are a part of a tract of land abutting on lot No. 4, in block No. 1, of said town site, being 50 feet in width along said lot 4, and extending 100 feet into Gastinaux channel, an arm of the North Pacific Ocean. The tract 50 by 100 feet is therefore partly up-land and partly tide-land, and is claimed by the plaintiff by virtue of possession, occupancy, and improvement, and upon which he has erected a wharf, warehouses, and other appurtenances commonly used for shipping purposes. The defendants deny the prior possession and occupancy of the plaintiff of the ground in dispute, and claim to hold the same by virtue of prior location, possession, and occupancy. The question for you to determine from the evidence and under the instructions of the court is, which one of these parties is entitled to the piece of ground in controversy.

While the paramount title to all lands in Alaska is in the United States, congress and the general government have recognized for a great many years the right of the American citizen to go onto public lands, occupy, possess, use, and improve the same, with the view of ultimately obtaining title thereto from the general government whenever the same shall be opened to purchase, and in this district this right is expressly recognized by congress in the first proviso of section 8 of the act of May 17, 1884, providing a civil government for Alaska. 23 Stat. 24; Supp. Rev. St. (2d Ed.) p. 433. When congress enacted this law it undoubtedly had in view the condition of affairs in this country, and, in order to protect settlers upon the public lands here, incorporated into said act the proviso above mentioned, which is in the following language:

"That the Indians or other persons in said district shall not be disturbed in the possession of any lands actually in their use or occupation or now claimed by them, but the terms under which such persons may acquire title to such lands is [are] reserved for future legislation by congress."

Under this provision, all persons who are in the actual use and occupancy of tracts of public land in this district, or who had laid claim to such tracts or pieces of land at the time this law was enacted, are protected against intrusion, and their possession cannot be disturbed. This provision is a mandate to the general land office to the effect that it cannot grant title adversely to a citizen who is in actual possession or occupancy, or who has a bona fide claim to a piece or tract of public land in this district; and the court also construes this provision as a mandate to the court that it shall not disturb a citizen who is in actual possession, or who has a well-founded bona fide claim to lands in Alaska. As to up-lands, the law is well settled both by the decisions of the courts and by the acts of congress that, where two persons claim adversely to each other any piece or parcel of government land, the one having the prior possession has the prior and the better right. This rule has been very generally, if not universally, adopted by the courts in the Western states, and in this district has met the approval of congress in the proviso to section 12,

c. 561, St. 1891 (26 Stat. 1100), relating to public lands in Alaska. This act, after making provision concerning the entry of town sites, and for the location and entry of tracts of land for manufacturing and trading purposes, contains the following provision:

"Provided that in case more than one person, association or corporation shall claim the same tract of land, the person, association or corporation having the prior claim by reason of possession and continuous occupation shall be entitled to purchase the same."

So that congress, by this express enactment, recognizes the doctrine as to public lands in Alaska that a claim based upon the prior occupation and possession is the best claim, and is one which may ultimately ripen into a fee-simple title under letters patent issued to such prior claimant whenever congress shall so provide by extending the general land laws or otherwise.

Priority of possession between the parties in this case is a question of fact for you to determine from the evidence; and, while no notice of location, such as is customary in case of mining claims, is necessary, still where such location notice is made with reference to nonmineral lands it may be received in evidence, and considered by the jury, as tending to show possession in the locator or his grantees, together with any other acts indicating possession, such as actual occupation of the ground, making improvements of any nature thereon, tilling the soil, clearing the land from trees and stumps, cutting brush, grading or leveling off the ground, building a house, constructing a wharf, or an entrance or approach thereto, or erecting warehouses, together with the cost of such improvements and structures, and any other acts which usually accompany the possession and occupation of land, done by the person owning or claiming the same. These are things which you have a right to consider, on both sides of the case, for the purpose of determining this question of occupancy and possession, and a bona fide intention on the part of the claimant to hold the land. The possessory right in and to government lands, when once acquired, may be conveyed from one person to another, and instruments in writing making such conveyances are admissible in evidence, and may be considered by you as tending to establish possession. You will therefore take into consideration in this case, on behalf of the parties on either side, the location notices, the deeds of conveyance or instruments in writing transferring this possessory right from one to another, and constituting chains of title on either side,—on the part of the plaintiff from the time the location is alleged to have been made by Mike Powers, in 1881, down to the plaintiff; and on the part of the defendants from the time of the alleged location by Price, in January, 1895. A possessory right acquired in public lands may be lost by abandonment, and where a party, having once acquired this right, surrenders his claim, goes off the ground, or gives up his possession in the sense of abandoning his right, the piece of land becomes restored to its original status in the public domain, and is subject to occupation and possession by any other citizen. But if the original occupant, after such abandonment takes place, and before any other person acquires any rights thereon, goes back on the ground, reassumes possession, makes additional improvements, his right to the piece of

land becomes restored, and the tract is again segregated from the public domain to such a degree as to enable him to hold it against anybody except the United States. There is some evidence in this case tending to show that the possession and occupancy of the plaintiff and his grantors were not continuous from 1881, but, although such possession may have been interrupted, if you find that it was resumed prior to the location and occupancy claimed by the defendants, then the plaintiff has the better right.

It is disclosed by the evidence, and not controverted on either side, that an official survey and plat of the town site of Juneau has been made, and a trustee appointed as provided by law, and an application made by him for a patent to said town site, for the purpose of granting title to persons lawfully entitled thereto, to the lots comprising said town site. You have a right to consider this testimony for the purpose of aiding you in locating this piece of ground in dispute, as well as that of the piece alleged to have been taken up by Mike Powers in 1881, of which the piece of ground in controversy here is claimed to be a part. And the court charges you that such official survey and plat of the town site may be considered by you for the purpose of determining the locus of the ground in dispute. A town site, and the lots and blocks thereof, officially surveyed and platted by the United States, become permanent landmarks, and stakes and other markings indicating the boundaries thereof become permanent monuments, under such survey and plat, all of which the jury has the right to use and consider for the purpose of determining where a piece of land adjoining such town site, and outside of its exterior boundaries, is situated. And in this case you have a right to consider lot 4, in block 1, of the Juneau town site, upon which the restaurant known as the "Owl" is alleged to be situated, a landmark for the purpose of aiding you in determining where the piece of land, 50 by 100 feet, located by Powers in 1881, lies, and also where the land in dispute in this action is actually located.

With reference to tide-lands, the law in this country has been drawn by analogy from the law of England, and the doctrine there held, which, in principle, has been incorporated into the law of this country, is that the fee-simple title to land lying within the ebb and flow of the tide is in the king or queen as sovereign of the realm. Following the principle of the English law, the rule in this country upon this subject is that the title to land lying within the ebb and flow of the tide is in the state along whose shores the tide-lands lie, such title being so vested by virtue of the sovereign character of such state. Therefore, while the general government may retain its title to up-lands after a territory becomes a state, the title to all the tide-lands along the shores of a territory becomes vested in the state upon its admission into the Union, and its consequent assumption of state sovereignty. Until quite recently it has been the rule that a state is the only power that can primarily pass fee-simple title to tide-lands under our system of government. But before a state is admitted into the Union,—that is, while it is in its territorial condition,—it possesses no sovereignty whatever, and the courts have held that the general government is vested with the title to tide-lands along

the shores of any territory, in the nature of a trust for the benefit of the future state whenever such territory becomes a member of the federal Union. This rule has been modified by recent decisions of the supreme court of the United States, and the law now is that during the territorial period the general government has entire dominion and sovereignty, national and municipal, federal and state, over the territories, and may grant title and rights to lands below the high-water mark in aid of navigation and to promote commerce. *Shively v. Bowlby*, 152 U. S. 1, 14 Sup. Ct. 548; *Mann v. Land Co.*, 153 U. S. 273, 14 Sup. Ct. 820. The court therefore charges you that the United States holds paramount title to tide-lands in this territory; and, where the right of navigation is not impaired, rights of possession by citizens of the United States to such tide-lands will be determined by the same rules of law as govern similar rights on the up-lands; and this court will apply to the tide-lands the rules that American citizens may occupy, possess, use, and improve the same, subject, however, to the paramount right of free navigation; and that the prior possession will determine the prior right, until "future legislation by congress," as to up-lands, or until the ultimate sovereign, whether state or federal, having title to tide-lands, shall otherwise provide in relation thereto.

The defendants have submitted to the court some propositions of law, a portion of which I will give you.

(1) "This is an action in what is known as ejectment. The plaintiff, to recover in this action, must do so upon the strength of his own title, and not upon the weakness of the defendants' title."

(2) "The plaintiff in this action must prove to you by a preponderance of evidence, before he can recover, that he has a legal estate in the property in dispute, and a present right in the possession thereof; and by a legal estate is meant one the right of which may be enforced in a court of law."

Upon this second proposition the court further charges you that, if you find from the evidence, under the law as given you by the court, that the plaintiff by himself in person, or through his grantors, has the prior occupation and possession of the ground in dispute in this action, then he has the prior right thereto, and such right being one which may ultimately ripen into a fee-simple title, constitutes a legal estate, the right to which will be enforced and maintained in this court by an action in ejectment.

(3) "The plaintiff alleges in his complaint that the premises he claims is the identical piece or parcel of land upon which now stands erected and built the new wharf belonging to the plaintiff, and that he is entitled to the possession thereof. The plaintiff is bound by the allegations in his complaint, and, unless you find from the evidence that the defendants are in possession of the identical piece or parcel of land upon which now stands the plaintiff's wharf, your verdict must be for the defendants."

In addition to this third proposition as submitted the court charges you that, if you find from the evidence that the plaintiff, by himself or his grantors, has the prior possession or occupancy of the piece of land 50 by 100 feet claimed to have been located in 1881 by Powers

and Starr, or either of them, and that the piece of land claimed by the defendants, upon which the building known as the "Horse Shoe" now stands, is a part and parcel of the ground so located, then the plaintiff has the right of possession to the whole of the ground so located, including the piece in dispute.

These propositions cover all the law raised in this case under the evidence presented. Of course, gentlemen, the court expects you to determine this case according to the law and the evidence, and you will not be governed by any partiality towards either the plaintiff or the defendant. The simple question for you to determine from all the evidence presented in the case is, which one of these parties has the prior possession and occupancy of the piece of ground described in the complaint. If you find from the evidence that the plaintiff and his grantors have been in the continuous occupancy and possession of the tract located by Powers in 1881, and that the piece of ground in dispute is a part of said tract, or if you find from the evidence that in 1894, or prior to the location made by Price, and the erection by him of the Horse Shoe Building, the plaintiff had gone on to this Powers tract, while it was unoccupied and unpossessed public land, and took possession of it, including the ground in dispute, improved it, built a wharf, warehouses, and other structures thereon, costing, as he testifies, about \$30,000, and was in the possession and occupancy thereof at the time Price filed his location notice and built the structure known as the "Horse Shoe," then the plaintiff is entitled to the ground, and you should so find in your verdict. On the other hand, if you find that the plaintiff did not have such possession, or that the ground was unoccupied, unpossessed, and unimproved public land when Price took possession of it, in 1895, then he had the right to go on, locate and occupy it, and the defendants, as his grantees, are entitled to your verdict.

Verdict for the plaintiff.

WILCOX v. NEW YORK, N. H. & H. R. CO.

(Circuit Court, S. D. New York. June 15, 1897.)

NEW TRIAL—SUFFICIENCY OF EVIDENCE.

When one person might think one way and another another upon evidence, it cannot be said that a jury were influenced by any wrong motives in finding either way upon it.

This was an action by Lucina H. Wilcox, administratrix, against the New York, New Haven & Hartford Railroad Company to recover for the alleged negligent killing of her husband. A verdict was returned for plaintiff, and the defendant has moved for a new trial.

W. L. Snyder, for plaintiff.

Henry W. Taft, for defendant.

WHEELER, District Judge. At Mamaronec, on the main line of the defendant's road, where there are four tracks straight for about two miles, with a highway bridge over them a little less than a mile west, the station where tickets are sold and baggage is checked is

on the north side of the tracks, and there is a small waiting room with a platform on the south side of the tracks, from which passengers take trains going east, and there is a fence between the south track and the one next to it, which extends about 70 feet east of the waiting room. The plaintiff and her husband, the intestate, came to the waiting room to take a train east, a little before train time. He started to go along the track, and around the east end of the fence to the station on the north side for tickets and checks. A fast train came along and struck and killed him when he was within about 15 feet of the end of the fence.

After a verdict for the plaintiff, the defendant has moved for a new trial on account of the finding of the jury upon the evidence as to contributory negligence, because the great weight of the evidence is said to have been, on that question, on the side of the defendant. There is no question but that it is within the power, and may be within the duty, of a court to set aside a verdict when it appears to have been found from passion or prejudice, and not upon a fair consideration of the evidence, although there may have been sufficient evidence on each side to require it to be submitted to the jury. The claim here is that, although there was evidence on both sides of this question, the weight of evidence was so great on the defendant's side as to show that the verdict was not fairly reached upon consideration of the whole. The evidence from the plaintiff herself showed that she and her husband, after looking in the waiting room to see if they could get tickets, went to the tracks, and looked up and down, and saw no train either way, and that he started along the track towards the end of the fence; and from others that immediately afterwards a train from the west, coming at the rate of 65 miles an hour, rushed by, and struck him. This evidence as to looking was contradicted by one witness on the part of the defendant, but was confirmed in part by another. On account of her interest, the defendant claims that the balance of direct evidence was largely in its favor as to whether they so looked; and that as the track was straight, and in sight, so far to the westward, if they had looked, they would have seen the train. The great speed of the train would bring it from beyond sight to where they were within less than two minutes, and they might have looked before he started, and the train not have been in sight at all, or have been so far away as not to be noticed by them; and upon the question as to whether they looked or not, the balance of the proof by witnesses would seem to be quite as much in favor of their looking as not.

The defendant also insists that the intestate could and should have gone along the south side of the track to opposite the end of the fence, and then have crossed over; and that when he heard the train he should have gone off on the south side, and been out of its way. The evidence shows that there was no notice to passengers to take any particular way around the end of the fence; that the surface of the roadbed at the edge of the stone ballast of the road on the south side towards opposite the end of the fence was narrow; and that people usually went along the track around the end of the fence, as he started to go, instead of going that way. Under all the

circumstances, it seems to have been a fair question for the jury whether the intestate was in fault in taking the course he did after looking out, as they must have found he did, for the train; and also whether, under the circumstances, when he saw the train coming directly towards him, as he could judge of its speed in that position, and without time to reflect, he should try to go around the end of the fence, rather than off at the side. All these circumstances were to be taken together, and upon all of them the jury had good grounds for deciding either way, as the evidence should have weight with them, whether he was in fault or not. When one person might think one way and another another, upon evidence, it cannot be said that a jury were influenced by any wrong motives in finding either way upon it. As this is the only question made upon this motion for a new trial, this review of the evidence and of circumstances fails to lead to any just conclusion that the verdict was not fairly reached. **Motion overruled.**

HOLMES et al. v. GRABEEL.

(Circuit Court, W. D. Virginia. May 21, 1896.)

EJECTMENT—PURCHASE PENDENTE LITE—AMENDMENT OF DECLARATION.

The filing of an amended declaration in ejectment, wherein the amendment consists in separating plaintiffs, who were before joint plaintiffs, and making some of them joint plaintiffs and some of them separate plaintiffs in the several counts of the amended declaration, as permitted by the Virginia Code (section 2731), is not the commencement of a new cause of action, so as to require service of new process on the defendants. And hence a purchaser of the lands from a defendant originally served pending the suit, and prior to the amendment, is bound by the judgment subsequently rendered.

This was an action of ejectment by Seth C. Holmes and others against Josephus Grabeel. The case was heard upon defendant's objection to the admission in evidence of the record in a previous action entitled *Holmes v. Fulkerson* and others.

C. F. Trigg, B. H. Sewell, White & Penn, and Bullitt & Kelly, for plaintiffs.

A. L. Pridemore, for defendant.

PAUL, District Judge. In this case, the plaintiffs having introduced evidence to trace their title to the land in controversy, beginning with a patent issued to Samuel Young by the commonwealth of Virginia, dated on the 7th day of May, 1787, through succeeding conveyances, devises, and inheritances, to the plaintiffs, the defendant introduced evidence to show title to the said lands by adversary possession. Of the lands in controversy, the defendant claims to have purchased a tract of ——— acres from one Christly Brunk in the year 1873. In rebuttal, the plaintiffs offer in evidence a transcript of the record in an action of ejectment in which Seth C. Holmes and others were plaintiffs and W. W. Fulkerson, the said Christly Brunk, and others were defendants. The said action was tried and determined in the United States circuit court for this district at Abingdon on the 30th day of October, 1880, and a verdict and judgment

rendered for the plaintiffs. Counsel for the plaintiffs state that they offer this record for the purpose of proving that title to that parcel of the lands in controversy in this action which the defendant claims to have derived by purchase from Christly Brunk was recovered by the plaintiffs and their predecessors in said action of Holmes against Fulkerson and others. The defendant objects to the introduction of this record on the ground that the defendant in this action, Josephus Grabeel, was not a party to that action and cannot be bound by the record; but the plaintiffs claim that his vendor, Christly Brunk, was a party to the said action, and that if the defendant, Josephus Grabeel, bought the land of Christly Brunk in 1873, he was a pendente lite purchaser, and took no title to the land which he claims to have bought of Christly Brunk, as the said action of ejectment of Holmes et al. against Fulkerson, Brunk et al. was commenced in the year 1871. The defendant claims that the record shows that the judgment of the court in the action of ejectment of Holmes against Fulkerson, Brunk et al. was entered on an amended declaration filed on the 28th day of October, 1876, and that the defendant Grabeel is not bound by that record, inasmuch as the original declaration was filed in 1871, and he purchased part of the land in controversy from Brunk in 1873. This contention is based by counsel for the defendant upon the ground that the amended declaration of October 28, 1876, was the commencement of a new action, and that as the defendant became the purchaser after the commencement of the action in 1871, he, in order to be bound by the verdict of the jury and the judgment of the court of the 30th day of October, 1876, should have been made a party defendant to that action, and served with a notice of the filing of the amended declaration. The court thinks an examination of the provisions of the Code of Virginia regulating actions of ejectment, and of the steps taken, as shown by the record, in the action of Holmes et al. against Fulkerson, Brunk et al., will place the question under discussion in a satisfactory light. Section 2727 of the Code of Virginia of 1887, under the caption of "How Action Commenced," provides that "the action shall be commenced by the service of a declaration, in which the name of the real claimant shall be inserted as plaintiff, and all the provisions of law concerning a lessor shall apply to such plaintiff." Section 2728 provides, "What shall be Stated in the Declaration." Section 2729 provides, "How Premises Described." Section 2730 provides, "Plaintiff to State How he Claims." Section 2731 provides that "the declaration may contain several counts, and several parties may be named as plaintiffs jointly in one count and separately in others." Section 2732, under the caption of "Notice to Defendant; Service Thereof," provides as follows:

"To such declaration there shall be subjoined a notice, in writing, by the plaintiff or his attorney, addressed to the defendant, and notifying him that the said declaration will be filed on some specified rule day in the clerk's office of the court in which the suit is to be prosecuted, or in court on some day named in the then next term of said court. Such declaration and notice shall be served in the same manner as other notices."

Section 2733 provides as follows:

"When the declaration is filed with the proof of the service of notice thereof as aforesaid, the proceedings thereon shall conform to the provisions of sec-

tion thirty-two hundred and eighty-four, so far as they relate to actions at law."

The section (3284) referred to in the last-named section is as follows:

"Sec. 3284. * * * If a defendant, who appears, fail to plead, answer, or demur to the declaration or bill, a rule may be given him to plead. If he fail to appear at the rule day at which the process against him is returned executed, or, when it is returnable to a term, at the first rule day after it is so returned, the plaintiff, if he has filed his declaration or bill, may have a conditional judgment or decree nisi as to such defendant. No service of such decree nisi or conditional judgment shall be necessary. But at the next rule day after the same is entered, if the defendant continue in default, or at the expiration of any rule upon him with which he fails to comply, if the case be in equity, the bill shall be entered as taken for confessed as to him, if it be at law, judgment shall be entered against him, with an order for the damages to be inquired into, when such inquiry is proper."

According to these provisions of the Code, we see that in an action of ejectment, after the declaration has been properly served and returned to the clerk's office, the case is, as to all subsequent proceedings in the action, treated as any other action at law. There is no more familiar rule of practice known in the courts of Virginia than that by leave of the court a declaration may be amended at any time prior to the trial, provided the amendment is not such as to state a new cause of action, or make new parties defendants. An examination of the record offered in evidence shows that the amendments made to the declaration of October 28, 1876, were made under section 2731 of the Code, which provides that the declaration may contain several counts, and several parties may be joined as plaintiffs jointly in one count, and separately in others. The amendment consisted in separating the plaintiffs who were joint plaintiffs in the original declaration, and making some of them joint plaintiffs and some of them separate plaintiffs in the several counts of the amended declaration. The record shows that the plaintiffs were given leave at various times during the pendency of the action for several years to amend the declaration, such as making new parties plaintiffs by reason of the death of some of the original plaintiffs, and that no new process was required on account of such amendments. The record further shows that the amended declaration was filed by consent of the defendants, and that they pleaded to the same. The record, under date of October 28, 1876, has this entry:

"This day came the parties, by their attorneys, and by consent the continuances entered in this cause on Tuesday last are set aside, and by like consent leave is given the plaintiffs to file an amended declaration in this cause, and, the said amended declaration being filed, the defendants pleaded not guilty, to which the plaintiffs replied generally; and, issue being joined thereon, this cause was continued."

It is the opinion of the court that as an action of ejectment, after the declaration is duly filed and returned to the clerk's office, takes the same course as any other action at law, and that, as a rule of practice in the courts of Virginia, no new process is necessary when leave is given to amend the declaration, unless new parties be made defendants, or the declaration is so amended as to make a new cause of action, that none was necessary when the declaration was amended in the case of which the record is offered in evidence; that Christly

Brunk was a defendant named in the original declaration, and that he continued a defendant through all the proceedings in that action, and was bound by the verdict of the jury and the judgment of the court in its final determination, and that the record offered by the plaintiffs is admissible in evidence to prove that the land claimed by the defendant, Grabeel, was recovered of Christly Brunk in the action of Holmes et al. against Fulkerson, Brunk et al.; and that the present plaintiffs are the owners of that title.

PENNSYLVANIA R. CO. v. LA RUE.

(Circuit Court of Appeals, Third Circuit. June 4, 1897.)

No. 7, March Term, 1897.

MASTER AND SERVANT—NEGLIGENCE—SAFE APPLIANCES—LUMBER CARS.

A railroad company transporting lumber on low-sided gondola cars owes to its employes a personal duty to provide such cars with strong and safe side standards; and, if it delegates this duty to an employe, it is liable for his negligence, resulting in injury to another employe, though it furnished him with proper standards.

Dallas, Circuit Judge, dissenting.

In Error to the Circuit Court of the United States for the District of New Jersey.

This was an action at law by Augustus H. La Rue against the Pennsylvania Railroad Company to recover damages for personal injuries. At the trial the defendant requested the court to direct a verdict in its favor, and also requested certain instructions, which were denied. The jury returned a verdict for plaintiff, and judgment was entered accordingly. The defendant then brought the case to this court on writ of error.

Alan H. Strong, for plaintiff in error.

J. Lefferts Conrad, for defendant in error.

Before ACHESON and DALLAS, Circuit Judges, and BUFFINGTON, District Judge.

ACHESON, Circuit Judge. A careful examination of this record has convinced us that the refusal of the court below to direct a verdict for the defendant on the grounds urged in the first and fourth points presented in the brief of the plaintiff in error was right. There was, we think, abundant competent evidence to show that the accident here in question was occasioned by the car which was afterwards seen at the Barrowpit siding, and that that was the same car mentioned by the Harrisburg witnesses. We are also of the opinion that there was sufficient evidence from which the jury might well conclude that the injury which the plaintiff sustained was caused by negligence in the failure to substitute an oak standard for the hemlock standard, the breaking of which brought about the disaster. There was here no such inference to be drawn from the evidence, as matter of law, as would have justified the court in taking the case from the jury. *Railway Co. v. Cox*, 145 U. S. 593, 606, 12

Sup. Ct. 905; Railroad Co. v. Mackey, 157 U. S. 72, 83, 15 Sup. Ct. 491.

The following stated facts, we think, are fairly deducible from the evidence: On the evening of October 5, 1895, after dark, Augustus H. La Rue, the plaintiff below, then a fireman in the employ of the defendant, the Pennsylvania Railroad Company, while in discharge of his duty upon a locomotive engine of the defendant running westwardly, near Metuchen, N. J., and when in the act of shoveling coal into the fire box, was struck on the head and seriously injured, and at the same time part of the cab of the engine was carried away. At the time of the accident a freight train of the defendant was running eastwardly upon the track next to the track upon which the plaintiff's train was running. There was in the freight train a low-sided gondola car, loaded with lumber (flooring boards), which, in consequence of the breaking of one of the uprights or standards with which the sides of the car were equipped for holding the lumber in place, became loosened so as to project over and beyond the side of the car; and the projecting lumber raked the side of the cab of the plaintiff's engine, and struck the plaintiff. The standard that broke and caused the accident was a defective hemlock standard at the forward end of the lumber car on the side next to the plaintiff's engine. This car had been loaded at Williamsport, Pa., and was bound for Jersey City via Harrisburg. When the car reached Harrisburg a hemlock standard on the forward end of the car was found to be broken, and in consequence the load had shifted out of place, and the lumber was projecting over the side of the car. The defendant's general car inspector at that point sent the car into the defendant's repair yard, where there was a supply of oak standards for the equipment of lumber cars. All the standards on this particular car when it reached Harrisburg were of hemlock. The defendant's foreman of car repairs (Charles Moyer) took out the broken hemlock standard, and replaced it with an oak standard, and he substituted an oak standard for the other forward hemlock one. He also took out several other hemlock standards, substituting therefor oak standards. At the other extreme end of the car,—which had been the rear end on the trip from Williamsport,—he let the hemlock standards remain. In explaining what he did, Moyer testified that when such a loaded lumber car is under way the principal strain comes on the forward end. Either when this car was put back into the train at Harrisburg, or afterwards, and before the accident, the position of the car in the train was reversed, so that the two end hemlock standards were subjected to the principal strain. This reversal of the car in the course of transportation, whereby the weaker end became subject to the greater strain, was a thing that might very readily occur, and ought to have been foreseen. At Harrisburg, before the car was taken out of the repair yard, the projecting lumber was properly replaced in the car. The defendant requested the court to charge the jury thus:

"(1) If the plaintiff was injured by the improper equipment of the car spoken of by Moyer, owing to his not having replaced all of the hemlock stakes, and if he had been furnished with, and then had, proper stakes for that purpose, the defendant is not responsible therefor."

The court declined so to charge the jury, and, to the contrary, charged that, if Moyer was negligent in that matter, the defendant was answerable for his negligence. We are now to determine whether the refusal of the court to affirm the above proposition, and the instruction thus given to the jury, were correct. Now, undoubtedly, it is authoritatively settled by decisions of the supreme court of the United States that, as a general rule, those entering into the service of a common master become thereby engaged in a common service, and are fellow servants, and that the common master is not liable for the negligence of one of his servants which has resulted in an injury to a fellow servant. *Railroad Co. v. Baugh*, 149 U. S. 368, 13 Sup. Ct. 914; *Railroad Co. v. Hambly*, 154 U. S. 349, 14 Sup. Ct. 983; *Railroad Co. v. Peterson*, 162 U. S. 346, 16 Sup. Ct. 843. But it is the equally well established doctrine of that court that it is the personal duty of the master to provide his servant with a reasonably safe place to work in, and to furnish reasonably safe tools, machinery, and appliances for the security of the servant while in the performance of his appointed work. *Hough v. Railway Co.*, 100 U. S. 213. Thus, in *Railroad Co. v. Baugh*, 149 U. S. 386, 13 Sup. Ct. 921, the court said:

"A master employing a servant impliedly engages with him that the place in which he is to work, and the tools or machinery with which he is to work or by which he is to be surrounded, shall be reasonably safe. * * * He has a right to look to the master for the discharge of that duty, and if the master, instead of discharging it himself, sees fit to have it attended to by others, that does not change the measure of the obligation to the employé, or the latter's right to insist that reasonable precaution shall be taken to insure safety in these respects."

So, also, in *Railroad Co. v. Peterson*, 162 U. S. 353, 16 Sup. Ct. 845, the court, speaking of the positive duties which the master owes to the servant, declared:

"He owes the duty to provide such servant with a reasonably safe place to work in, having reference to the character of the employment in which the servant is engaged. He also owes the duty of providing reasonably safe tools, appliances, and machinery for the accomplishment of the work necessary to be done. * * * If the master be neglectful in any of these matters, it is a neglect of a duty which he personally owes to his employé; and, if the employé suffer damage on account thereof, the master is liable. If, instead of personally performing these obligations, the master engage another to do them for him, he is liable for the neglect of that other, which in such case is not the neglect of a fellow servant, no matter what his position as to other matters, but is the neglect of the master to do those things which it is the duty of the master to perform as such."

Which of the two above-stated principles is controlling here? Are we to apply to the facts of the plaintiff's case the rule of nonliability of the master for the negligence of a co-employé, or the rule of the master's responsibility growing out of a positive duty, the nonfulfillment of which cannot be excused by his delegation of its performance to another? It will be perceived that the above-quoted proposition submitted by the defendant assumed the standards to be part of the "equipment" of the car. The court below in its charge designated them as "appliances," and submitted to the jury, as decisive

of the controversy, the question whether there was any negligent failure to equip the car with reasonably safe standards for the secure conveyance of its load of lumber. Herein we think the court was right. In the case of a low-sided gondola car employed in the transportation of lumber, side standards to keep the load in place, whether such standards are for constant use, and permanently attached to the car by chains, or are unattached and intended for use on a single occasion, are appliances necessary for the proper equipment of the car, and as essential to the safe transportation of the load as is a proper car body. These side standards, to all intents and purposes, are part of the car. Such views were expressed by the court of appeals of the state of New York in the case of *Bushby v. Railroad Co.*, 107 N. Y. 374, 14 N. E. 407. There a brakeman on a lumber car by the breaking of a defective stake was thrown with the lumber from the car and was injured, and it was held that the stakes were necessary appliances forming part of the car, and that the railroad company was chargeable with negligence in failing to exercise due care that suitable and proper ones were furnished, even although, in accordance with its practice, the stakes had been supplied by the shipper of the lumber to whom the car had been delivered for the transportation of lumber. That ruling was not modified nor its force abated by the later decisions of the same court in *Byrnes v. Railroad Co.*, 113 N. Y. 251, 21 N. E. 50, and *Ford v. Railway Co.*, 117 N. Y. 638, 22 N. E. 946. In each of the last-cited cases the fault was not at all in the character of the car or its appliances, but wholly in the negligent loading of the car by the railroad company's employes. In the present case the negligence which caused the mischief was not the improper or insecure loading of the car, for in this regard there was no fault. Nor was this a case of the negligent use by the defendant's employes of safe appliances. The ground of complaint here is that the defendant failed in the positive duty it owed to the plaintiff to equip the car with reasonably safe appliances for the service in which it was employed. It is no answer to the complaint of the plaintiff, who has suffered a grievous injury from defective appliances, to say that the defendant had provided at its repair yard proper standards. Its whole duty to the plaintiff was not fulfilled, short of the actual proper equipment of the car. The negligence of the person to whom the defendant delegated the performance of this duty was the defendant's negligence. We discover no error in the rulings of the court below, and therefore the judgment is affirmed.

DALLAS, Circuit Judge (dissenting). I dissent from the judgment in this case, because, in my opinion, the rule which should be applied in its decision is that of nonliability of the master for the negligence of a fellow servant, and not that which holds the master responsible for defects in appliances furnished by him to the servant. The railroad company provided a proper car for the transportation of the lumber. It required no repair, and was not repaired. Standards were needful, and fit ones were supplied. The failure to use these appliances to the extent to which they should have been used

was the omission of the co-employé who ought to have so used them. The company discharged its duty by supplying them of the right kind and in sufficient quantity, and by making proper provision for their use.

UNITED STATES v. LA CHAPPELLE. SAME v. ABERCROMBIE.
SAME v. RICHARDSON. SAME v. ROBINSON.
SAME v. WILLIAMS.

(Circuit Court, D. Washington, E. D. May 31, 1897.)

1. PUBLIC LANDS—OPENING INDIAN RESERVATION—INVALID TREATY—CANCELLATION OF ENTRIES.

In 1884 an agreement was negotiated between the government and an Indian chief named Moses, purporting to represent the Indians living on the Columbia reservation, in Washington territory, by which the Indians, in consideration of a sum of money, agreed to remove to another reservation, and that the Columbia reservation should be opened to settlement, except that any Indians who desired to remain might do so, and lands not exceeding 640 acres to each family should be selected for them. Certain Indians living on the reservation, who did not acknowledge the authority of Moses, refused to be bound by this agreement, though they indicated a willingness to make a similar one on their own account. Through the misunderstanding of an agent, the position taken by these Indians was incorrectly reported to the government, and, without making any provision for them, the land was opened to settlement. Certain white men attempted to settle on the lands, and were resisted by the Indians, who were thereupon forcibly removed by United States troops, and imprisoned. During their imprisonment, the white settlers seized their improvements, settled on the land, and filed homestead declarations, which were accepted. The government having learned the facts as to the Indians' position in the matter, contest proceedings were instituted in the land department, and the entries were finally canceled, though the settlers had in the meantime made improvements at considerable expense; and suits were brought to oust them from possession. *Held*, that the lands in question never became part of the public domain which could lawfully be taken up under the homestead law, and that neither by estoppel against the government, nor as bona fide purchasers, had the settlers acquired any rights to hold the lands.

2. ESTOPPEL AGAINST GOVERNMENT—PRIVATE RIGHTS.

Though the doctrine of estoppel may be applied in some cases against the government, it cannot be applied to give one private individual an advantage over another, or to divest existing rights of individuals without their consent.

F. C. Robertson, Asst. U. S. Atty.

Blake & Post, J. H. Dawes, and W. R. Bell, for defendants.

HANFORD, District Judge. These several actions were brought by the United States, to evict the defendants from certain lands situated near Lake Chelan, in Okanogan county, which they respectively claim to have settled upon and improved, and to which they now claim to have lawful possession, under and by virtue of the homestead laws of the United States. Previous to the year 1884 there was a large Indian reservation, called the "Columbia Indian Reservation," embracing the several tracts now claimed by the defendants. As it was considered unnecessary, and detrimental to the interests of the white people, to withhold from settlement so

large a section of Washington territory, for the occupation of a comparatively small number of Indians, an agreement was negotiated in Washington city, between the officers of the Indian department, on behalf of the United States government, and an Indian chief named Moses, on behalf of the Indian occupants, whom he assumed to represent, which agreement, by its terms, provided for the payment of a large sum of money to the Indians, and that provision should be made for their removal to the Colville Indian reservation, and, in consideration thereof, the Indians relinquished to the United States their rights in and to the Columbia reservation, and consented that the same should be thrown open to settlement by the white people. The agreement contained a provision, however, that such of the Columbia Indians as should elect to remain, and to acquire title to lands within the Columbia reservation, might do so, and there should be selected for such Indians lands not exceeding 640 acres for each head of a family. Said agreement was confirmed, and provisions made for carrying the same into effect by an act of congress approved July 4, 1884 (23 Stat. 79, 80). At that time the region round about the outlet of Lake Chelan was occupied by a small independent band of Indians, who have never recognized Moses as their chief, but, on the contrary, have their own hereditary chief, and they always denied the authority of Moses to make disposition of their lands, and refused to receive any part of the money appropriated by the act of congress to be paid to the Indians as consideration for the extinguishment of their title to the Columbia reservation. An agent of the Indian department was sent to induce these Chelan Indians to remove to the Colville reservation, or, if they elected to remain upon the Columbia reservation, to select such lands as they wished to have set apart for their homes, and to make survey of the land so selected. This agent failed to induce the Indians to conform to the agreement, and the act of congress aforesaid, in any respect; and he also failed to comprehend that these Indians had not disposed of any of their rights, nor authorized Chief Moses to sell their lands. The young chief, who is commonly known by the name of Long Jim, and who, by his appearance and conduct, has shown himself to be of more than average intelligence for an Indian, and also a man of high spirit and dignified bearing, responded to the overtures of the government's agent, saying in substance:

"I and my people are upon the soil which has always been our home, and the home of our ancestors for many generations. We do not wish to remove. We do not have to select land, for we now occupy the land which has always been in our possession. We have no disposition to interfere with the white people, and we wish to live in peace, and maintain friendly relations with the government at Washington, but to do as you request would be displeasing to the Great Spirit."

A great deal of trouble to the government and to the band of Indians and to the defendants might have been avoided if the agent had been able to appreciate the diplomacy of Long Jim's oration, and had conveyed to the Indian department the idea which Long Jim intended should be conveyed,—that is, that he meant to assert the rights of his people; that he repudiated the action of Chief

Moses in assuming to make a contract for them, but, for the sake of peace, they were willing to make a new agreement, if the government would recognize their right to act for themselves. Instead of doing this, the agent reported that the Indians were obstinate and unmanageable; and after a time, the government, ignoring their rights, and without making any provision for them, opened the reservation to settlement.

The testimony shows that these Indians have always been thrifty and able to maintain themselves, without annuities from the government. Besides hunting and fishing, they have engaged in stock raising, and have plowed and cultivated sufficient land to provide winter feed for their stock, and corn and vegetables to supply their own demands. Their houses, fences, and improvements would not excite admiration in the New England states, but they were sufficient for shelter, and to protect their growing crops from intrusion, until they were disturbed by white settlers. In the year 1889 the first attempt was made by the defendant La Chappelle to take possession of the lands in controversy. The defendant was immediately notified by Long Jim that the land was his, and the attempt to settle thereon was for the time being abandoned. The next year the same defendant returned, and, showing a more determined spirit, he provoked the Indians into making a demonstration such as would be natural on the part of any person claiming to own land against one whom he regarded as a trespasser. This was reported to the Indian department, and thereupon the agent of the Colville reservation, assisted by a company of soldiers, arrested Long Jim and several of his men, and incarcerated them in Ft. Spokane for a period of more than two months. While the Indians were imprisoned, Mr. La Chappelle established his residence upon the land which he claims, and took possession of the crops which the Indians had planted; and some of the other defendants also made their settlements, and used the timber of the Indians' houses and rude fences for their own purposes, and they were allowed to file their homestead declarations in the United States district land office. The other defendants made their settlements and filings subsequent to this time, except the defendant John Francis Williams, whose homestead declaration, when tendered at the land office for filing, was rejected. After the imprisonment of said Indians, the officers of the Indian department came to have a better understanding of the situation and rights of these Indians, and began to actively assist them in acquiring title to their homes, under the provisions of the public land laws of the United States. The measures adopted took the form of contest proceedings in the land department, which resulted finally in a decision by the secretary of the interior in favor of the Indians, and the cancellation of the homestead entries which had been made by the defendants. While said contests were in progress, the defendants made large expenditures of money and labor in improving their holdings. The defendants are all qualified and entitled to acquire land under the homestead law of the United States. They have fully complied with the law as to actual residence upon and cultivation and improvement of their claims. Their improvements consist of houses, fences,

orchards in bearing, and conveniences and comforts for home life, and in each case are of the value of several thousand dollars; so that the cases must be determined upon the question as to whether the defendants or the Indians have a superior right to the lands.

The defendants invoke the doctrine of estoppel in bar of the prosecution of these actions by the United States, their contention being that the president having, by his proclamation, declared the Columbia Indian reservation to be a part of the public domain, and open to settlement under the homestead law, except as to the portions thereof selected and allotted to other Indians, pursuant to the act of July 4, 1884, and the officers of the Indian department having exercised their authority, and used the military power of the United States to subjugate these Chelan Indians when they were making demonstrations to intimidate settlers, and the officers of the land department having received and filed applications to enter the lands under the homestead law, and the defendants having on the faith of said acts of the government relied, and expended their money and labor in making improvements, for the purpose of acquiring title under the homestead law, the prosecution of these causes is so utterly inconsistent with the previous acts of the officers of the executive branch of the government, and so prejudicial to the defendants, as to amount to a legal fraud.

The authorities cited by counsel for the defendants prove that the doctrine of estoppel may be applied in some cases against the government, but not in any case to give one private individual an advantage over another, or to divest existing rights of individuals without their consent. The laws of the United States and the policy of the government have from the earliest times recognized the Indians' right of occupancy, until the same has been formally relinquished. I think that congress has the power and may dispose of lands in the possession of the Indians, without their consent. But, without authority expressly conferred by an act of congress, officers of the executive branch of the government cannot dispose of lands to individual citizens while the Indians are in actual possession, and their right of occupancy has not been extinguished. The position of the defendants is, in my opinion, untenable for another reason. The supreme court has so often decided that it is the right and duty of the secretary of the interior to cancel private entries of public lands whenever it shall be discovered that such entries were allowed through mistake or inadvertence, or when the land is for any reason not subject to such entry, that the question is no longer open for discussion, and the applicability of the rule on this subject to the cases on trial is, to my mind, apparent.

It is next contended by the defendants that the Chelan Indians forfeited all right to the land within the Columbia reservation, under the provisions of the act of congress of July 4, 1884, by their failure to make selections, within one year, of the lands to be allotted for their use. As to this there are two answers. In the first place, these Indians were not bound by the agreement entered into by Chief Moses, for the reason that they never gave their assent, and Moses had no authority to represent them; and, in the second place, the

act of congress contained no provision forfeiting rights for failure on the part of the Indians to make selection of particular land. The law only requires them to elect within one year whether they will continue to reside within the boundaries of the former Columbia reservation, and it is provided:

"That, in case said Indians so elect to remain in said Columbia reservation, the secretary of the interior shall cause the quantity of land therein [in the Moses agreement] stipulated to be allowed them to be selected in as compact form as possible, the same when so selected to be held for the exclusive use and occupation of said Indians, and the remainder of said reservation to be thereupon restored to the public domain, and shall be disposed of to actual settlers under the homestead laws only. * * *"

The law imposes upon the secretary of the interior, and not upon the Indians, the duty of selecting lands for their use; and the president was not authorized to restore any part of the Columbia reservation to the public domain, and to open the same for settlement under the homestead law, until after selections for the use of the Indians had been made. The proclamation of the president opening the reservation to settlement, having been issued prematurely, may have deceived the defendants as to their rights, but it could not on that account have the effect to defeat the prior and superior rights of the Indians to remain in the occupation of their habitations and the quantity of land deemed by congress to be necessary for their use. The duty of the secretary of the interior prescribed by the act of congress could only be discharged by making the selections of lands for the Indians, and, not having been previously discharged, it remained to be performed after the proclamation.

I place my decision upon the ground that the lands claimed by the defendants have never become part of the public domain, which could be lawfully taken by settlers under the homestead law. The law authorizes settlers to take only unoccupied public lands, to which the Indian title had been extinguished. Rev. St. U. S. §§ 2257-2289. Even if the president's proclamation be regarded as an authoritative declaration that the Indian title had been extinguished, and though it be conclusive upon the Indians, still the continued occupation of the land by the Indians was founded upon natural right, and their rights were recognized by the law; so that their possession amounted to a legal appropriation for their use, and on that account, by the terms of section 2289, it is not land subject to be taken under the homestead law.

The loss which the defendants must suffer is serious, and is to be regretted, and yet they are not in a situation to claim the rights of bona fide purchasers, without notice. The possession of the Indians, prior to the initiation of their settlements, had been actual, visible, continuous, and notorious. The testimony shows that other citizens had seen that the lands in controversy were good, and desired to take the same, but were deterred by the possession of the Indians; and from the time Mr. La Chappelle made his first attempt to initiate a settlement, until the present time, the Indians have been active and diligent in asserting their rights, and giving notice thereof. An element of actual bad faith on the part of this defendant is

shown by his own admission that, while the Indians were in prison, he took possession of their growing crops, and afterwards garnered the same for his own use. In seeking to acquire the lands which they now claim, each of the defendants voluntarily entered into a controversy with the Indians, assuming the risk of a total loss of their improvements; and the consequence of their failure to defeat the Indians in the controversy affords no legal ground for trampling down superior rights.

In my opinion, these cases come fairly within the reason of the decision in the case of *Atherton v. Fowler*, 96 U. S. 513-520. The pith of the opinion by Mr. Justice Miller in that case is in the following excerpt:

"Does the policy of the pre-emption law authorize a stranger to thrust these men out of their houses, seize their improvements, and settle exactly where they were settled, and by these acts acquire the initiatory right of pre-emption? The generosity by which congress gave the settler the right of pre-emption was not intended to give him the benefit of another man's labor, and authorize him to turn that man and his family out of their home. It did not propose to give its bounty to settlements obtained by violence at the expense of others. The right to make a settlement was to be exercised on unsettled land; to make improvements on unimproved land. To erect a dwelling house did not mean to seize some other man's dwelling. It had reference to vacant land, to unimproved land; and it would have shocked the moral sense of the men who passed these laws if they had supposed that they had extended an invitation to the pioneer population to acquire inchoate rights to the public lands by trespass, by violence, by robbery, by acts leading to homicides, and other crimes of less moral turpitude."

The several Indians were not holding particular tracts, with defined boundaries, and they asserted their claim to an area much greater than the government has permitted them to retain. But they are not to suffer total deprivation of rights on this account. They lived together as one family, and their actual presence was equivalent to an inclosure of a quantity of land, reasonably sufficient for their necessities. The defendants therefore, in making entries, were, of necessity, aggressors against the Indians, at their own doorstep, and they acquired no legal rights by their wrongdoing. Findings of fact will be prepared, and a judgment entered in each case in accordance with this opinion.

HINCHMAN et al. v. PARLIN & ORENDORFF CO.

(Circuit Court of Appeals, Fifth Circuit. May 18, 1897.)

No. 56.

FRAUDULENT CONVEYANCES—HUSBAND AND WIFE—INSTRUCTIONS TO JURY.

On a question as to the validity, as against creditors, of a conveyance of property from a husband to his wife, in payment of an alleged indebtedness, a charge which expressly leaves the question of the bona fides of such indebtedness to the jury is not erroneous, though it calls attention to the absence of any notes, book charges, or other contemporaneous evidence of the debt.

In Error to the Circuit Court of the United States for the Northern District of Texas.

D. A. Kelley, for plaintiffs in error.

N. F. Short, for defendant in error.

Before PARDEE and McCORMICK, Circuit Judges, and NEWMAN, District Judge.

McCORMICK, Circuit Judge. This case was before us at our last term. The issues of law and fact involved in it are fully discussed in our opinion, reported in 21 C. C. A. 273, and 74 Fed. 698. Upon a second trial in the circuit court the judge charged the jury as follows:

"The jury will find that if Mrs. Hinchman sold Mr. Hinchman this property for \$27,000 in cold cash, and intended to hold him for that amount of money afterwards, at the time of the transaction, then he was in debt to her in that amount. That is the law. She had the right to sell, and he the right to buy, that which he had given her; no doubt about that. The question for this jury is, what were they doing? Was that such a sale as two strangers would make one to the other, or was it a part of a transaction to cover up something that was to be done? Or, admitting that it was the wife's property, was it such a transaction, then and there understood between them that it was to be her land, and it was only to enable him to raise \$10,000 upon it, and transfer it back to her? If it was that, then he owed her \$10,000 that he got, and not the full price of the property. If, on the other hand, he bought that property bona fide at the time, for \$27,000, and mortgaged it for \$10,000, and then deeded it back to her when it was not worth more than the mortgage on it, as claimed by the defendants, then, under that circumstance, he owes her \$27,000; no doubt about that. That, as I understand it, is the contention of Mr. Hinchman and his counsel. If the jury finds that to be the fact, then he owes her that amount of money. A debt, gentlemen, is a matter that is familiar to every jurymen. You all know what a debt is. That does not need any explanation, to tell you what a debt is, nor does it need any explanation as to how debts are evidenced. Did Mr. Hinchman owe his wife \$27,000? Was any record ever made of this transaction? Did he ever make any entry on his books of the \$27,000 or the \$10,000? Did he enter any credit for his wife, or debit himself or firm, for any amount of money? Did any paper pass between him and his wife? Has there been anything produced that will show that he owed this debt, other than the deeds produced in evidence? The jury will say whether that is so or not as between strangers, for, I repeat, a transaction of this kind between husband and wife must have as good support as between strangers. I have been asked by Mr. Hinchman's counsel to charge you, and the court so charges you, that a man is the lawful guardian or agent of his wife's property if she has any. But, gentlemen of the jury, how do agents generally carry out an agency? Do they keep any account of their agencies? Do they render any account of what they get? If so, how and when? Was there any accounting of the agency between Mr. Hinchman and his wife? You will remember money was paid occasionally to the wife? Have we any account of it, or were there any entries made at the time? I want to call your attention, gentlemen of the jury, particularly to the word 'then'; not what was done afterwards, not what comes now to protect something which was protected before. How do people transact business at the time the transaction takes place? You make a transaction with a man, and an entry is made. You take some account then. You keep some record of it. Has there been any record shown here as agent for anybody? Has there been any bank account showing Mr. Hinchman was keeping account as agent for his wife? Gentlemen of the jury, it is for you to say. I say it again, it is for you to say. The court does not propose to interfere with your duty to determine the facts. Did any agency exist then, and what evidence have we of it?"

This charge is made the basis of the fourth assignment of error, and the plaintiffs in error complain that:

"This charge complained of was very prejudicial to the claimant. It instructed the jury substantially that the transactions between husband and wife

were to be scanned with the same strictness as those of strangers dealing with each other at arm's length; that, when strangers deal with each other, they keep an account of it, either a note or a book entry; and that, when an agent acted for his principal, he kept a record of what he did; and that when a woman came into court, claiming that her husband had been acting as her agent, and that he owed her money, and could not show up any note or book accounts evidencing the debt, that such evidence was insufficient, as strangers did not do business in that way, and that her claim must fail."

It is manifest, upon the consideration of the case as presented to us at the former term, and as discussed in our opinion, then delivered, and from the consideration of the record now before us, that on the last trial the issues between the parties had been reduced to the single question of fact: Did A. Hinchman, in transferring all of his property to his wife in 1888, in good faith prefer her as a creditor, or were the transactions had for the purpose of withdrawing all of his property from the claims of his bona fide creditors? In considering this question, it was important to determine whether, in fact, he owed his wife a debt at the time, and, if so, what was the amount of that debt. If the proof was such as to satisfy the jury that the husband did not in fact owe a debt to the wife on account of dealings there had been between them, or if they were satisfied that he did not owe more than one-third of the amount he claimed to have owed and that she claimed he owed her, and that the adjustment made between them in 1888 was in the nature of an afterthought, and for the purpose of withdrawing his property from the claims of his bona fide creditors, the claim of the wife urged in this action would necessarily fail. It was the turning point in the case. It was not only the privilege, but it was the duty, of the trial judge to group the testimony, and focus it upon this vital issue. It was his duty to submit to the jury the issue of fact, and to have them fully understand that the determination of that issue was theirs, and not his. A careful examination of the charge complained of satisfies us that the judge did not go beyond his duty in the charge given. The law applicable to the issue was given as fully and as fairly as the claimant could ask; in fact, as fully as the claimant did ask. The power and right of the jury to pass upon the issue of fact were stated and restated with clearness and emphasis. The jury having found upon this issue against the claimant, the other questions presented on the trial below, and brought up by bill of exceptions for our review, become immaterial. We find no substantial error in the rulings of the circuit court at the last trial. The judgment of that court is therefore affirmed.

UNITED STATES v. MAYERS.

(District Court, W. D. Virginia. December 11, 1896.)

POSTMASTERS — UNDERPAYMENTS TO LETTER CARRIERS—EXPERIMENTAL FREE DELIVERY OFFICES—INDICTMENT.

A postmaster at an experimental free delivery office, designated by the postmaster general, pursuant to the joint resolution of October 1, 1890, is an officer of the United States, charged with the payment of an appropriation made by act of congress, within the meaning of Rev. St. § 5483, and is in-

dictable thereunder for paying to a letter carrier, employed in such experimental free delivery, less than the amount provided by law, and requiring them to give vouchers for a sum greater than that paid to them.

Indictment for Violating Section 5483, Rev. St. On demurrer to the indictment.

A. J. Montague, U. S. Atty.

R. T. Barton and Liggett & Strayer, for defendant.

PAUL, District Judge. This is an indictment charging the defendant with violating section 5483 of the Revised Statutes of the United States. The defendant demurs to the indictment, on the ground that the offense charged therein does not constitute an offense against the laws of the United States.

The first count in the indictment is as follows:

"The jurors of the United States of America, within and for the district and circuit aforesaid, on their oaths present that G. F. Mayers, late of Frederick county, in the district aforesaid, at said county, heretofore, to wit, on the — day of —, in the year of our Lord one thousand eight hundred and ninety-two, at the said Western district of Virginia, and within the jurisdiction of this court, the said G. F. Mayers being then and there an officer of the United States, to wit, postmaster at Stevens City, Virginia, charged with the payment of an appropriation made by an act of congress, to wit, an appropriation for the payment of letter carriers at experimental free delivery offices, did unlawfully pay to an employé of the United States, to wit, one Douglas K. Drake, and, to wit, one Edgar C. Cadwallader, who were then and there employés of the United States, to wit, letter carriers, a sum less than that provided by law, to wit, the sum of \$122.92, and required said employés to give vouchers for an amount greater than that actually paid to and received by them, to wit, the sum of \$306.17, against the peace of the said United States and their dignity, and against the form of the statute of the said United States in such case made and provided."

There are two other counts in the indictment, each to the same effect, charging in the second count that the defendant took from one Douglas K. Drake, an employé of the United States, a receipt for \$73.50, whereas he had paid to said Douglas K. Drake only the sum of \$31.25; and charging in the third count that said defendant had taken from one Edgar C. Cadwallader, an employé of the United States, a receipt for \$231.66, whereas he had paid only the sum of \$91.66 to said Edgar C. Cadwallader.

The first question to be determined is: Is the defendant, as postmaster, an officer, within the provisions of section 5483, charged with the payment of any of the appropriations made by an act of congress? Second. If he is such an officer, is there an offense charged in this indictment of which this court has jurisdiction?

As to the first question, section 3639 of the Revised Statutes of the United States provides as follows:

"Sec. 3639. The treasurer of the United States, all assistant treasurers, and those performing the duties of assistant treasurers, all collectors of customs, all surveyors of the customs, acting also as collectors, all receivers of public moneys at the several land offices, all postmasters, and all public officers of whatsoever character are required to keep safely, without loaning, using, depositing in banks, or exchanging for other funds than as specially allowed by law, all the public money collected by them, or otherwise at any time placed in their possession or custody, till the same is ordered, by the proper department or officer of the government, to be transferred or paid out; and when such or-

ders for transfer or payment are received, faithfully and promptly to make the same as directed, and to do and perform all other duties as fiscal agents of the government which may be imposed by any law, or by any regulation of the treasury department made in conformity to law. * * *

This section (3639) designates postmasters as one class of fiscal agents of the government, by whom public money may be collected, or into whose possession and custody it may otherwise be placed. It provides for the safe-keeping of the public money, and provides the mode for transferring or paying out the same, viz. by an order of the proper department or officer of the government, and, when such order for payment is received, to faithfully and promptly make the same as directed. They are further required "to do and perform all other duties as fiscal agents of the government which may be imposed by any law, or any regulation of the treasury department made in conformity with law."

Section 161 of the Revised Statutes provides as follows:

"Sec. 161. The head of each department is authorized to prescribe regulations, not inconsistent with law, for the government of his department, the conduct of its officers and clerks, the distribution and performance of its business, and the custody, use, and preservation of the records, papers, and property appertaining to it."

Section 396 of the Revised Statutes prescribes what shall be the duty of the postmaster general, and, among other things, requires (seventh clause) him "to superintend the disposals of the moneys of the department," and (ninth clause) "to superintend generally the business of the department, and execute all laws relative to the postal service."

Section 3866 of the Revised Statutes requires the postmaster general to fix the salaries of letter carriers within certain limitations.

Under the regulations of the post-office department, letter carriers are paid by the postmasters at the offices at which they serve out of the postal funds. Postal Laws and Regulations, § 180.

The indictment alleges that the defendant was charged with the payment of an appropriation made by an act of congress, to wit, "an appropriation for the payment of letter carriers at experimental free delivery offices."

Under then-existing laws, letter carriers could not be appointed in cities of less than 10,000 population, or at any post office which produced a gross revenue for the preceding fiscal year of less than \$10,000. Act Jan. 3, 1887 (24 Stat. 355). But a joint resolution was passed by congress on October 1, 1890, providing for "experimental free delivery" at small offices. The resolution is as follows:

"Resolved by the senate and house of representatives of the United States of America in congress assembled, that the postmaster general be enabled to test at small towns and villages the practicability and expense of extending the free delivery system to offices of the third and fourth classes, and other offices not now embraced within the free delivery, said test to be made on petition of the patrons, and in the discretion of the postmaster general, the sum of ten thousand dollars, which sum shall be taken from the amount appropriated for the free delivery service for the fiscal year ending June thirtieth, eighteen hundred and ninety-one, and shall be applied to the payment of carriers for one hour or two hours per day, as may be necessary for the convenience of the public and advantage of the postal service, said pay to be fixed

by the postmaster general at rates not exceeding the present maximum rates for pay of carriers."

The joint resolution of October 1, 1890, just quoted, clearly authorizes and empowers the postmaster general to employ letter carriers for this special, experimental free delivery service, and to fix the rates at which they should be paid so as not to exceed the maximum rates then being paid to letter carriers. It places these carriers, in their relation to the post-office department, as to their compensation, on the same footing as other carriers, and has made no change in existing laws or the postal regulations as to the manner in which they shall be paid; and, in the absence of any declaration on the part of congress to the contrary, it is to be presumed that they are subject to the same regulations and paid in the same manner as other carriers. The only difference the court sees between the two sets of letter carriers in this respect is that other letter carriers are paid by the postmaster at the offices at which they serve out of the postal funds, while the experimental free delivery carriers are to be paid by the postmaster at the post offices at which they serve out of the appropriation made by congress for the purpose.

The demurrer admits whatever is well alleged in the indictment. The charge in the indictment is in the language of the statute, and the indictment is therefore not defective in matter of form; and the court is of opinion that the defendant, being a postmaster, was an officer of the United States, within the meaning of the statute, and, as such, was charged with the payment of an appropriation made by an act of congress. The demurrer is overruled.

BACHE v. UNITED STATES.

(Circuit Court of Appeals, Second Circuit. May 27, 1897.)

CUSTOMS DUTIES—CLASSIFICATION—WINDOW GLASS.

Cylinder, crown, or common window glass, which has been either colored throughout when melted, or colored on the outside by flashing, is dutiable under paragraphs 112 and 118 of the tariff act of 1890, and not under paragraph 122, the former sections being probably more specific as applied to it, but, if not, the higher rate of duty being applicable under section 5. 77 Fed. 603, affirmed.

Appeal from the Circuit Court of the United States for the Southern District of New York.

This was an appeal from the decision of the circuit court affirming the decision of the board of general appraisers as to the classification of certain merchandise consisting of cylinder, crown, or common window glass, a part of which was colored throughout when melted, and the rest on the outside by flashing.

Charles Curie, David Ives Mackie, and W. Wickman Smith, for appellants.

Wallace Macfarlane and James T. Van Rensselaer, for appellee.

Before WALLACE, LACOMBE, and SHIPMAN, Circuit Judges.

PER CURIAM. The importations in controversy were stained window glass, and the question which we have to decide is whether the merchandise was subject to duty pursuant to paragraphs 112 and 118 of the tariff act of October 1, 1890, or was subject to duty pursuant to the provisions of paragraph 122 of the same tariff act. Paragraph 112 imposes duty upon "unpolished cylinder, crown, and common window glass" (of the dimensions of the importations in question) at 3½ cents per pound, and paragraph 118 subjects to a duty of 10 per cent. ad valorem, in addition to the rates otherwise chargeable thereon, "cylinder, crown or common window glass, when ground, * * * stained, colored, or otherwise ornamented or decorated." Paragraph 122 provides that upon all "stained or painted window glass" (not exceeding in size the importation in question) "not specially provided for in this act," the duty shall be 45 per cent. ad valorem. It is not clear that the importations were not dutiable under the provisions of the first two paragraphs mentioned, these being more specific than paragraph 122, because of the omission of the words contained in the latter paragraph, "not otherwise provided for." *Matheson & Co. v. U. S.*, 18 C. C. A. 143, 71 Fed. 394; *U. S. v. Eisner & Mendelsohn Co.*, 8 C. C. A. 148, 59 Fed. 352. If, however, these paragraphs are not more specific than the other, the case is one in which section 5 of the same tariff act comes into operation. That section provides: "If two or more rates of duty shall be applicable to any imported article it shall pay duty at the highest of such rates." The decision of the circuit court is affirmed.

C. F. SIMMONS MEDICINE CO. et al. v. SIMMONS.

(Circuit Court, E. D. Arkansas, E. D. May 24, 1897.)

1. CONTRACTS IN RESTRAINT OF TRADE—SECRET PROCESSES.

An agreement, made by one who enters the employ of the manufacturer of a medicine compounded by a secret process, not to make or sell any of the medicine, or reveal the secret of its composition, is not in restraint of trade, and will be enforced in equity by injunction.

2. SALE OF RIGHT IN SECRET COMPOUND—DISCLOSURE BY SELLER—INJUNCTION.

Equity will not permit one who has sold for a valuable consideration the absolute and exclusive property in a medicine compounded by a secret process to reveal such secret to a third person, either by himself, or through a member of his family, and will restrain by injunction the use of a secret so revealed.

3. UNFAIR COMPETITION IN BUSINESS—IMITATION OF WRAPPERS, ETC.

Defendant manufactured and sold a medicine to which he gave a name similar to the name of complainant's medicine, including the name of the inventor; he placed on the wrappers of his medicine a picture of a bust, and an autograph signature, complainant's medicine having long been known among an ignorant class of purchasers by similar signs; he issued directions which were almost a literal copy of the complainant's; and he published a card in which he described himself as the son and successor of the inventor of complainant's medicine. *Held*, that defendant was guilty of unfair competition.

This is an action to enjoin the defendant from compounding, making, or selling any liver medicine called "Simmons' Liver Medicine,"

and on which the name of Simmons is used, or disclosing, for making and compounding such medicine, the knowledge which was imparted to him by complainants while in their employ, and to restrain him from selling medicines put up by him, and called "Simmons' Stomach Compound."

The bill alleges: That the complainant corporation is now, and for many years has been, the owner of a recipe for liver medicine, and engaged in manufacturing such medicine, which said medicine, for over 50 years, and before it became the property of the complainant, had a world-wide reputation. That it became known to the public as, and was called, "M. A. Simmons' Liver Medicine," "Dr. M. A. Simmons' Liver Medicine," "Liver Medicine by M. A. Simmons," and "Dr. Simmons' Liver Medicine." That the secret recipe for its preparation was originally owned by Dr. M. A. Simmons, of Iuka, Miss., who sold it to Simmons & Hayden in 1879 for \$30,000, and of which firm the complainant corporation is the successor in title and right. That by said purchase the corporation became the owner of the secret recipe for making the liver medicine, trade-mark, name, etc. That ever since 1850 these medicines were distinguished from others by a bust picture, the name of M. A. Simmons, and his autograph signature. That in 1886 the defendant, while in complainants' employ, was intrusted with the secret recipe for the making of said medicine, in order to enable him to assist in the preparation of the same, he entering into a certain contract with complainants never at any time to communicate the knowledge he had so received and would thereafter receive, except by the direct order and consent of the complainant C. F. Simmons; that he would not thereafter, directly or indirectly, for himself, or for others than the complainants, or heirs and assigns, make or sell any of the medicines made by complainants, nor would he ever make or sell any liver medicine on which he would use his name, or the name "M. A. Simmons," except in certain states named in the contract, and in those states only for local consumption. When this contract was made the defendant was not quite 21 years of age, but six months later, in February, 1887, after he had attained his majority, this contract was, in writing, ratified and confirmed by the defendant. The plaintiffs fully complied with their part of the contract, but the defendant during the fall of 1895 began to manufacture, according to the secret process imparted to him by complainants, a liver medicine which he calls "Simmons' Stomach Compound," and has entered into competition with complainants in making and selling the same as a liver medicine, which he was doing in the state of Arkansas,—a state not excepted from the provisions of the contract. The bill then recites a full history of the medicine from 1840 to the present time, and shows that the complainant corporation is the sole owner thereof. The bill further charges an infringement of complainant's trade-mark, ungenerously and piratically, against equity and good conscience, dressing his packages of medicine so as to be sold as and for those of complainant, the bill setting out specifically all the facts in this connection; also charging that the defendant copied the directions for the use of complainant's medicine, as printed on its packages, and printed them on those prepared by him; that he also bodily copied the trade circular of complainant, which he has been using and sending out with his own medicine. The bill was filed a short time after the defendant commenced putting his medicine on the market. The answer denies that complainants own the secret recipe for the making of this medicine, but claims that it was an heirloom of the Simmons family, handed down from generation to generation; that he knew it from earliest childhood, it being no secret between the members of the family; that when he entered complainants' employ he supposed that they were using the family recipe as it was known to him, but he found their process was not in exact accordance with the original family recipe. Denies that the medicine he makes is according to the recipe confided to him by complainants while in their employ, but it is a formula of his own, based upon the original recipe of the Simmons family, acquired by him from family tradition and from his mother. Admits that the exact process and manner of manufacturing used by complainants was unknown to him until imparted to him while in their employ, but denies using that process. Admits the execution of the contract in the bill set out, but states that he was

an infant then, and that he signed it without scrutiny and deliberation; that the ratification of the contract by him, although made when of age, was shortly after he attained his majority, while inexperienced in business, and having full confidence in complainant C. F. Simmons, who is his older brother; that the contract is void because founded on no sufficient consideration, as being in restraint of trade, and is not the contract that he had been advised it was at the time he executed it, and at the time he ratified it. Denies that his packages are put up so as to closely resemble those of complainant, and avers that all medicines for the stomach, liver, and bowels, having for their basis the original Simmons recipe, are necessarily so. Denies that his packages are addressed so as to deceive an ordinary observer, although he used his bust picture and autograph signature thereon. The testimony on both sides is very voluminous, covering several thousand pages of typewritten matter. As the opinion states the facts found by the court, it is unnecessary to set any of the evidence out in this statement.

Carroll, Chalmers & McKellar and Stevenson & Trieber, for complainants.

John J. & E. C. Horner, Sanders & Fink, and Rose, Hemingway & Rose, for defendant.

WILLIAMS, District Judge (after stating the facts as above). The able arguments of counsel on both sides, and the elaborate briefs filed by them, have been of invaluable assistance to the court in determining this cause. The pleadings of both parties are commendable for their clearness and brevity, and the authorities bearing on the points involved, furnished by counsel, have greatly aided the court, and lightened its labor.

The bill seeks relief upon two main grounds: First, complainants rely upon the contract; and, second, upon the general rules of equity courts governing cases of this kind in the absence of any contract. So far as the contract is concerned, complainants complain that the defendant has violated it in the following particulars: First, in making a liver medicine which he calls "Simmons' Liver Compound," and selling it in competition with plaintiffs' liver medicine, using plaintiffs' secret process for that purpose; second, in making use of the knowledge imparted to him, in trust and confidence, in the manufacturing and compounding of the said medicine; third, in making and selling a liver medicine, using his name thereon, within the territory prohibited by the contract.

As to the invalidity of the contract, in its being in restraint of trade, the various decisions of the supreme court of the United States are conclusive that such a contract, entered into under the circumstances under which this contract was made, is not void as being in restraint of trade. As was remarked in *Gibbs v. Consolidated Gas Co.*, 130 U. S. 396, 9 Sup. Ct. 553:

"The decision in *Mitchel v. Reynolds*, 1 P. Wms. 181, is the foundation of the rule in relation to the validity of contracts in restraint of trade; but, as it was made under a condition of things and a state of society different from those which now prevail, the rule laid down is not regarded as inflexible, and has been considerably modified. Public welfare is first considered, and if it be not involved, and the restraint upon one party is not greater than the protection to the other requires, the contract may be sustained. The question is whether, under the particular circumstances of the case, and the nature of the particular contract, as involved in it, the contract is or is not unreasonable. *Oakes v. Water Co.*, 143 N. Y. 430, 38 N. E. 461; *Match Co. v. Roeber*, 106

N. Y. 473, 13 N. E. 419; Central Transp. Co. v. Pullman's Palace-Car Co., 139 U. S. 24, 11 Sup. Ct. 478; Peabody v. Norfolk, 98 Mass. 452."

The chief contention over the contract is as to the understanding of the contracting parties at the time of its execution and ratification. The defendant claims that, when he signed it, his understanding, to use his own words, was:

"That his brother asked him if he would sign the contract that he would not make any of the medicine, and would not give the secrets of the medicine away. I told him I would sign a contract of that kind. A few days after that he told me he had a contract ready, and read it to me just about as I have stated it here; that I would neither make any of the medicines made by the Simmons Medicine Company, nor sell nor give away their formulæ to anybody, and I signed it thinking it was the contract."

There is therefore no room for doubt as to the first two subjects of the contract. Both the contracting parties understood it thus far. But having entered the service of complainants, and having had imparted to him their secrets, defendant was, in equity and good conscience, obliged to preserve them as sacredly as his own, and this as well without a contract as with it. The leading English case on that subject, and which has been universally followed by the courts of this country, including the supreme court of the United States, is *Morison v. Moat*, 9 Hare, 241. In that case, Vice Chancellor Turner, in delivering his opinion, said, among other things:

"Upon the whole, therefore, I am of the opinion that the plaintiffs have made out their case for an injunction. I think, however, the injunction cannot go to the extent which is asked for by the notice of motion. It should, I think, go to the extent of restraining the defendant from selling, under the title or designation of 'Morrison's Universal Medicine,' or 'Morrison's Vegetable Universal Medicine,' any medicine made or manufactured by him; proceeding, to this extent, not upon the mere use of the name, but because this is clearly the mode in which defendant is availing himself of the breach of favor and contract; and, upon the authorities, I think it should also go to the extent of restraining the defendant from making or compounding any medicines according to the secret, and from in any manner using the secret of compounding the medicine."

And in another part of this decision it is said:

"There is no doubt whatever that where a party who has a secret in trade employs persons under contract, express or implied, or under duty, express or implied, those persons cannot gain knowledge of that secret, and set it up against their employer."

As to the third part of that contract, as before set forth, although it has been ably presented by both parties, I do not deem it necessary, in determining this case, to pass upon it. It is a well-settled rule of pleading, and the application of evidence thereto, prevailing in the courts of the United States, that "in equity the proofs and allegations must correspond." "The examination of the case by the court is confined to the issues made by the pleadings. Proofs without the requisite allegations are as unavailing as such allegations would be without the requisite proofs to support them." *Rubber Co. v. Good-year*, 9 Wall. 793; *Boone v. Chiles*, 10 Pet. 177. The plaintiffs, in their bill, complain that the defendant is making a liver medicine called "Stomach Compound," using its trade secret for that purpose; but there is neither allegation nor proof to sustain the theory that defendant is making any other or different medicine in which the

trade secret is used, and upon which the defendant is using his name, or the name of M. A. Simmons. The entire complaint is based on the charge of the manufacture of a medicine, in which use is made of the trade secret and the unfair competition. The court cannot, even if so inclined, extend the relief beyond the scope of the bill and proof. In this view of the case, it can make no practical difference whether the relief be granted under the terms of the contract, so far as it is shown and admitted by defendant, as both parties understood it, or whether it be given under the general equity powers of the court. From the evidence the court is satisfied that the medicine compounded by the defendant, and sold as "Simmons' Stomach Compound," is practically the same as that of complainants, and based solely upon the recipe confided to him while in complainants' employ. The testimony tends to show that, these medicines being vegetable compounds, it is not possible to closely analyze them, and thus ascertain by scientific tests what the ingredients are, and that the only tests by which they can be compared are appearance, taste, and smell. On that point the testimony is conclusive that, while there is some slight difference in the appearance of the medicines, they are exactly alike in taste and smell. Defendant, in his answer, is silent as to his knowledge of the original heirloom of the Simmons family, although he denied that the recipe was a secret in the family, but, on the contrary, averred that it was within the knowledge of the Simmons family for generations, and handed down by the ancestors of that family from generation to generation; that whatever knowledge he had of the medicine, or the manner of its compounding, he acquired from his father and mother while the medicine was being made in the laboratory of his father at Iuka, Miss. This allegation is not sustained by the testimony. The father, Dr. M. A. Simmons, testifies:

"To my knowledge, no one knew it [the secret recipe] except myself and wife. It was my exclusive property. I always mixed it in a private mixing room, never allowing any one present except my wife, and guarded the secret, as to property and processes, as carefully as I could."

The evidence also shows that when, in 1878, the doctor removed from Iuka to St. Louis, defendant was not quite 13 years of age; and it is hardly probable that a child of such an age could carry in his mind from 1878 until 1886 a formula secret in its character, and composed of quite a number of ingredients,—which must be carefully compounded, as to quantity and quality of each ingredient,—with sufficient certainty, without any memorandum thereof. Besides, in his testimony he gives a different version of how he acquired the secret formula. In his deposition he says that in 1883 his mother, his sister, and himself were together, when his mother inquired of his sister if she knew how to make liver medicine. Sister replied, "No," that she never expected to make any liver medicine. His mother's reply was that "We cannot tell what may happen." His sister and defendant took down the formula dictated by the mother, and at the trial he handed to the court what purports to be this formula, as preserved by him. This information he obtained four years after the sale of the secret recipe, and the exclusive right to make the medicine had been sold by Dr. M. A. Simmons to Simmons & Hayden, whose

successors in right and title complainants now are. There can be no question that no court of equity would permit a person, after he had sold the absolute and exclusive property in a patent medicine for a valuable consideration, to impart the formula and secret recipe, which are the most valuable parts of the purchase, to others, that they may be used in competition with his vendee. Whatever knowledge Mrs. Simmons possessed, she acquired as wife of Dr. M. A. Simmons; and she could not do what her husband would be restrained from doing, and especially if, as in this case, nearly the entire consideration was paid to her as voluntary alimony. To permit this would enable every owner of a patent medicine to sell the secret thereof to one person, and have his wife, or some other member of the family to whom it had theretofore been confided, either use it, or sell it to others to be used, in competition with the purchaser. "Equity prevails against the party who gets the secret of another delivered to him in breach of contract or of trust." *Green v. Folgham*, 1 Sim. & S. 398. These findings clearly entitle plaintiffs to an injunction on that branch of the bill.

The complainants also complain of the ungenerous and unfair competition, by reason of a large number of things, in the dressing of the packages containing the medicines, and especially by reason of the bust picture and autograph signature thereon, and placing of some of the same words used on complainants' packages in the same relative positions on defendant's packages; an almost literal copy of directions for using the medicine, and the diseases for which it is intended; and sending out circulars in which he announces "that being the son of Dr. M. A. Simmons, of Iuka, Mississippi, and having been raised in his laboratory, naturally drifts to the medicine business," etc. The general rule applicable to this class of cases is too well settled to require the citation of many authorities. A great many of the authorities relied upon by counsel for one side are also cited in the brief of counsel for the other side. The rule may be epitomized by the following citation from one of the latest decisions of the supreme court of the United States:

"There can be no question of the soundness of the proposition that, irrespective of the technical trade-mark, the defendants have no right to dress their goods up in such manner as to deceive an intending purchaser, and lead him to believe he is buying those of the plaintiff. Rival manufacturers may lawfully compete for the patronage of the public in the quality and price of their goods, in the beauty and tastefulness of their inclosing packages, in the extent of their advertising, and in the employment of agents; but they have no right, by imitative devices, to beguile the public into buying their wares under the impression that they are buying those of their rivals." *Coats v. Thread Co.*, 149 U. S. 566, 13 Sup. Ct. 966.

And, while it is true that the likelihood of deception must be of a nature to deceive an ordinary purchaser exercising ordinary care, regard must be had to the class of persons who purchase a particular article for consumption, and the circumstances ordinarily attending their purchase. "In determining whether packages are so dressed as to be calculated to deceive persons, equity regards the consumer, as well as the middleman, for it is to him, more than to the jobber or wholesale purchaser, that the various indicia of the origin

appeal; and the court will not tolerate a deception devised to delude the consuming purchaser by simulating some well-known and popular style of package." *N. K. Fairbank Co. v. R. W. Bell Manuf'g Co.*, 23 C. C. A. 554, 77 Fed. 869; *Lever v. Goodwin*, 36 Ch. Div. 1. In the case at bar the evidence shows: That a very large class of purchasers of these medicines, and especially in the Mississippi valley, where they are principally sold, are mostly unable to read and write. That, long before defendant commenced the manufacture of his medicine, the Simmons liver medicines were well known to the consumer,—one, known as "Simmons' Liver Regulator," prepared by Zeilin & Co., distinguished by a large letter "Z" printed in red ink conspicuously on each package; and the other, "Simmons' Liver Medicine," prepared by complainants, having a bust picture, and the autograph signature of M. A. Simmons beneath it. Those desiring to purchase the Zeilin preparation would generally call for the packages with the red letter "Z," and those desiring complainants' medicine would ask for that with a picture. There can be no doubt, from the testimony, that dealers had no trouble to substitute and sell defendant's medicine when that of complainant was called for. And one of defendant's chief witnesses testified that when a negro would call for "Simmons' Tea," as a great many of them called it, he would give him Simmons' Stomach Compound (defendant's medicine), because it was a cheaper preparation; that the negroes had been calling for Simmons' medicine ever since they had been buying it,—could not state how long that was, but perhaps during the 30 years that he was in business; some of them called it tea; that the negroes buy a great deal of it; and that whenever he could, after the defendant's medicine was put on the market, upon calls for Simmons' Tea he sold them defendant's medicine. A number of other witnesses in the drug business testified to the same effect; thus showing, not only how easily frauds can be perpetrated upon the public by selling them defendant's medicine when they desire that of complainants, but that it is being actually done. From the testimony I cannot escape the conviction that it was defendant's intent to mislead the public into the belief that the medicine prepared by him was the same as that of Dr. M. A. Simmons, now complainants' property. The directions for using the medicine which accompany each package were almost literally copied by defendant from those sent out with complainants' medicine. Counsel for complainants have furnished the court with copies of these directions as sent out with complainants' and defendant's packages, placing them in parallel columns, and the court inserts them here to show the striking similarities, from which it is impossible to reach any other conclusion than that defendant copied them from those prepared and used by complainants:

[Copied from the printed directions enclosing each package and bottle of M. A. Simmons' Liver Medicine, made by him and his successors, as shown by Exhibit "2" to Original Bill in this case.]

[Copied from the printed directions enclosed in each Tin Box of Defendant's Medicine, as shown by Exhibit "D" to Original Bill in this case.]

Dr. M. A. Simmons'
Vegetable Liver Medicine

I.

Is a certain and effectual remedy for all kinds of Liver Complaints and all diseases and indispositions that are caused from a diseased state, or inactivity of the Liver—such as chronic and acute inflammations of the Liver, Sick Headache, Dyspepsia, Sourness of the Stomach, Loss of Appetite, Lowness of Spirits, Colic, Costiveness, etc. And with other appropriate remedies it is important to prepare the system and hold it in a state of preparation for a cure of all non-febrile and chronic diseases. Use it for chronic Rheumatism and all Chronic Pains, Scrofula, Chronic Chills, Fits, Female Diseases—including all troubles during Pregnancy.

II.

By arousing, emulging and regulating the action of the Liver, it cures its diseases—healthy bile thoroughly applied, being its natural remedy. And by that important action it assists nature in its efforts to remove all diseased conditions, and to regulate all morbid actions. The system is thus enabled to rid itself of an astonishing number and variety of the above and other non-febrile and chronic diseases, without any other medicine.

III.

It is necessary to arouse, increase or regulate the action of the Liver, and continue the regular and healthy action during the treatment of all diseases. And as mercurials can not be safely continued for a length of time, this innocent Vegetable Liver Medicine is important at some stage in the treatment of all diseases.

IV.

For Dyspepsia

Take a tablespoonful of the Liver Medicine soon after each meal. If that size dose (of Liver Medicine) does not operate so as to produce one copious stool every day, add to the dose until it will, and if it produces more than two, lessen the dose; but be sure to take a little every time, anyhow, if it is only a teaspoonful or a few drops. If your bowels are already too loose and irritable, begin with smaller doses, say one teaspoonful, and increase or lessen as above advised from that according to effect. And if the bowels continue so loose that the medicine seems to pass off without acting on the liver—which is very rarely the case—the patient should eat bountifully of very soft boiled eggs—the nearer raw the better—seasoned to taste with salt and black pepper. Also eat a large thimble full of prepared chalk three to five times daily. And in some diseases of the

M. A. Simmons, Jr.
Stomach Compound

I.

Is a certain cure for all Stomach Troubles and all other diseases that are caused by irregularities of the Liver, Stomach and Bowels. If you have any of the following diseases, look for directions in such cases and take Stomach Compound accordingly, and you will be relieved at once. Sick-Headache, Dyspepsia, Indigestion, Sour Stomach, Loss of Appetite, Colic, Costiveness, Biliousness, etc., etc. And with other appropriate remedies it is necessary to prepare the system and hold it in a state for the cure of chronic diseases, such as Chronic Pains, Scrofula, Chronic Chills, Fits, Female Diseases, including all troubles during Pregnancy.

II.

By arousing and regulating the action of the Liver, Stomach and Bowels, often cures these so-called chronic diseases without anything else.

III.

Stomach Compound is purely vegetable and harmless, pronounced to be superior to any preparation for the Liver, Stomach and Bowels.

IV.

For Dyspepsia

Take a tablespoonful of Stomach Compound three times daily before each meal. If that size dose does not operate so as to produce at least one free action on the bowels every day, take a little more, and if it produces more than two actions, take less, but be sure to take a little every time; if the bowels are already too loose, begin with smaller doses, say one teaspoonful, and increase or lessen as above advised, from that according to effect. And if the bowels continue so loose that the medicine seems to pass off without acting on the Liver, the patient should eat half a teaspoonful of prepared chalk three or four times daily, and eat heartily of very soft boiled eggs, with salt and pepper to taste, which will have a tendency to bind the bowels. In some very stubborn cases, may have to use an injection of one tablespoonful of common starch, with about 20 drops of laudanum

lower bowels it is necessary to take an injection of starch and laudanum occasionally, until the Liver Medicine can get to the liver and regulate the peristaltic action of the whole canal. One tablespoonful of common starch, as for clothes, with thirty to sixty drops of laudanum, according to age and emergency. Or one-fourth of a grain of morphine dissolved in an ear syringe full of cold water—repeat if necessary. Any deranged condition of the bowels may be regulated at pleasure with this Liver Medicine used as directed.

V.

For Piles.

Keep up the regular and healthy condition of the Liver, Stomach and Bowels with the Liver Medicine, and all symptoms of piles will soon disappear.

VI.

For Costiveness,

And the digestion yet good and the blood healthy, take the Liver Medicine every night in a sufficient quantity (beginning with a tablespoonful to produce one copious stool every day), but if the digestive organs are in the least weakened, or if you think your blood is not healthy, use the Medicine as directed in case of Dyspepsia. If there is a pain in the right side, in the shoulders or back of the neck, and digestion yet good, the Liver Medicine must be taken three times a day, in quantities sufficient to produce two or three stools a day.

VII.

Pregnant Women

Should take the Liver Medicine every night in a sufficient quantity to produce one stool every day, beginning with a tablespoonful and add or diminish as the case may require—in this way they are relieved of restless feelings at night, heartburn, etc.

VIII.

For Cramp Colic

Take a gill of Liver Medicine when the attack is on; repeat if necessary in a few minutes, and you will be well before you know it.

IX.

Best Tonic.

It is believed that this is the very best General Tonic, and the only medicine that will restore the Liver to regular and healthy action and cure its diseases. By keeping the Liver, Stomach and Bowels in this perfect healthy condition with the Liver Medicine, many other diseases would get well without any *specific* direction of remedies to them.

to a pint of water, only until the bowels are checked enough so that the stomach will retain the Stomach Compound long enough to take hold of the liver, and then the bowels may be regulated at pleasure with the Stomach Compound.

V.

For Piles.

Keep the Liver, Stomach and Bowels in a regular, healthy condition by the use of Stomach Compound, and all symptoms of Piles will soon disappear.

VI.

For Costiveness,

And the digestion being good and the blood in good fix, take Stomach Compound every night in doses large enough to produce one good free action every day. Commence with, say a tablespoonful, but if your digestion is not good, and your blood out of fix, use the medicine as in Dyspepsia. If there is in your back or right side, under shoulder or back of neck, any pain, and your digestion good, you must take Stomach Compound in sufficient quantity to produce two or three good free actions.

VII.

Pregnant Women

Are often troubled with Heartburn, Restlessness at Night, Smothering, or Short Breath and Costiveness. This will all be overcome by taking Stomach Compound in sufficient quantity to produce one good free action on the bowels daily, beginning with a tablespoonful, and add or diminish as may be required.

VIII.

For Cramp Colic.

Take three tablespoonfuls when the attack is on; repeat if necessary in a few minutes. You will be relieved at once.

IX.

The Best Tonic.

Stomach Compound is the best Tonic on earth. When your Liver, Stomach and Bowels are active and right, you are right, and you need nothing but Stomach Compound to keep you right.

X.

In all cases of Liver Complaints
Not prescribed for in this bill, use the
medicine as directed for Dyspepsia.

XI.

N. B.—All the above named doses
are for grown persons, and may be less-
ened for children according to their
ages. Give the liver medicine to chil-
dren for Colic or Costiveness as soon
as they are born, and always after-
wards, whenever they need it.

XII.

Use the Powder in Substance.

In cases of Fever and Diseases which
cause Fever—use the medicine in sub-
stance in place of making tea from it
as above. For children it should be
stirred in a little cold coffee or milk,
for fear they suck it into their lungs if
put in their mouth dry.

XIII.

Test Your Whisky.

A little ball of raw cotton rolled in
your fingers will sink in any whisky
that will save medicine. If the cotton
floats, the whisky is too weak.

XIV.

For Enlargement of the Spleen,
Chronic Chills,

While convalescing from any acute dis-
ease, for General Debility and all other
diseases in which a natural Tonic is
indicated, use the Liver Medicine, as
in case of Dyspepsia.

XV.

To Prepare this Medicine in Powder
for Use.

Pour half pint of boiling water upon
the contents of one of the little pack-
ages—cover it closely—infuse twelve
hours—strain through coarse linen, flax,
linsey or flannel, and add half as much
good whisky as the tea measures. To
make up two of the little packages at
once, use one pint of boiling water.
To make it strong—The vessel should
be as near the right size to hold the
powders with the amount of water, as
possible. Cover it closely to keep all
the steam in the vessel.

X.

In all Cases of Liver Complaint
Not mentioned in this, use Stomach
Compound as in Dyspepsia.

XI.

For Children.

Keep the bowels open with Stomach
Compound, and give it to them when
first born for Costiveness and Colic,
and always after when they need it.

XII.

Use the Powder.

In cases of Fever and diseases which
cause fever, use the Powder, instead of
making a tea of it. For children, it
should be stirred in a little milk or
cold coffee, for fear they suck the pow-
der into their lungs if put into their
mouths dry.

XIII.

Test Your Whisky.

A little ball of raw cotton, rolled in
your fingers, will sink in any whisky
that will save medicine. If the cotton
floats, the whisky is too weak.

XIV.

For Enlargement of the Spleen.

While convalescing from any acute
disease, for General Debility, and all
other diseases in which you need a nat-
ural tonic, use Stomach Compound as
in Dyspepsia.

XV.

To Make Liquid.

Pour one-half pint of boiling water
upon the contents of one of the tin
boxes, cover it closely, let it stand 10
hours, strain through a piece of coarse
muslin or flannel, and add half as
much good whisky as the tea measures,
then ready for use. Notice—It is better
to have an earthen vessel to make it in,
and as near the right size for the
amount of tea you wish to make, as
possible, as you can keep all the steam
in and by so doing, get the strength
from the medicine.

If you wish to make up more than
one box at a time, you can do so by
following these directions.

In sending out card circulars containing the following:

"Having been raised in the drug store and laboratory of my father, Dr. M. A. Simmons, of Iuka, Miss., know more of that business, am in it, and this card is to ask every family to try my Stomach Compound (a purely vegetable prepara-
tion) for the stomach and bowels. It will keep these most important organs
in healthy condition, and cure all diseases and bad feelings that are caused
from indigestion, or want of action of the liver, stomach, and bowels, such
as dyspepsia, sour stomach, biliousness, costiveness, enlargement of the spleen,

colic, dry gripes, general debility, sick headache, and all other troubles in all parts of the system that are caused by the liver, stomach, and bowels not being in healthy condition."

—Defendant undoubtedly intended to convey the impression that his medicines are the same as those known as M. A. Simmons' of Iuka, Miss. The testimony is so voluminous on that point, and the similarities so numerous, that to state them all in this opinion would be impracticable. But after having carefully examined them, and aided by the arguments of counsel for both sides, I have no hesitancy in finding that the facts clearly establish that the medicines of defendant constituted an unfair and ungenerous competition; that they were so dressed by him with the intent to deceive the public, and lead at least the ignorant class of the purchasers, who constituted the largest percentage of them in the localities in which defendant compounds and sells his medicines almost exclusively, to believe that they were purchasing complainants' medicines, which have been established for over 50 years, and have become well and favorably known to the public. Courts of equity must prevent such injustice, when appealed to. Complainants acted promptly in this matter. As soon as they learned of the manufacture and sale of defendant's compound, they instituted this action. Let there be a decree for complainants in conformity with the views herein expressed.

GOLDIE et al. v. DIAMOND STATE IRON CO. et al.

(Circuit Court, D. Delaware. June 16, 1897.)

1. PATENTS—NOVELTY AND INVENTION—RAILROAD SPIKES.

The Goldie patents for a railroad spike and for a spike-pointing machine (Nos. 394,113 and 413,341) show patentable novelty and meritorious invention. 64 Fed. 237, affirmed.

2. SAME—INFRINGEMENT.

A patent for a railroad spike having a point with diagonal cutting edges located in the same perpendicular plane with the rear side of the spike, and which is made by shearing the point obliquely in the direction of its length, is infringed by a spike having two points with diagonal cutting edges located in the same perpendicular plane, and which is made by shearing off the point in the same manner, excepting that the central shear is crescent shaped.

This was a suit in equity by William Goldie and others against the Diamond State Iron Company and others for alleged infringement of certain patents relating to railroad spikes and spike machines. The cause was heretofore heard on motion for a preliminary injunction, which motion was granted. 64 Fed. 237.

Kay & Tottin, for plaintiffs.

Francis T. Chambers, for defendants.

ACHESON, Circuit Judge. This bill charges the defendants with the infringement of three letters patent, all granted to William Goldie, one of the plaintiffs. The first patent, which is numbered 394,113, and dated December 4, 1888, is for a novel spike, adapted more especially for use in railroad construction. The second and

third patents are numbered, respectively, 413,341 and 413,342, and are both dated October 22, 1889. The former is for a new spike-pointing machine, and the latter for a new method of pointing spikes. The distinguishing feature of the Goldie spike described and claimed in the first above mentioned patent consists in its having a point provided with diagonal cutting edges located in the same perpendicular plane with the rear side of the spike. The specification states that these diagonal cutting edges, as the spike is driven into the wood, divide the fiber by a clean, shearing cut, and the point of the spike passes into the timber in the same relative position that it had when started, and that thus there is obtained a square-cut backing or solid supporting wall to hold the spike against the crowding strain of the rail. Another important stated characteristic of the spike is that it is provided on the front side of the point with a sloping compressing surface, formed with oblique facets on the front side of the diagonal cutting edges, these oblique facets turning and compressing the ends of the severed fiber outwardly towards the side grain of the timber. The result, as stated, is that the body of the spike for its full length is held firmly in the wood. The claims of this patent are as follows:

"(1) A spike having a point provided on each side with diagonal cutting edges, located in the same perpendicular plane with its rear side, substantially as set forth. (2) A spike having a point provided with a sloping compressing surface on its front side, and with cutting edges, p, p, located in a plane with the rear side of the point, and diverging from the center diagonally upward to the lateral sides, and with the oblique facets, O, O, on the front sides of the said cutting edges, substantially as set forth."

The invention of the Goldie machine patent (No. 413,341) relates to means for pointing the spike after it has been swaged or pressed into the ordinary taper form, by shearing the point obliquely, and in the direction of the length of the grain of the metal, so as to produce a keen and sharp cutting edge. To accomplish this, the described machine of the patent is provided with a reciprocating plunger having on its lower end one or more cutters of a shape to conform to the cutting edges required on the spike, and an anvil die having its upper face arranged to support the spike in a position oblique to the movement of the plunger, and having its front lower edge fitted to conform to the cutter or cutters on the plunger; the plunger having below its cutters a guide stop to receive the point of the spike, and sustain the spike against end thrust during the cutting operation. The claims of this patent are:

"(1) In a spike-pointing machine, the combination with a reciprocating plunger provided on one end portion with one or more cutters, of an anvil die having an inclined die face for supporting the spike in a position oblique to the movement of the plunger, whereby the fiber of the rolled metal is divided obliquely in the direction of its length, substantially as set forth. (2) In a spike-pointing machine, the combination, with a reciprocating plunger provided on its lower portion with cutters, and having a gage stop projecting below and in rear of the said cutters, with an anvil die having an inclined face for supporting the spike with its end presented to the cutters, and in a position oblique to the movement of the plunger, substantially as and for the purpose set forth."

The patent No. 413,342 covers the method of producing a sharp cutting edge on a spike point by first swaging the point of the spike blank into the ordinary form with front and rear compressing sur-

faces, and then shearing off the surplus metal of the dull pointed end obliquely across and in the direction of the length of the grain of the metal. The claim of this patent is in the words following:

"The herein-described method of forming a cutting edge on a spike point, consisting substantially of swaging the point to produce front and rear compressing surfaces, and then producing a sharp edge by shearing off the surplus metal obliquely across and in the direction of the length of the grain or fiber of the rolled iron; substantially as set forth."

On motion for a preliminary injunction, this case was heard by the court upon bill, answer, and affidavits, and an injunction against the defendants, under all the patents, was granted. 64 Fed. 237. Afterwards an amended answer setting up additional matters of defense was filed. Voluminous proofs on the one side and the other were then taken. At final hearing the case was fully and ably discussed by the counsel of the respective parties, whose oral arguments have been supplemented by exhaustive briefs. Thus aided, and in the light of the plenary proofs, the court has attentively re-examined the patents in suit, and has given careful consideration to all the questions at issue. In disposing of the case, however, the court cannot do much more than state its conclusions. To discuss the proofs with particularity would expand this opinion unreasonably and needlessly.

1. Naturally we first take up the spike patent. The spike of this patent was put upon the market about the year 1889, and from the start met with unusual public favor. Upon its undoubted merits, it has gone into extensive use on many lines of railway. It satisfactorily appears that it possesses advantages which were not to be found in any spike previously in use. Abraham C. Stickney, a road master of large experience, speaking of this spike, testifies, "My experience has been that the holding power of the Goldie spike would be at least fifty per cent. greater than the power of the common spike." It is shown that in practical use this spike cuts the fiber of the timber cleanly, without tearing, that the wood is left compact about the spike, and that its holding power against the spreading action of the rail far exceeds that of the common spike. In a word, the spike has been found to fulfill the objects the inventor had in view as stated in his specification. The great utility of this spike is firmly established by the evidence. Upon the question of patentable novelty, also, the plaintiffs are here entitled to a favorable judgment. None of the prior patents can fairly be said to show anticipation. The "lance-point" spike described and claimed in Goldie's patent of 1883 proved to be unsatisfactory. The perfect uniformity of bevels required in that spike (not to speak of the great cost of production) precluded its practical use. That spike was only a single step forward in Goldie's development of this art. Had he stopped there, he would have failed of practical success. The 1883 spike did not have a cutting edge located in a plane with the rear side, and therefore lacked the great feature of the invention of the 1888 patent. There is, I am quite satisfied, a clear, patentable difference between the lance-point spike and the spike of the patent in suit. Barbed-Wire Patent, 143 U. S. 275, 282, 12 Sup. Ct. 443, 450; Sayre v. Scott, 3 U. S. App. 643, 5 C. C. A. 366, and 55 Fed. 971. Nor can I discover in the Fennerty

patent anything to suggest the Goldie invention. The Fennerty specification states that "both the inclined sides of the shank, A, terminate at the bottom in a cutting or chisel point, H." This calls for the old chisel point, and excludes the Goldie point. The Kingsland patent and the Wills patent relate to horseshoe nails, which can hardly be said to belong to the art of spike making. But, be that as it may, I am not able to perceive in either of the two last-named patents any disclosure of the Goldie invention. The proofs fully justify the conclusion that the spike patent in suit is valid, and that it covers an invention of decided merit. This brings us to the question of infringement. Upon the full proofs, the case is not essentially different from what it was at the preliminary hearing. I must, then, adhere to the conclusion at that time reached,—that infringement of the spike patent is made out. Here I need only repeat the views expressed by the court when the preliminary injunction was granted. The plaintiffs' spike and the defendants' spike differ in this: that, whereas the spike shown in the patent has a single point, the defendants' spike has two points, each, however, being substantially the same as the Goldie point in form, function, and result. The two points in the defendants' spike are produced by shearing away as well a central part of the metal as the sides, after the point is formed by swaging. The central shear, indeed, is crescent shaped, but this is purely a formal difference. The substance of the invention remains. The principle of the two spikes is identical. The defendants' spike is provided with diagonal cutting edges located in the same perpendicular plane with the rear side of the point, and with oblique facets on the front sides of the cutting edges. To all intents and purposes, the defendants' construction is a mere duplication of the Goldie point. Surely a patent is not to be evaded by such an expedient as we have here. *Hoyt v. Horne*, 145 U. S. 302, 308, 12 Sup. Ct. 922; *Devlin v. Paynter*, 28 U. S. App. 115, 122, 12 C. C. A. 188, and 64 Fed. 398.

2. We now approach the consideration of patent No. 413,341, for the spike-pointing machine. The problem which was before Mr. Goldie when he conceived this machine was to provide practical means for putting sharp cutting edges and smooth compressing surfaces upon the point of a spike after it had been swaged or pressed into the common form, by shearing off the superfluous metal obliquely, and in the direction of the length of the grain of the metal. To accomplish this result, he devised, as we have seen, a special spike-pointing machine, consisting of a stationary anvil die having an inclined upper face terminating in cutting edges conforming to the shape of the point to be produced, and so arranged as to support the spike, and hold it in position oblique to the movement of a reciprocating plunger provided with cutters conforming to the cutting edges of the anvil die; the plunger also having below its cutters a guide stop to sustain the end of the spike against downward movement during the shearing operation. This machine has proved to be entirely successful, and by it the Goldie spikes of the patent of 1888 are produced. Mr. Tretheway, a skilled machinist, who has had great practical experience in metal shearing, thus describes the operation of this machine:

"In the pointing of the spikes on the Goldie machines, the cold spikes are held at an incline approaching the line of the stroke of the plunger, which provides for an actual shearing of the point cleanly between the plunger and the bottom die; there being a shearing or cutting through the metal on lines fixed by the shapes of the plunger and die, and such a shearing as will include the formation of a sharp point on the spike."

Again Mr. Tretheway states:

"To shear in this peculiar way (that is, obliquely and in the direction of the length of the spike) raised some serious difficulties, and I would not have believed it possible to do so unless I had seen the Goldie machines actually doing the work. In the first place, the spike itself is small, and there is no opportunity to support it outside of the dies themselves, and therefore the dies have to provide support for the spike."

I have examined the large number of prior patents relied on by the defendants, namely, patents for spike machines, for shearing boiler plates, horseshoe-nail patents, and other patents; and I have carefully read and reflected upon the evidence as to alleged prior uses, and touching the general subject of spike making and metal shearing. The result of this investigation is unfavorable to the defense. I do not find in the prior art, as exhibited in this record, any device or machine possessing the functions and capable of performing the work of the Goldie machine. Nor do I discover any prior mechanism suggestive of the peculiar spike-pointing machine which Goldie has devised. His machine was the outcome of original conception. The defense of anticipation, in my judgment, is not sustained by the proofs. I am clearly of the opinion that the Goldie machine in question is patentably new and useful, and, furthermore, that the invention is one of more than ordinary merit. Have the defendants infringed this patent? The proofs, I think, require an affirmative answer. The defendants have two machines,—one a reciprocating, and the other a rotary machine. In each there are an anvil die and guide stop substantially, if not identically, the same as those described and claimed in the Goldie patent. The defendants' reciprocating machine has a plunger provided with a series of cutters one above the other. The operation of this machine is the same as that of the Goldie machine, except that several shearing cuts are taken successively across the spike point, instead of a single cut. This, however, is an immaterial difference. In construction, mode of operation, and result, this machine of the defendants is substantially the same as Goldie's machine. This is likewise true of the defendants' rotary machine, which also is provided with a series of cutters acting successively. The rotary machine performs all the functions of the Goldie reciprocating machine, and the difference in movement is quite immaterial.

3. We now reach patent No. 413,342, for the method of pointing spikes. The defenses peculiar to this branch of the case are alleged prior practice at the works of the Phoenix Iron Company and at the works of Corydon Winch, and that the patent does not describe and claim patentable subject-matter. The proofs, I think, do not sustain the defense of prior use. The evidence as to the alleged practice at Phoenixville lacks the completeness requisite to overthrow a patent. That the Goldie method was ever practiced at Winch's is not estab-

lished to my satisfaction. It rather seems to me that all that was there done by the workmen was to trim off the ends of the objectionable spikes,—such as were too long and thin to drive,—in order to put them in form to pass inspection. No particular method was observed; much less, the peculiar method described and claimed in this patent. The other named defense, however, raises a serious question, in view of the late decision of the supreme court in *Locomotive Works v. Medart*, 158 U. S. 68, 72, 15 Sup. Ct. 745. In the opinion of the court in that case it is declared:

"It may be said, in general, that processes of manufacture which involve chemical or other similar elemental action are patentable, though mechanism may be necessary in the application or carrying out of such process, while those which consist solely in the operation of a machine are not."

Now, the specification of patent No. 413,342 contains a description of the machine covered by patent No. 413,341, and of no other device; and the question presented is whether patent No. 413,342 is for a patentable method, or merely for the operation of the described machine, within the definition of patentability laid down by the supreme court in the case cited. Upon this question I do not feel called upon to express an opinion, for the reason that the plaintiffs are shown to be entitled to, and they will be allowed, an injunction against the defendants with respect to their infringing spike and their infringing machines, and generally against infringement of the spike patent and machine patent, and this will afford the plaintiffs all the relief that they now need. The decree may be without prejudice to the plaintiffs' rights under the method patent. Let a decree be drawn in favor of the plaintiffs in accordance with the views expressed in the foregoing opinion.

ADAMS et al. v. TANNAGE PATENT CO.

(Circuit Court of Appeals, Third Circuit. May 10, 1897.)

1. PATENTS—PRELIMINARY INJUNCTION—PRIOR ADJUDICATION.

A patentee should not, on motion to dissolve a preliminary injunction, be deprived of the advantage he holds, as the owner of a patent adjudged valid by a court of appeals, upon anything less than thoroughly convincing additional proofs. 77 Fed. 191, affirmed.

2. SAME—PROCESSES FOR TAWING LEATHER.

The Schultz patents, Nos. 291,784 and 291,785, for processes of tawing leather, *held* (on appeal from a refusal to dissolve a preliminary injunction) not anticipated, and valid and infringed. 77 Fed. 191, affirmed.

Appeal from the Circuit Court of the United States for the Eastern District of Pennsylvania.

This was a suit in equity by the Tannage Patent Company against William W. Adams and others for alleged infringement of letters patent Nos. 291,784 and 291,785, issued January 8, 1884, to Augustus Schultz, for processes of tawing hides and skins. The cause was heard below on motion to dissolve a preliminary injunction, and the motion was denied. 77 Fed. 191. The defendants have appealed.

Hector T. Fenton, for appellants.

Charles Howson, for appellee.

Before DALLAS, Circuit Judge, and BUTLER and BUFFINGTON, District Judges.

DALLAS, Circuit Judge. This is an appeal from an order denying a motion to dissolve a preliminary injunction restraining the appellants from infringing two patents (Nos. 291,784 and 291,785) issued to Augustus Schultz on January 8, 1884, for a process for tawing hides and skins. The validity of these patents was earnestly assailed before this court in the case of Tannage Patent Co. v. Zahn, 17 C. C. A. 552, 70 Fed. 1003. They were then sustained, and we have now no doubt that this was rightly done. That litigation seems to have been observed with much interest by those engaged in the business concerned, and it is quite evident that some of them are not disposed to abide by its result. But we think it should be regarded as a finality until sufficient reason for departing from it shall have been made to plainly appear, and that the appellee should not, upon a motion to dissolve a preliminary injunction, be deprived of the advantage it holds as the owner of a patent adjudged by a court of appeals to be valid, upon anything less than thoroughly convincing additional proofs.

We have examined the new evidence adduced in this case, but do not feel called upon on this appeal from an interlocutory order to refer to it in detail. If it had been introduced in the Zahn Case, it would not have induced a different decision. It was all considered by the circuit court, and the patent which seems to have been chiefly relied upon there, and which has been mainly pressed here, was particularly discussed by the learned judge below. We are entirely satisfied with his conclusion. The objection that the plaintiff is not entitled to maintain this suit because it does not itself manufacture is without force. Its right to sue for the protection of its licensees is unquestionable. The decree is affirmed.

SHARPLES et al. v. MOSELEY & STODDARD MANUF'G CO. et al.

(Circuit Court of Appeals, Second Circuit. May 26, 1897.)

1. PATENTS—VALIDITY AND INFRINGEMENT—CENTRIFUGAL MILK SEPARATORS.

The Sharples reissue, No. 11,311 (original No. 442,461), for a centrifugal milk-separating machine, of which the distinguishing features are the simultaneous driving of the vessel and heating of the milk by a jet of steam or other similar motive power applied directly to the vessel, without the use of a driving spindle, *held* valid as to claims 4 and 5; and said claims *held* to be infringed by a rotary "milk tester," in which these distinctive features are used. 75 Fed. 595, affirmed.

2. SAME.

The Sharples patent, No. 458,194, for a rotary milk-testing apparatus, construed as to claim 3, of which the distinctive feature is an annular casing fixed to the frame outside the pockets, against which the jet of steam is delivered, and which aids in concentrating the steam about the bottles; and said claim *held* not infringed by a machine made in accordance with the Stoddard patent, No. 484,685. 75 Fed. 595, reversed.

Appeal from the Circuit Court of the United States for the District of Vermont.

The complainants, Phillip M. Sharples and David T. Sharples, brought before said court their bill in equity, which was based upon the alleged infringement by the defendants of claims 1, 4, and 5 of reissued letters patent No. 11,311, dated February 28, 1893, issued to the complainants, and of claim 3 of letters patent No. 458,194, dated August 25, 1891, issued to David T. Sharples. The reissue relates to the class of centrifugal machines known as "milk separators," which separate the cream from the blue milk. The other patent is for a centrifugal milk-testing apparatus, which, after the milk is heated with acid in accordance with a process given to the public in 1890 by Dr. S. M. Babcock of Wisconsin, separated the butter fat from the rest of the milk, whereby the value of the milk for the manufacture of butter is ascertained. The circuit court decreed that the defendants should be enjoined against their infringement of claims 4 and 5 of the reissued patent and of claim 3 of patent No. 458,194. 75 Fed. 595. From this decree the defendants appealed.

Charles Howson, for complainants.

E. B. Stocking, for defendants.

Before LACOMBE and SHIPMAN, Circuit Judges.

SHIPMAN, Circuit Judge. Centrifugal milk separators were, on December 8, 1890, the date of the original Sharples patent, well known. The patented improvement consisted in dispensing with a driving spindle, in requiring only the balancing of the vessel, which was effected by suspending it in a casing upon a fixed bearing, and in applying the motive power directly against the outer wall of the vessel, whereby an increased heat was imparted to the heavier part of the milk, which assisted in hastening the separation of the cream without materially heating the latter. The jets, as of steam, were directed by nozzles against wings or buckets projecting from the periphery of the vessel, and the bearing was placed substantially in the perpendicular line which passed through the center of gravity of the loaded vessel. The simultaneous driving of the vessel and heating of the milk by the agency of steam, or a similar motive power applied directly to the vessel, were the distinctive features of the improvement; and, so far as the record shows, the patentees were the first to cause a centrifugal milk-separating vessel, suspended in a casing upon a fixed bearing, to be whirled directly by a jet, as of steam, a driving spindle being dispensed with, and the balancing of the vessel only being required, and to drive and heat this separator by the same jet applied at the outer wall of the vessel. Claims 4 and 5 of the reissue are as follows:

"(4) In a centrifugal machine, a separator vessel, suspended upon a fixed bearing, located substantially in the perpendicular passing through the center of gravity of the loaded vessel, in combination with means for applying rotating power directly to said vessel, substantially as set forth. (5) In a centrifugal machine, a rotary separator vessel pivotally suspended, substantially as described, in combination with a nozzle or nozzles located at the periphery of the vessel, and adapted to apply a jet, as of steam, thereto, whereby said vessel is directly rotated, and the jet utilized to affect the temperature of the rotating liquid, substantially as and for the purpose set forth."

Claim 4 is identical with claim 3 of the original patent. Claim 5 differs from claim 4 of the original only in this respect: it substitutes "and the jet utilized to affect the temperature of the rotating liquid" for the words "and the heat of the jet utilized," and it is suggested that the substitution was intended to permit the use of such a motive

power as would cause the rotating liquid to be cooled equally. Such a construction of the claim is not permissible. It means what the original fourth claim meant. The defendants' machine is what is known as a "milk tester"; that is, instead of a single vessel, which is rotated for the purpose of separating the cream from the milk, it consists of a series of small bottles containing milk and acid, and which are rotated for the purpose of separating the butter fat from the residue of the milk. The two classes of separators were well known, are cognate in character, and milk testers containing a series of bottles which were mounted upon a common frame and rotated around a common axis were familiar before the date of the original of the Sharples reissued patent. The patents to Gustaf De Laval and to George W. Tower, Jr.,—Nos. 365,120 and 431,128, respectively,—are illustrative of this class of separators. The defendants' machine has a whirling bottle-holding frame upon which is mounted a series of small milk-testing bottles. The frame is "suspended upon a fixed bearing in the perpendicular of the center of gravity of the load through which a nozzle takes a jet of steam against buckets on the periphery of the rotary apparatus," whereby the series of bottles is simultaneously whirled and heated by the operating jet of steam. The subdivision of one separator vessel into a theretofore well-known series of vessels which assume a radial position when the rotating apparatus is in motion is not of importance upon the question of infringement of claims 4 and 5 of the reissue. The defendants have applied the distinctive features of the plaintiffs' separating machine to their rotary milk-testing apparatus. Letters patent No. 458,194 describe a milk-testing apparatus, and the third claim is as follows:

"(3) In a milk-testing apparatus, the combination, with a rotary frame having independently hinged pockets to receive the testing vessels, of an annular casing, F, fixed to said frame outside of said pockets, and a steam nozzle located in close proximity to the exterior of said casing, the space surrounding said pockets being in communication with the outside of said casing, whereby the contents of the vessel are heated by the operating steam, substantially as set forth."

This machine was an improvement upon reissued patent No. 11,311. It had the familiar rotary frame with independently hinged pockets for the testing bottles, but the distinctive feature of claim 3 was the annular casing fixed to the frame outside the pockets against which the nozzle delivered the jet, and which was also designed to aid in concentrating the steam in the vicinity of the bottles. The casing had two walls,—one a top wall or flange extending inwardly, and the other a peripheral wall having buckets on the exterior, and preferably having openings through it,—and was intended to partially inclose, and not merely to surround, the pockets. The jet of steam impinged upon the exterior buckets. Milk-testing machines are usually used with an outside stationary metallic casing, which covers the whole whirling apparatus when in motion, and which retains and confines within itself and in the vicinity of the bottles the steam which is emitted from the nozzle. The complainants suppose that, although this exterior casing is not mentioned in the specification, and is not shown in the drawings, it is by implication a part of the structure, because it is an ordinary part of milk-testing apparatus. But the specification says that "figure 1 is a sectional elevation of the com-

plete apparatus," and, furthermore, a described object of the annular casing with the openings in its peripheral wall is to keep the vessels in an atmosphere of steam. The specification says that the contents of the vessel are maintained during the rotation "at a high temperature by the same steam which effects the rotation, and which enters the casing, F, and keeps the vessels in an atmosphere of exhaust steam. Openings, f³, shown in the wall, f¹, may be provided to insure the entrance of steam within the casing." It is difficult to understand the importance of this casing unless it was intended that the machine with its improvement was complete and efficient without the addition of a heavy exterior cover. The defendants' machine is made in accordance with letters patent No. 484,685, issued to Ralph Stoddard on October 18, 1892, for slight improvements in milk-testing apparatus. It has the old exterior cover, which covers a whirling apparatus provided with testing bottles. To the outer ends of radial arms is secured a rim, the outer periphery of which is provided with buckets against which the jet of steam strikes. The theory of the complainants is that this rim is the annular casing of claim 3 of No. 458,194. It is not that casing with its two walls inclosing the pockets, and designed to keep the steam in contact with the bottles, but is simply the rim of a rotating frame which receives the propelling force of the steam, which is kept in close contact with the bottles by the exterior cover. It is too great an expansion of the narrow improvement of claim 3 to construe it so as to include a mere rim, which does not retain the steam in the vicinity of the bottles. The decree of the circuit court is directed to be modified, with costs of this court, so as to decree that claim 3 of letters patent No. 458,194 was not infringed, and modifying accordingly the decree in regard to an injunction and an accounting with respect to that claim.

CAMPBELL v. MAYOR, ETC., OF CITY OF NEW YORK.

(Circuit Court, S. D. New York. May 14, 1897.)

1. PATENTS—STATUTES OF LIMITATION.

A patent was granted May 24, 1864, and infringement was begun in 1865, and continued until the expiration of the patent. Suit was begun November 24, 1877. At the time the patent was granted, therefore, there was no federal statute of limitations applicable to infringements, and the state statute would govern. The state statute was displaced by section 55 of the patent act of 1870, which required suits to be brought during the term of the patent or within six years after its expiration. This provision was repealed by Rev. St. § 5599, but existing causes of action were saved. *Held*, that no part of the claim for infringement was barred.

2. SAME—MARKING ARTICLES PATENTED.

Rev. St. § 4900, in relation to marking articles "patented," does not apply so as to prevent recovery of damages for infringement, when neither the plaintiff, nor any one for or under him, has made or sold the patented device.

3. SAME—NOTICE OF INFRINGEMENT—ESTOPPEL AS TO PRIOR INFRINGEMENT.

Where notice of infringement is given on a certain date, there is no estoppel, as against complainant, as to prior infringements, when it appears that defendant did not act upon the notice with respect to prior, or even subsequent, infringements, so as to make the claim for the prior infringements inequitable.

4. SAME—COMPETENCY OF WITNESSES.

In determining the profits or savings made by a city by the use of an infringing improvement upon its fire engines, the chiefs of its fire departments, its foremen, and others in those departments engaged at the time and before the infringement commenced, are competent witnesses on the question of the savings accruing from the infringing device.

5. COMPUTATION OF DAMAGES BY THE COURT.

The very long pendency of a suit in equity is good reason for a computation of damages or profits by the court, if it can be done, instead of again referring the cause to a master.

6. PATENTS—INFRINGEMENT—PROFITS OR SAVINGS.

Where, by the use of an infringing device in connection with a city's fire engines, the number of men required with each engine was reduced, the amount of their wages should be included in the computation of savings or profits, although the city did not in fact reduce the number of men employed, but either utilized them for other purposes or allowed them to remain idle.

7. SAME—BURDEN OF PROOF.

Where the complainant has shown that a certain amount of saving to the defendant resulted from the use of an infringing device, the defendant, if he claims that a part of the saving was due to a different device, has the burden of proof in respect thereto and as to the amount attributable to such other device.

Harvey D. Hadlock, Walter K. Griffin, William T. Washburn, and John McDonald, for plaintiff.

Edmund Wetmore and John R. Bennett, for defendant.

WHEELER, District Judge. This suit was begun November 24, 1877, upon letters patent No. 42,920, dated May 24, 1864, and granted to James Knibbs, assignor, for a relief valve in steam fire-engine pumps. The patent was sustained, and the cause sent to an account of profits. *Campbell v. Mayor, etc.*, 20 Blatchf. 67, 9 Fed. 500, and 47 Fed. 515. The master has reported profits from savings in making repairs, \$28,336, with a comprehensive statement of evidence and findings as to this claim and others not allowed. The cause has now been heard upon exceptions by each party to this report, some of which raise questions as to any recovery, and some as to any further recovery.

One general question arises upon the statutes of limitation of the state and of the United States. The infringement was begun in 1865, and continued till the expiration of the patent. When the patent was granted there was no federal statute of limitations applicable to infringements, and the state statute would govern. *Campbell v. City of Haverhill*, 155 U. S. 610, 15 Sup. Ct. 217. The state statute was displaced by section 55 of the patent act of 1870, which provided that "all actions shall be brought during the term for which the letters patent shall be granted, or extended, or within six years after the expiration thereof." This provision was repealed by the Revised Statutes, but existing causes of action were saved by section 5599, with the same right of suit as if the repeal had not been made. The state statute had not run upon any part of this infringement at the time of the act of 1870; the federal statutes took place and saved all of that was prior to December 1, 1873, until six years after the expiration of the patent; and the state statute, which again took

place, had not run upon what was after December 1, 1873, when this suit was commenced. So no part of the recovery sought here was barred, even at law, by any statute. Walk. Pat. § 472.

Another general question arises upon section 4900, Rev. St., which requires all patentees, their assigns and legal representatives, and all persons making or vending any patented article for or under them, to mark or label the articles "Patented," and prohibits the recovery of damages for infringement "by the party failing so to mark," except on proof of notice to the defendant. Mr. Justice Gray, in *Dunlap v. Schofield*, 152 U. S. 244, 14 Sup. Ct. 576, said:

"The clear meaning of this section is that the patentee or his assignee, if he makes or sells the article patented, cannot recover damages against infringers unless he has given notice of his right."

Neither the plaintiff, nor any one for or under him, has made or sold this patented device; and he does not come, according to this construction, within this prohibition. The defendant had notice, July 11, 1877, which was alleged in the bill, and has been suggested to have worked an estoppel as to prior infringements. But the defendant did not act upon the notice with respect to prior, or even subsequent, infringements, so as to make the claim for the prior infringements inequitable because of that precaution as to further infringement, and the insertion of it in the bill would not be any express or implied waiver of other grounds of recovery.

The master reports:

"The Amoskeag Manufacturing Company, one of the largest manufacturers of steam fire engines, immediately appropriated the invention, and an engine equipped with it was delivered by that company to this city. All engines subsequently purchased contained the invention. Engineers in the department witnessed its operation, and one of them applied the device to an old engine then in use. The other engines were thereafter sent to the repair shop to be fitted out with the relieving mechanism. It was extremely valuable in and of itself, and it opened the way for other improvements, which enabled steam fire engines to be operated so as to extinguish fires with a minimum loss in the destruction of property, and to avoid needless waste of water. The superiority of an engine containing in its main water pump this relieving device over those known to the art at the date of the invention is conceded. * * * The first steam fire engine came permanently into service in this city in 1858. There was but one such engine in service in 1860, when Chief Decker took charge of the department. He left the service in 1865, at which time there were twenty-nine in active service and four under construction. The patent in suit was granted May 24, 1864, and the first engine fitted with the relieving mechanism came into the service of the city during the year 1865. At the end of 1866 all the old engines in active service had been fitted with the patented relief."

That the plaintiffs—

"Claims are based upon benefits due wholly or in part to the patented device, which are as follows: (1) Economy in the use of water; (2) reduction in property destruction; (3) economy in engine and pump repairs; (4) prolongation in the life of engines; (5) stability, reliability, and increased efficiency in the use of engines; (6) economy in manual labor; (7) prolongation of the life and savings in the use of hose. As compared with the old style or solid pump engines, the evidence is conclusive that the defendant enjoyed each of the advantages above enumerated by the use in its fire service of steam fire engines subsequent to the grant of the patent in suit. Some of them were due solely to the relieving mechanism, and others were obtained by the use of that device in connection with subsequently patented controlling nozzles. There

was a great saving in water, and the damage to property by water was materially reduced."

The first two of these claims were abandoned for reasons given by the master.

The plaintiff improved as witnesses before the master chiefs of fire departments of the defendant, and foreman and others in those departments, some of whom had been engaged there from long before this infringement was commenced, and all were men of long experience about things connected with it, and of great skill and judgment concerning them. From their testimony as to the utility of the patented device, the uses made of it, and results produced, with their estimates as to the saving in number of men employed in making repairs, the master has found the defendant enabled "to discontinue the services of two machinists in making repairs to engines and pumps, whereby it made a saving of three dollars per day for each of said men, amounting to the sum of \$1,848 per year, for the period of fifteen years and four months, making an aggregate saving due to the invention of \$28,336," as before mentioned. Nevertheless, apparently because such evidence as to other claims was thought to be less competent, no other savings or profits are found. The exceptions raise questions as to this competency. The testimony is not that of mere experts giving opinions upon supposed cases, but of observers as well, stating facts from their own knowledge, with estimates and opinions thereupon. The cases most relied upon to show the incompetency of such evidence seem to be quite different from this one in this respect. Thus, in *Mayor, etc., v. Ransom*, 23 How. 487, the plaintiffs furnished no evidence as to damages or profits except that the invention was valuable, and could be applied at an expense of \$25, thereby greatly increasing the power of the machine. In *Ingersoll v. Musgrove*, 14 Blatchf. 541, Fed. Cas. No. 7,040, which was on a patent for an improvement in cuspidors, the plaintiff showed merely that the defendant infringed, and his prices were reduced 30 per cent. In *Sargent v. Manufacturing Co.*, 17 Blatchf. 249, Fed. Cas. No. 12,367, which was on a patent for an improvement on a lock, two witnesses appear to have estimated the value of the device to the defendant without stating facts as a foundation for the estimate. In *Munson v. City of New York*, 21 Blatchf. 342, 16 Fed. 560, which was a patent on a method for preserving bonds, one witness testified, without stating facts for foundation, as to what, in his judgment, would be the advantage or benefit from the use of that plan. In *Garretson v. Clark*, 111 U. S. 120, 4 Sup. Ct. 291, which was on a patent for an improvement on a mop head, the plaintiff merely proved the cost of his mop heads and the price at which they were sold. In *Coupe v. Royer*, 155 U. S. 565, 15 Sup. Ct. 199, which was on a patent for an improvement on a machine for treating hides, one of the plaintiffs testified that, in his opinion, there would be a saving of four or five dollars a hide by using his machine over what it would cost to treat hides by any other method, and that the difference between the treating hides on his machine and by hand would be more than one dollar a hide. Such evidence alone was held in these cases, respectively, to be in-

competent. On the other hand, that the estimates and opinions of experts, and of observers stating facts for foundation, are in many such cases admissible in evidence and competent from which to find ultimate facts relating to such subjects, is well shown in many books and cases.

In 1 Greenl. Ev. (Redfield's Ed.) § 440a, it is said:

"Facts which are latent in themselves, and only discoverable by way of appearances more or less symptomatic of the existence of the main fact, may, from their very nature, be shown by the opinion of witnesses as to the existence of such appearances or symptoms; such as the state of health or of the affections, as already stated. Sanity is a question of the same character. So, too, upon inquiries as to the state or amount of one's property, when the facts are too numerous and evanescent to be given in detail, those acquainted with the facts are allowed to express an opinion, which is the mere grouping of the facts. So, too, as to the marketable condition and value of property, and many other questions, where it is not practicable to give more definite knowledge, opinions are received."

In 2 Best, Ev. (Wood's Ed.) § 517, subd. 2, in speaking of exceptions to the general rule that witnesses are to be confined to knowledge, it is said:

"Another class of exceptions is to be found where the judgment or opinion of a witness on some question material to be considered by the tribunal is formed on complex facts, which, from their nature, it would be impossible to bring before it."

In Wood's note to the same section it is stated that opinions are to be confined to that class of evidence that lies within the peculiar knowledge of a certain class of men—

"Or that class of evidence that from necessity can be given in an intelligible manner in no other way than by the opinions and impressions of the witness, derived through some one of the senses." "As an illustration of the applicability of this class of evidence, it may be stated, generally, that knowledge of any kind gained for and in the prosecution of a business or occupation, as pertaining thereto, which is not generally known, but which only comes from a particular training or experience, is, when material in a cause, sufficient to make its possessor an expert, and to entitle his opinion to be considered and weighed by the jury for what it is worth."

Many cases illustrating the competency of this kind of evidence are mentioned in this note.

In *Webber v. Eastern R. Co.*, 2 Metc. (Mass.) 147, a witness, who did not profess to be an expert, but who had been a county commissioner several years, and had estimated damages for roads and railroads, and as secretary of an insurance company had examined and estimated the value of estates, testified that, in his opinion, the passage of locomotive engines within 100 feet of a building would increase the rate of insurance from $1\frac{1}{2}$ to 2 per cent., and the rent of the buildings would be reduced from one-fourth to one-third; and, on exceptions to this, Shaw, C. J., in delivering the opinion of the court, said:

"He was, we think, quite competent to give his opinion as evidence to the jury upon that subject."

In *Porter v. Manufacturing Co.*, 17 Conn. 249, one question was whether a dam on a stream was reasonably sufficient and safe. Witnesses were admitted to testify that they had been acquainted with the stream many years; that it rose very rapidly in time of freshets;

that the dam was high, and kept back a large pond; and that, in their opinion, under such circumstances, such a dam as the defendant's was could not stand. As to this Storrs, J., for the court, said:

"The judgment or opinion of these witnesses, as practical and observing men, was sought on this point on the facts within their knowledge and to which they testified. They had acquired by their personal observation a knowledge of the character of the stream, and also of the dam, and were therefore peculiarly qualified to determine whether the latter was sufficiently strong to withstand the former. The opinions of such persons on a question of this description, although possessing no peculiar skill on the subject, would ordinarily be more satisfactory to the minds of the triors than those of scientific men who were personally unacquainted with the facts in the case; and to preclude them from giving their opinion on the subject in connection with the facts testified to by them would be to close an ordinary and important avenue of truth."

And after alluding to the admissibility of the testimony of experts, he said further:

"On such a question the judgment of ordinary persons, having an opportunity of personal observation, and testifying to the facts derived from that observation, was equally admissible, whatever comparative weight their opinions might be entitled to, of which it would be for the jury to judge. It was a question of common sense as well as of science."

In *Transportation Line v. Hope*, 95 U. S. 297, on a question of negligence in towing a canal boat, a witness had testified that for many years he had been the captain of a tug boat, and was familiar with the making up of tows; that he was a pilot, and had towed vessels on Long Island Sound, although he was not familiar with the Sound, but that he was familiar with the waters of the Chesapeake Bay. As to the admissibility and competency of his testimony, Mr. Justice Hunt, for the court, said:

"The witness was an expert, and was called and testified as such. His knowledge and experience fairly entitled him to that position. It is permitted to ask questions of a witness of this class which cannot be put to ordinary witnesses. It is not an objection, as is assumed, that he was asked a question involving the point to be decided by the jury. As an expert, he could properly aid the jury by such evidence, although it would not be competent to be given by an ordinary witness. It is upon subjects on which the jury are not as well able to judge for themselves as is the witness that an expert, as such, is expected to testify. Evidence of this character is often given upon subjects requiring medical knowledge and science, but it is by no means limited to that class of cases."

In *Walsh v. Insurance Co.*, 32 N. Y. 427, it was decided that the testimony of experienced navigators on questions involving nautical skill was admissible. The witness in that case was asked to what cause the loss of the vessel was attributable, which was the point to be decided by the jury. The court sustained the admission of the evidence, using this language:

"We entertain no doubt that those who are accustomed to the responsibility of commanding, and whose lives are spent on the ocean, are qualified, as experts, to prove the practical effect of cross seas and heavy swells, shifting winds and sudden squalls. The books give a great variety of cases in which evidence of this character is admissible, and we have no doubt of the competency of the evidence to which this objection is made."

In *Suffolk Co. v. Hayden*, 3 Wall. 315, Mr. Justice Nelson, delivering the opinion of the court on the question of damages in patent cases, said:

"The question of damages, under the rule given in the statute, is always attended with difficulty and embarrassment, both to the court and jury. There being no established patent or license fee in the case, in order to get at a fair measure of damages, or even an approximation to it, general evidence must generally be resorted to; and what evidence could be more approximate than that of the utility and advantage of the invention over the old modes and devices that had been used for working out similar results? With a knowledge of these benefits to the persons who have used the invention, and the extent of the use by the infringers, a jury will be in possession of material and controlling facts therein, in the exercise of a sound judgment, to ascertain the damages, or, in other words, the loss to the patentee or owner by the piracy instead of the purchase of the use of the invention."

In *Herring v. Gage*, 15 Blatchf. 124, Fed. Cas. No. 6,422, the master's record shows that much testimony of opinions by experts, and by observers stating facts for reasons, was received by the master. As to this Wallace, J., said:

"By further exceptions, the defendants insist that the master's findings, as to the actual savings realized by the defendants by the use of the device, is not sustained by the evidence. This finding is based, in part, upon the testimony of various experts, who were familiar with the practical working of the device in other mills, and who were permitted to state the quantity of flour lost when the device was not used; thus estimating the saving realized under their observations, and basing upon that their opinion of the saving ordinarily gained by the use of the device. The conditions under which the device was used differed in the different instances observed by the witnesses. It is contended that this testimony is not entitled to consideration. To this I cannot agree. Of course, the ultimate inquiry was only as to the saving made by the defendants. It was impracticable to ascertain this by direct evidence, because the defendants did not keep any account relative thereto. They and their witnesses gave their opinions, with the data upon which they were based. The complainants gave the best evidence which was attainable, from the nature of the case."

To the same effect are *Railway Co. v. Edwards*, 24 C. C. A. 300, 78 Fed. 745, and *Equipment Co. v. Blair* (2d Circuit, April 8, 1897) 25 C. C. A. 216, 79 Fed. 896.

Upon these authorities and cases, the testimony of the fire chiefs, engineers, and foremen seems to have been amply competent for consideration in ascertaining what was proved upon the issues before the master in this case. He seems to have warrantably found from it the saving in men for repairs, but to have hesitated because of the supposed incompetency of it as to the other claims. But, with its competency so established as to make it proper to be considered, he would apparently have proceeded to ascertain further the validity and amount of other claims made by the plaintiff. As to the saving of men from engine companies, the master in his opinion states:

"The proposition that a number of men could have been dismissed from each company operating with an old-style engine without impairing effective fire service, the improved apparatus compensating for the difference in men, is not seriously contested by the defendant. At any rate, the proofs sustain the proposition. * * * The majority of the witnesses agree that a company of nine men using the approved apparatus was about equal to twelve men using the old-style engine, and they also agree as to the men who could be displaced, viz. one to carry messages from pipe to engine and two men in holding the pipe."

And from this evidence, if he had supposed it to be admissible and competent, he seems to have been persuaded and ready to find

that there would be a saving of three men to each such engine company maintained by the defendant, the city of New York, during all of the time of the infringement of this patent. And as to the saving in hose, he states the testimony of several of these witnesses, and as to that claim says:

"But one factor is wanting,—the percentage of saving. During the period of the accounting the defendant expended for hose the sum of \$366,788.64. The lowest estimate of saving was one-third, or 33⅓%. This was by Mr. Bates. If that were the measuring factor, then, without the relieving mechanism, the city would have been compelled to purchase hose to the amount of \$550,182.96, and the difference between the two amounts, \$183,394.32, would be the saving. The city would have employed the same number of engines. It would have maintained practically the same equipment. It would have had the same service at fires, and it would have provided hose equal to the necessities of the department. Basing one of the factors upon opinion evidence in such a computation does not call for an irrational presumption necessary to support the contention as to the increased number of engines."

Both parties agree in requesting that this case be not returned to a master, and its long pendency seems to be a good reason for the computation of savings and profits by the court, if it can be done. *Tuttle v. Clafin*, 22 C. C. A. 138, 76 Fed. 227. The testimony of the witnesses before mentioned is so full upon these two points, and so undisputed upon either of them, that such course in this case seems proper, under the circumstances. For example, the testimony of Martin Cook, foreman of engine company No. 4, No. 39 Liberty street, who had been connected with the department going on 23 years in the capacity of fireman, assistant engineer, engineer, assistant foreman, and foreman, covering all the period of this infringement, as to the saving in men and the saving in hose, who testified:

"373. Re-D. Q. Have you ever known hose, known as the 'Maltese Cross Hose,' to be attached to an engine operated with the relieving mechanism being in use,—or, in other words, with the automatic relief lock,—while the hose was lying in the street? If so, please state the effect of so operating the engine upon that hose. 374. Re-D. Q. Did you prior to 1881? A. Lots of times. It would have an effect on some engines different from others. With a single-pump engine, it would make that jump like a snake through the street,—stretch out from the motion of the pump. A double-pump engine, worked under a high pressure, would do the same, only not to as large an extent. 375. Re-D. Q. What effect would that have on the hose? A. Bad effect; sometimes burst three or four lengths, one after the other. 376. Re-D. Q. In what way as to chafing? A. Wear it out working on the street." 55. Q. What number of men did you require to handle the pipe when the relieving mechanism was in use? A. One; never more than two. 56. Q. Why did it require more men to control the pipe without the device than with it? A. There would be more pressure on the line; it would require more men to hold it and move it around. 57. Q. Did it require more men to hold the hose without the relief operating, in moving it from one story to another in a building, than when it was in operation? A. It did require more men; yes, sir. 58. Q. How many? A. I said it would require four or five men. 59. Q. Have you had occasion during the time prior to 1881 to operate at a fire on the inside of a building when you found it necessary to move from one floor to the other with the relieving mechanism on the engine? A. With the relieving mechanism on the engine at small fires it is under a small pressure, such as we can use with the relief mechanism on an engine. * * * 62. Q. Locked or closed hard upon the seat,—either? A. Yes, sir. 63. Q. With the relieving mechanism locked, how many men did it require, under a pressure of 160 pounds, to remove a line of hose from one floor of a building to another? A. I had the experience of

doing that. Four or five men. * * * 67. Q. Now, operating under like circumstances, with the exception of instead of a locked relief having a relief in operation, how many men would it take to remove the hose from one floor to another, under the circumstances stated in the last question? A. With 160 pounds pressure, about two men."

Many other witnesses, with similar qualifications and experience, covering all this time, have testified how, under varying circumstances, there would be a saving in wear and tear of hose, and the extent of it, and the saving in the number of men necessary to be had with each engine company, and the saving of them. The great majority of all the witnesses in this case on this subject would put the saving of men necessary for each engine company on account of this improvement at three. No one puts it at less than two; and from the kind of savings to which the improvement applies, and the testimony, taken altogether, it is quite conclusive and satisfactory that, at the least, two men could well be dispensed with from each engine company in service during the time and on account of this infringement by the respective engines. The statement of Mr. Purroy, entitled "Supplementary Account No. 2" (Master's Record, vol. 4, p. 5476), shows that from 1865 there were of active engines, besides spares, three; from 1866, three; from 1867, five; from 1868, four; from 1871, five; from 1873, six; from 1874, one; from 1877, three; and from 1880, three,—engines containing the improvement from those times, respectively, to the expiration of the patent, May 24, 1881. Computing the time from when the improvement began to be used in each engine to the expiration of the patent, omitting the two years prior to 1867, the whole number of years for a single engine amounts to 328, which would be, at two men for each engine, equal to 656 years for one man, which, at \$3 per day for 308 working days to the year, would amount to \$924 per year for one man, and for the two men to each engine to \$606,344. While the numbers of men in each company theoretically remained the same, many men were detailed from the companies to do work as plumbers, tinsmiths, caulkers, gas fitters, stone cutters, painters, and many other necessary purposes, which altogether would amount to near as many as have been reckoned at two each to a company in making this computation, and probably to a good many more. This fact that the number was nominally always the same is mentioned by the master, among other things, as a reason for not allowing for the savings as to these men. By the improvement, there was this amount and more or less work of men to be done. That the defendant actually kept so many men in service, when so many less would be sufficient, would make the saving of labor of men none the less. The men were there and used for other purposes, if not idle; and the defendant had so many more men to use for other purposes, in useful labor or in idleness, as should be seen fit. The saving in services of men attributable to the improvement was no less, whether the defendant did or did not actually bring these savings to its own treasury by reduction of the money for this purpose paid out. But, on the whole, it seems clear enough that the defendant did in this way, on account of this improvement, save at least this amount.

An appliance, called a "shut-off nozzle," is referred to as contributing substantially to this saving; but this nozzle, according to the finding and the proof, was a thing long before known, and one of no use whatever, in this connection for this purpose, without this relief valve. It was like any of the other parts of a steam fire engine into which this improvement was put. The saving so made when the engines had these shut-off nozzles, which they could have as well as any other part of an engine, was due wholly to this improvement. It stood in the same relation to that as it did to any other of the parts of the engines, and was entitled to credit for whatever it saved as a part at any time of the then working whole. All the witnesses agree that with that nozzle, but without this improvement, none of this saving could have been made. Besides this, after such showing, if any deduction was to be made on account of the contribution of the shut-off nozzle to the savings, the burden was upon the defendant to show how much it would be. *Elizabeth v. Pavement Co.*, 97 U. S. 126; *Crosby Steam-Gage & Valve Co. v. Consolidated Safety-Valve Co.*, 141 U. S. 441, 12 Sup. Ct. 49; *Tuttle v. Claffin*, 22 C. C. A. 138, 76 Fed. 227.

The plaintiff claims, and evidence such as has been mentioned tends to show, that engines with this improvement were to those without it, in efficiency, by some witnesses one equal to two, by some two equal to three, and by some three equal to five. The plaintiff claims to recover what it would have cost more to maintain the same efficiency of the fire department with engines of the former style than it has with those having this improvement, as savings due to the improvement. If the defendant had been required by law to provide a fire department up to any certain degree of efficiency, and had made use of this improvement in reducing the number of engines necessary to bring the department up to that degree, there would be reason in saying that the defendant had made as much profit in savings by using the improvement as the engines saved would have cost; but, while the city was required by law to have a fire department, it was not required to have one of any particular efficiency. The extent of it was left largely to the discretion of the officials of that department. They made use of this improvement, but not in any other way than by having it in the defendant's engines. What they saved by it to the defendant was what the cost in the use made of these engines was reduced by it. The other gain was in the improvement of the fire department in efficiency for putting out fires, and not to the city in its expenditures for the fire department. As to this, the conclusion of the master seems to be sound.

The exceptions of the defendant, and those of the plaintiff, as to savings in number of engines, are overruled; those of the plaintiff as to savings in hose and in number of men are sustained; and the savings in hose are found to be \$183,394.32, and in number of men to be \$606,344, and, including those reported by the master, to be, in all, \$818,074.32.

WESTERN ELECTRIC CO. v. STANDARD ELECTRIC CO.

(Circuit Court, N. D. Illinois, N. D. March 8, 1897.

PATENTS—LIMITATION BY PRIOR ART—INFRINGEMENT—DYNAMO-ELECTRIC MACHINES.

The Scribner & Warner patent, No. 496,449, construed in connection with the prior art, and *held* not infringed as to claim 2, which is for a dynamo-electric machine having pole pieces perforated on a line coincident with a plane passing through the axis of the armature shaft, whereby a uniform magnetic field is produced, regardless of the direction of rotation of the armature.

Barton & Brown, for complainant.

Francis W. Parker, for defendant.

SHOWALTER, Circuit Judge. This is a bill in equity for the alleged infringement of letters patent of the United States No. 496,449, issued May 2, 1893, on the application of Charles E. Scribner and Ernest P. Warner, to the complainant corporation as assignee. The applicants say in the specification that they "have invented a certain new and useful improvement in perforated pole pieces for dynamo-electric machines." The proposed monopoly is set forth in two claims. The action here is grounded on the second of these claims, which is in words following:

"A dynamo-electric machine having consequent pole pieces cut away or perforated on a line coincident with a plane passing through the axis of the armature shaft, such perforations being symmetrical with regard to said plane, whereby a uniform magnetic field is produced, regardless of the direction of the rotation of the armature, substantially as described."

The first claim of this patent is for the method set forth more at large in the specification, whereby the exact size of the cuttings or perforations (that is to say, the ultimate shape of the pole pieces) is attained. As I understand from the patent and from the testimony, a dynamo-electric machine is first constructed with consequent and uncut pole pieces. The predetermined resistance or full load is let into the external circuit. The armature is then rotated at the predetermined speed, and the predetermined current is generated or induced in the external circuit. The brushes, under these conditions, are put in position for maximum and sparkless commutation by experimental readjustment of the field coils. As I understand from the evidence, the point of maximum commutation is at this stage forward not only of the point of maximum electro-motive force, but forward of what will be the point of practical and maximum commutation when the cuttings or perforations in the pole pieces shall have been completed on the method of the patent. The brushes are thereupon shifted forward from point to point through the quadrant of commutation as the machine is operated, the load or resistance in the circuit being at the same time proportionately cut down. At each successive position of the brushes it will ordinarily be found that, when the current is preserved constant, sparking will appear, and that the movement of the brushes in that locality to bring them to the point of sparkless commutation reduces or changes the current

in volume. These variations in current and in the position of the brushes are noted as the exploration proceeds throughout the quadrant of commutation, and from them as a guide the cuttings or perforations of the pole pieces are finally, and after successive trials, completed. The specification contains the following statement:

"Our invention consists in producing in the field lines of force uniformly distributed as to generating or current producing effect throughout the arc or segment traversed by the coils of the armature opposite the faces of the different pole pieces, whereby the machine is made capable of running in either direction, and of being regulated under varying load to maintain constant current strength by shifting the brushes upon the commutator."

At the moment the short circuit is completed in the quadrant of commutation, the current from the working circuit with which the coil then parts is still running in such coil. This current is at once dissipated, and another in the contrary direction is induced. If this latter current be brought up to the point where it has the same volume and momentum as the working circuit which it is about to join, and if this condition be attained at the instant the coil becomes part of said working circuit, there will be neither flash nor spark. But the electrical state of the short-circuited coil is the resultant of shifting conditions. With respect to magnetic saturation, the state of the armature core varies from the region of the pole tips to the center of the pole pieces, and the poles of the armature, considered as a magnet, change in position as the brushes are moved. The uniformity of field sought by the method of the patent in suit is a uniformity in resultant effect on the short-circuited coil, to the end that, at whatever position in the quadrant of commutation the short-circuiting may occur, the current shall at the instant the short circuit is broken be the same in volume and momentum as that of the working circuit which it then joins. The cutting or perforation of the claim in suit is functional, on the theory of the patent, to secure (1) a current greater in volume than would be practical without cutting or perforation; (2) a current which is constant and uniform in volume under all variations of load; (3) sparkless commutation; and, (4) as I infer from the evidence and specification of the patent, wider range of the brushes; that is, greater variation in electro-motive force, or greater variation in load or working capacity. Prior to this patent the difficulty of sparks or flashes at the commutator was met—or the effect of sparks or flashes avoided—by brushes adjusted for variable overlap, by a construction whereby the segmental subdivisions of the commutator were greatly increased in number, or by a provision for blowing out the sparks. As I gather from the testimony, there are from 10 or 12 to 16 or 18 commutator segments in the machine made by complainant, and the brushes used in connection with such machine have a fixed overlap. The dynamo-electric machine constructed by defendant at the time this suit was brought was a consequent pole machine, with 96 segments on the commutator. Each pole piece contained a cut or perforation in the center, on a line coincident with a plane through the axis of the armature, and symmetrical with reference to said plane. The pole pieces were not, however, shaped or cut pursuant to the method of the patent;

nór, apparently, were said pole pieces, especially if the base or bed plate is to be considered, quite uniform in shape or volume of magnetic material, or symmetrical with respect to each other. The effect of the cutting in the case of the machine as made by defendant was intended to be, and in fact was, to increase the volume or quantity of the current. A machine which, for instance, without the perforation, would yield a current of seven amperes, became, with the perforation, an eight-ampere machine. With the pole pieces uncut, the current would decrease from no load to full load. When perforated, the tendency of the current was to increase in volume from no load to full load. But in defendant's machine the cuts or perforations in the pole pieces did not enlarge the working range or variation in electro-motive force, nor were they the means of securing sparkless commutation. So much I gather more particularly from the testimony of Clinton E. Woods, a practical electrician, called by both the parties as a witness. The iron ring or core of the revolving armature is itself, as before suggested, a magnet. I gather from the testimony and the arguments that, when the machine is in operation, there results out of the condition of the armature a magnetic flow or current from the neighborhood of the forward tip of the pole piece along the adjacent armature core to the rear pole tip; thence across the gap space; thence along the pole piece back to the forward tip; thence across the gap space to the armature core. The lines of force due to the field magnets, and which enter the armature core, crossing the gap space from the center of the pole piece to the forward tip, and so proceeding by the armature core to the opposite pole of the field magnets, are, within the space along the armature core from the forward tip to the center of the pole piece, antagonized by the magnetic flow in the armature core already spoken of. There results from this antagonism what is called the "distortion of the field due to armature reaction." The field of force is thus narrowed and weakened, especially near the pole tip, or the place of maximum commutation. The cutting or perforation in the pole piece interposes an additional resistance to that current, which is due to the magnetic condition of the armature; thus strengthening the field, and shifting it in the direction of maximum, and from the point of minimum, commutation. In this way the quantity or volume of the current in the external circuit, but not necessarily the working range of the machine, is increased. Counsel for complainant say in their argument, in reply:

"It will be seen that the perforation or slot in the pole piece obstructs or throttles the magnetic flux, or increases the magnetic reluctance; and therefore it destroys, to a certain extent, the effect of the magnetism of the armature core. Now, the effect of the magnetism of the armature core is to neutralize the effect of the field magnet, and this neutralizing effect takes place at the tip of the pole piece [meaning the forward tip]. The result of this neutralizing or demagnetizing effect of the armature core magnet is to cause the magnetic flux in the vicinity of the tip of the pole piece [meaning the forward tip] to be much weaker than it should be. So the cutting of the slot in the pole pieces, which destroys the effect of the magnetism of the armature core to a certain extent, by increasing the resistance of the magnetic circuit from one pole to the other of the armature core, has the double effect of weakening the field magnet at the point where the field magnet tends to concentrate the lines of

force, and also to remove the antagonistic effect of the magnetism of the armature core at the pole tip [meaning the forward tip]."

They say, further, in explaining the operation of the complainant's machine (and this is also in their reply argument):

"In the operation of a dynamo, the armature lines of force flowing through the pole pieces, being of the same polarity as and opposite in direction to the lines of force flowing from the pole pieces through the armature, will repel the field of force lines, and force them in the direction of rotation of the armature. This is called the 'distortion of the field of force due to armature reaction.' The effect of the distortion of the field of force is to concentrate the lines of force at the middle or central portion of the pole pieces, and to materially diminish and weaken the lines of force at the forward tips of the pole piece, and by this we mean at the tip where the short-circuited coil enters when the brushes are adjusted for full load."

The specification of the Hochhausen patent, No. 404,848, dated June 4, 1889, contains the following statements:

"The object of my invention is to * * * heighten the efficiency of dynamo-electric machines. My invention also relates to the construction of the field-of-force magnet for dynamo-electric machines and motors, and, in some of its features, relates more especially to machines of the kind in which the field magnet is composed of two or more electro-magnets having their like poles conjoined to form a magnetic field-of-force pole [that is, to consequent pole machines]."

I quote further from the Hochhausen specification:

"In machines of this construction, it is common to use as the pole a mass of iron joining the ends of the magnets, and curved to form a proper pole face for the armature rotating in proximity to it. Owing to a reaction between this mass of iron and the armature of the machine, the line of strongest magnetization and the line of commutation are in ordinary machines shifted to a greater or less extent forward in the direction of rotation when the machine is in operation. With field-of-force magnets, as ordinarily constructed, I have found that there is not, strictly speaking, a symmetrical magnetic field, and the brushes of the machine cannot be set exactly on a diametrical line. My invention consists of a field magnet having a perfectly symmetrical field produced in obvious manner; that is to say, by a symmetrical disposition of the masses of iron making up the field magnet or the framework with relation to the field-of-force poles. Pieces or blocks of diamagnetic material—such as brass, and indicated at F—serve to mechanically unite the juxtaposed pole ends without furnishing any mass of magnetic material, which, as before explained, might give rise to a distortion of the magnetic field during rotation of the armature. The form of magnet shown and described gives great compactness, and at the same time a highly-intense magnetic field for the armature is obtained. It will be seen that, from the construction just described, there is practically no mass of iron forming a pole piece for the machine that is not under the strong and direct influence of field-of-force coils; and it results, therefore, that, owing to the absence of the usual mass of magnetic material removed from the coils, but employed to join the pole ends of the electro-magnets, the armature is less able to shift the line of strongest magnetism in the direction of rotation."

The slot or space in the center of the pole pieces is also emphasized by Hochhausen in his second, third, and fifth claims, which are as follows:

"(2) In a dynamo-electric machine or motor, a field-of-force magnet consisting of two electro-magnets, whose cores are curved in the arc of a circle which, prolonged, would pass through the center of the armature, and which magnets have their core ends of the same name magnetically distinct, so far as concerns union by a mass of nonmagnetic material, but held in proper proximity and properly formed to constitute together a field-of-force pole piece. (3) In a dynamo-electric machine or motor, a field-of-force pole piece consisting of two magnet-

core ends of the same polarity, arranged in proximity, with the axes of the magnet cores at the end presented to the armature, forming substantially a perpendicular to the circle of the armature periphery, in combination with uniting pieces of nonmagnetic material, as and for the purpose described." "(5) In a dynamo-electric machine or motor, a field-of-force magnet composed of two electro-magnets whose like poles are placed in proximity, but are magnetically disunited, in combination with the uniting diamagnetic block, and whose magnetic axis continued from their pole ends would cut the circular periphery of the armature at a right angle."

It is said that the Hochhausen machine has no pole pieces, and is thereby distinguished from the invention of the patent in suit. Pole pieces are merely extensions of the magnet cores beyond the coils in order to form the concave or cylindrical space between the opposite poles in which the armature may revolve. The windings in the Hochhausen machine are brought far towards the ends of the cores, and over the pole pieces. In that machine the pole pieces may be said to be rudimentary or initial, but they are there, and they are consequent pole pieces. If the ends were brought in contact; if the cut, which in that machine is on a line coincident with a plane through the armature axis, and symmetrical with reference to said plane, were not made; if the interposed strip were not non-magnetic,—the distortion of the field due to armature reaction would be present in that machine. The slot filled with the nonmagnetic material has distinctly the function of abating the armature reaction, as against the lines of force between the field magnets, by interposing a resistance to the magnetic current in the armature core, and so of strengthening the field near the forward pole tips. So far as I can find, there is not in the Hochhausen patent, or in any prior patent wherein slotted or perforated consequent pole pieces are shown, any suggestion that the slot or perforation is so made as to secure sparkless commutation, constant current, or wider variation in the range of the brushes. But, as said, strengthening the field by abating armature reaction, and so increasing the volume of the current, is the distinct purpose of the slot in the Hochhausen machine; and this, as also noted above, is the function of the slot in the machine made by defendant when the suit was brought. In the machine as subsequently made by defendant, the pole pieces are not perforated, nor are they cut out eccentrically, as described in complainant's patent. Moreover, the number of commutator segments is increased in the new machine from 96 to 132. It is not stated in the claim that the opposite poles are uniform in volume, or symmetrical in construction, with respect to each other. But the diagrams seem to show that they are so made, and, from the requirement that the armature is to be rotated in either direction, it might be plausibly concluded that the opposite poles must present to each other faces of the same dimensions, and must be symmetrical in volume of magnetic material. On this ground, perhaps, the machine of defendant is also distinguished from that of complainant. However, for reasons before given, and on what seems to me the best conclusion from the evidence, I think the claim is so far limited by the prior art that the defendant does not infringe. The bill is therefore dismissed for want of equity.

NATIONAL FOLDING-BOX & PAPER CO. v. ELSAS et al.

(Circuit Court, S. D. New York. May 26, 1897.)

1. PATENTS—POWER OF COURT TO INCREASE DAMAGES.

Under Rev. St. § 4921, the power of the court to increase the damages may be exercised in equity as well as at law.

2. SAME.

Statutory authority to give treble damages includes authority to multiply or increase them to any amount less than treble damages.

3. SAME—CONCEALMENT OF BOOKS.

In a case of deliberate infringement, the spiriting away by defendant of his books after decree against him, to embarrass the accounting, constitutes good ground for imposing increased damages, under Rev. St. § 4921.

4. SAME—INTEREST.

Interest cannot be added to the damages, from the filing of the bill, before a doubling of the damages by the court.

This was a suit in equity by the National Folding-Box & Paper Company against Herman Elsas and others for infringement of a patent. The cause was heard on a motion by plaintiff to be allowed treble damages.

Walter D. Edmonds, for plaintiff.

Arthur v. Briesen & Harry M. Turk, for defendants.

WHEELER, District Judge. This case shows deliberate infringement in attempted defiance of the plaintiff's patent, and spiriting away of the books of the defendants after decree, to the great embarrassment of the accounting. On settlement of the final decree the plaintiff moved for treble damages, and this motion has now been heard. The defendants insist that damages can only be trebled or increased at law, which at some time may have been true; but the present statute seems to fully provide for this. Rev. St. § 4921. The master has reported damages, not profits, and seems to have been driven to that aspect of the case, and hampered there in finding full damages, by the acts of the defendants in concealing their books. In view of this situation, this seems to be a very proper case for the application of this statute, and for an increase of damages under it. Authority to treble, of course, includes authority to multiply, or increase, to any amount within what trebling would reach. From the nature of this allowance the award does not rest upon, but must go beyond, actual damages capable of legal proof, and rest largely in discretion, like exemplary damages in actions at law. Upon consideration of the conduct of the defendants here the damages reported, \$382.90, are doubled, making \$765.80. The plaintiff has submitted a computation including interest on the damages found from the bringing of the bill, which amounts to \$122.34, and would make the damages found \$505.24. To double this would double interest, which would not be lawful, even if the interest was allowable. But while lapse of time and what money would bring at interest may be considered in assessing damages for an injury done considerably before, interest upon unliquidated damages does not seem to be allowable before verdict, judgment, or decree. *Silsby v. Foote*, 20 How.

378; *Mowry v. Whitney*, 14 Wall. 620; *Littlefield v. Perry*, 21 Wall. 205. The interest might be considered in multiplying or otherwise increasing damages within the limit, but, as such, it does not seem to be a proper foundation for such a proceeding. The damages found seem to be the proper damages to be multiplied, or added to. Decree for damages found, \$382.90, doubled to \$765.80.

EVANS et al. v. SUESS ORNAMENTAL GLASS CO. et al.

(Circuit Court, N. D. Illinois. February 8, 1897.)

PATENTS FOR INVENTIONS—GLASS CHIPPING—NOVELTY.

The Evans patent, No. 494,999, for an alleged improvement in the art of chipping glass, consisting in applying to clear glass a pattern of oiled paper or other flexible material, then submitting the glass and pattern successively to the sand-blast and the hot-chipping compound, and finally removing the pattern and hot-chipping compound together, is void for want of novelty, in view of the prior state of the art.

In Equity. Suit by Samuel Evans and others against the Suess Ornamental Glass Company and others.

Charles F. Brown, for complainants.
Coburn & Strong, for defendants.

GROSSCUP, District Judge. The bill is to restrain infringement of letters patent No. 494,999, issued to Evans, as the inventor, and Rawson, as assignee of one-half interest, under date of April 4, 1893. The patent relates to an alleged new and useful improvement in the process of chipping glass. The art of ornamenting glass either by sand-blasting or chipping is of some years' duration. Sand-blasting seems to have come first, and was effected by exposing the clear glass to the action of sand blown in against it by strong currents of air. The glass was thus made semi-opaque, and answered many purposes, such as interior doors, partitions, etc. In time, the desirability of further ornamentation of such glass led to this further treatment: The clear glass was covered with a varnish, or with paper by means of some adhering material, on which were cut out patterns, such as were wished, passing the glass with such patterns through the sand-blast, with the result that the portions uncovered were mottled or blasted, while the portions covered remained clear. The chipping of glass is, in some respects, an improvement upon sand-blasting, and was brought about by a treatment as follows: The clear glass was first sand-blasted, then spread over its roughened surface with warm glue. Glue drying under heat contracts, while glass under heat expands. Thus, the two materials, in adhesion to each other, had, under heat, the opposite tendencies of contraction and expansion. This results in portions on the surface of the glass giving way, leaving it with a chipped or mottled appearance.

The object of the complainants' patent is to apply to this art, thus developed, such treatment as will chip, as the glass had formerly

been sand-blasted, into letters or ornamental portions. The result attained is that the surface of a sheet of glass may be partially chipped, partially sand-blasted, and partially left clear, under any pattern desired; the several portions being separated from the others by clear lines of demarcation. The so-called "invention" consists in applying to the clear glass a pattern of oiled paper or other flexible material, calculated to resist the action of the sand-blasting process, as well as the action of the hot-chipping compound, such as hot glue; then submitting the glass with the pattern thereover successively to the sand-blast and the hot-chipping compound; and then raising the pattern from the glass, together with the hot-chipping compound thereover, leaving the balance of the glass over which the pattern is not spread to be chipped by the compound in the usual way.

The claims are as follows:

"(1) The process of chipping glass, which consists in covering the surface of the glass with a thin film of soap, in applying a pattern thereover adapted to resist the action of a sand-blast process, of removing the film of soap exposed in the openings of the pattern, in subjecting the glass with the pattern thereon to the sand-blast process, in applying a glass-chipping compound in a liquid condition to the surface of the glass and the pattern thereon, in lifting the pattern off the glass, together with the chipping compound thereover, while such chipping compound is in a liquid condition, and in allowing the chipping compound to dry in the ordinary way, substantially as described.

"(2) The process of chipping glass, which consists in covering the surface of the glass with a coating adhering to the glass sufficiently well to form a means of attaching a flexible pattern thereover, and adapted to form a coating protecting the glass from the action of a glass-chipping compound when interposed between the glass and such glass-chipping compound, in applying a flexible pattern thereover adapted to resist the action of the sand-blast process, in subjecting the glass with the pattern thereon to the action of the sand-blast process, in coating the entire surface of the glass with a glass-chipping compound in a liquid condition, in removing the flexible pattern from the glass, together with the glass-chipping compound thereover, while the glass-chipping compound is in a liquid condition, and in allowing the glass-chipping compound to dry in the ordinary way, substantially as described."

It is difficult to understand in just what respect the novelty of the process is claimed to reside. The general art is old. The use of soap or other coating suited to holding the pattern to the glass is not a patentable element. Its office here is the same as its office in many other arts. The mere application of a pattern, independently of its material, is derived from the previous art of ornamenting glass in process of sand-blasting. The removing of the film of soap or other material is certainly not new. The application of the chipping compound was in the previous art, and its application in a liquid condition seems necessarily in such art. The lifting of the pattern off the glass, together with the chipping compound thereover, was also done in the previous sand-blasting ornamentation. I can only see two possible features of novelty in this process,—the material of the pattern, and the condition of the chipping compound when the pattern is lifted up. It was not seriously contended that the application of oiled paper to this process was a departure involving inventiveness. Many other materials will answer the same purpose as oiled paper, and, what is more, the claim is not resting

upon oiled paper, but upon any material suited to resist the action of the sand-blast process. This is too broad to cover any particular material, and is so broad that it covers material formerly used in patterns applied to glass undergoing the sand-blast process.

Much stress at the argument was laid upon the contention that the chipping compound or glue was in just such condition of self-cohesion that when the pattern was lifted up, cutting through the glue substance, the glue would neither be so liquid as to run over the adjoining space, nor so solid as to break along irregular lines. This is, at most, the discovery of a suitable condition for the lifting of a pattern, and is not the description of any new material, or new method of making such material, or new way of treating such material. Neither do I think that it evinces invention. The pattern being on the glass underneath the warm glue, and the want being seen, namely, a clear-cut edge, almost any mechanic would conclude that a condition of either too much fluidity or too much solidity would impair the result.

I refrain from holding whether, if all the claims of the complainant were assumed, a process could be sustained under the Locomotive Works Case, 15 Sup. Ct. 745, for the reason that, in accordance with the foregoing conclusion, such opinion is immaterial. The bill will be dismissed.

WILLIAMS v. AMERICAN STRING WRAPPER CO. et al.

(Circuit Court, N. D. Illinois. April 19, 1897.)

PATENTS—INVENTION—STRING WRAPPERS.

The Williams patent, No. 558,244, for an improvement in string wrappers, consisting in cutting into the wrapper on both sides of the end of the string, to facilitate getting hold of the string, is void for want of invention.

This was a suit in equity by Benajah Williams against the American String Wrapper Company and others for alleged infringement of a patent. On final hearing.

Brown & Darby, for complainant.

Poole & Brown, for defendants.

GROSSCUP, District Judge. The bill is to restrain infringement of letters patent No. 558,244, granted April 14, 1896, to complainant, for improvement upon string wrappers. The most obvious way of putting a wrapper upon a newspaper was to wrap it round and round until the edge of the wrapper was reached, and then paste it down with mucilage or some other preparation. The difficulty of opening such a wrapper, however, early led to the following improvement: A string or thread was inserted in the wrapper, far enough back from the outer edge to escape the paste or mucilage. The person desiring to open the wrapper took hold of the end of this string, and pulled, thus causing it to cut as a **knife**, severing the wrapper behind the section that was pasted down. Many expedients were adopted to more readily enable the person operating to get hold of the string. One was to knot the string at its end.

Another was to allow it to project beyond the edge. Another was to cut out the wrapper on either side of the end, leaving a projection of the string flush with the edge. The patent under consideration introduces another expedient, namely, the cutting into the wrapper on both sides of the end of the string, so that, by means of the finger, the end of the string may be readily lifted. This expedient was probably new, and is doubtless useful, but I cannot bring myself to think that it evinces invention. It is true that in small things the advances must likewise be small, but smallness and obviousness, as applied to such advances, are not identical terms. The patent is, in my judgment, void for want of invention. The claim based on estoppel is not, in my judgment, sustained. The bill will therefore be dismissed.

DUNBAR et al. v. EASTERN ELEVATING CO. et al.

(Circuit Court of Appeals, Second Circuit. May 26, 1897.)

1. PATENTS—INVENTION—COMBINATIONS—GRAIN ELEVATORS.

The Dunbar reissue, No. 10,521 (original No. 264,938), for an improvement in grain elevators, and consisting in a combination whereby a portable elevator tower is arranged to be moved along in front of the elevator, so as to reach the different hatches of the vessel, and so that two elevator legs may be simultaneously used, is void for want of invention, and as being the result of mere selection by the skilled mechanic of existing devices, and applying them to their appropriate uses, with modifications of detail to fit them for the new environment. 75 Fed. 567, reversed.

2. SAME.

The circumstance that the same congregation of devices has never been assembled in the new location is not controlling, and is often of little value in determining the question of patentable novelty. Their assemblage may be nothing but an instance of a double use, and, when they require special adaptation to the new arrangement and occasion, it still remains to inquire whether this has required invention.

Appeal from the Circuit Court of the United States for the Northern District of New York.

George L. Lewis and Edmund Wetmore, for appellants.

Rogers, Locke & Milburn, for appellees.

Before WALLACE, LACOMBE, and SHIPMAN, Circuit Judges.

WALLACE, Circuit Judge. This appeal presents the question of the patentable novelty of the apparatus described and claimed in reissued letters patent No. 10,521, dated September 16, 1884, to Robert Dunbar. The subject of the patent is a portable elevator, adapted for use, in connection with an ordinary grain elevator, for unloading grain from vessels. The ordinary grain elevator is a warehouse having a tower equipped with a leg carrying an endless chain and buckets, an engine, and other connections for raising the grain from the hold of the vessel or other receptacle to the upper part of the warehouse. The leg is constructed to swing out at the bottom at a greater or less angle, and to be lowered so that the

buckets, as they are carried around the endless chain, dip into the grain, and carry it up to any desired height. As the buckets turn over at the top, they empty the grain into any desired hopper or receptacle, from which it is distributed by troughs or other devices into the various parts of the storehouse. When thus constructed, it was necessary to bring the hatch of the vessel to be discharged to the leg, and, when the grain was discharged from one hatch, it was necessary to move the vessel to bring the other hatch to the leg. Dunbar conceived the idea of making an accessory elevator, which could be moved so as to reach the different hatches of the vessel, and discharge the grain into the warehouse. By using such a contrivance, it would be unnecessary to move the vessel, and both hatches could be discharged, if desirable, at the same time.

The patent describes the ordinary grain elevator or tower, with apparatus for transferring the grain to the warehouse, "constructed and arranged in the ordinary way." The portable elevator tower, as described, is the ordinary elevator placed upon wheels and a track, and equipped with devices for moving it along the front of the warehouse in order to place it in the desired position opposite the hatch of the vessel, and with devices for fastening it to the building. The devices for moving the tower over the track consist of a chain or cable anchored at both ends, and connected with the drum of a windlass rotated by worm gear, so that upon turning the windlass one part of the chain is wound upon the drum and the other part is paid out. Those for fastening it to the building consist of two cables or guy ropes extending from the upper part of the warehouse to one of the upper floors of the tower, and passing downward over pulleys to the drum of a windlass on one of the lower floors of the tower. The windlass by which the guy ropes are paid out or tightened is described as being similar to that which is used for moving the tower. The building is provided with a trough, extending horizontally along its front, to receive the grain from the portable elevator at any desired point.

At the time of the alleged invention, portable elevators were old, and were of many varieties. One form of such elevators is shown in the patent to Walsh of August 20, 1878, arranged for taking the grain from the hold of a canal boat or vessel, and elevating it into a loft in a store room, or transferring it into the hold of another vessel. They were old when supported on flanged wheels and moved upon a track. The patent to Sykes of October 12, 1869, describes one for transferring grain, arranged upon truck wheels so that it may be moved on a track of a railroad, and the grain elevated from one receptacle and transferred to another. Another form is described in the patent to Mennell of January 11, 1881, for transferring coal from holds of vessels, and discharging the same into cars, barges, or other receptacles, the frame of which is provided with wheels, and adapted to run on a track. The mechanism for moving large structures was old, and had been employed in analogous structures. The English patent to Curtiss of January 21, 1853, shows a portable structure for elevating earth in the same way that grain is elevated; the structure being supported on wheels moving on rails, and being

moved backward and forward by apparatus substantially the same as that described in the patent in suit,—the ordinary windlass engaging with a cable anchored at each end. Dunbar contemplated making his portable elevator a high one, capable of emptying its contents into one of the stories of the many-storied grain elevators of Buffalo, but the patent is not limited to such an elevator. The descriptive parts, and some of the claims, though more directly addressed to such an elevator, are applicable to one of any height or size. When the elevator is not a high one, the devices for securing it to the main building could be dispensed with; and, if any at all should be needed, those of the simplest kind could be used to tie the two structures together.

In the claims of the patent the portable elevator is named as an "elevator tower," but the structure is termed in the description "an elevator or elevator tower," and both terms mean the same thing. The claims are as follows:

"(1) In an elevator tower, the combination of the mechanism, substantially as described, for moving it horizontally back and forth, with the gearing, N, drums, N', and cables, O, for securing it at any point to which it may be moved.

"(2) A movable and adjustable elevator tower, arranged upon wheels, and provided with the cables, O, gearing and drums or pulleys, N, N', and a grain spout, R, in combination with a main stationary elevator building, R', having a long, horizontally arranged trough, S, to receive the grain from any point to which the elevator tower may be adjusted.

"(3) The combination of the main stationary elevator, and the movable elevator tower, A, having wheels adapted to tracks in front of the main building, substantially as specified, whereby two elevators may be operated at the same time, so that a stationary elevator may be used in one hatch, while the movable elevator may be adjusted to operate in another hatch, substantially as specified.

"(4) The combination of a movable elevator tower, having wheels adapted to tracks, with a rope or chain, G, G', anchored at both ends, and passing around a drum or pulley, and with gearing through the medium of which the said drum may be rotated, substantially as set forth.

"(5) The combination of the stationary elevator, R', a movable elevator tower, ropes or cables connecting the two, and mechanism as shown, whereby said ropes may be tightened and loosened, all substantially as described."

Concededly, Dunbar is entitled to the credit of originating the conception of using a second elevator as an adjunct of the ordinary grain elevator, which could be moved so as to reach the different hatches of the vessel, and discharge into the main elevator; but his right to a patent cannot rest upon this conception alone. It must rest upon the novelty of the means which he contrived to embody the conception, and to carry it into practical application. He effected a new organization of a portable elevator, but if this did not involve invention, but was that which could have been done by the skilled mechanic by selecting known devices, applying them to their appropriate uses, and introducing such modifications of detail to fit them for the new environment as would be dictated by experience and good judgment, the patent cannot be sustained.

It is manifest from what has been said of the prior state of the art that what Dunbar did was to adapt well-known devices to the special purpose to which he contemplated their application. The elevator, with all its equipment for reaching, raising, and transfer-

ring grain, was at hand. Various forms of portable elevators, carried by wheels and moved upon tracks, were at hand. To adapt his elevator to the new occasion, it was necessary that a track should be located in such relation to the warehouse that the elevator could be moved upon it back and forth to reach vessels lying at the dock, and discharge their contents into the warehouse. The devices known to builders and in common use for moving similar structures were at hand, and it was only necessary for him to select them with reference to the particular structure to be moved. It was necessary to select a more powerful windlass and a stronger cable, if he proposed to move an elevator of large size and weight, than would be required to move one of smaller size and weight. It was necessary that appropriate fastening devices should be selected to secure the elevator to the warehouse when doing its work of discharging from the vessel, and these were at hand, in great variety of forms. It was also necessary that a receptacle for the grain at the warehouse should be provided, which could be reached by the discharging spout of the elevator.

We are unable to doubt that all these things were within the range of ordinary mechanical skill, and that they could have been suggested and constructed by any competent builder, and that what Dunbar did was merely to exercise the common skill of the calling in locating his track, and selecting his moving and fastening devices, and in arranging the proportions and subsidiary features of his portable elevator to correspond with those of the warehouse. The fastening devices which he employed have no special novelty, if indeed, they are of any utility except when the movable elevator is a tall one. Hooks would have answered as well, and upon the tall elevator of the defendants hooks are used. Any intelligent man would have known that, if a tall elevator were to be used, it would be expedient to attach the structures together at the upper part. The trough which he placed along the front of the warehouse was the receptacle most obviously convenient, and in common use in the grain elevators for distributing the grain to different parts of a building. It certainly did not involve inventive skill to place it on the outside of the building, within reach of the spout of the portable elevator.

We are not unmindful of the advantages which have resulted from the new organization of the elevator described in the patent, but we are unable to doubt that the improvements of Dunbar were but the work of an intelligent builder. When, in the evolution of grain elevator construction, their desirability became manifest, it did not require genius or inventive faculty to create them. As was said in *Atlantic Works v. Brady*, 107 U. S. 192, 2 Sup. Ct. 225, the process of development "creates a constant demand for new appliances, which the skill of ordinary head workmen and engineers is generally adequate to devise, and which, indeed, are the natural and proper outgrowth of such development."

The learned judge who decided the cause in the court below said:

"Unquestionably, the methods adopted by the inventor to carry out his conception, considered separately, were old, but the combinations were new,

Wheels, tracks, spouts, windlasses, troughs, and guy ropes were undoubtedly well known, but no one had ever assembled them in congeries producing a movable elevator tower."

The circumstance that the same congregation of devices has never been assembled in a new location is not controlling, and is often of little value in determining the question of patentable novelty. Their assemblage may be nothing but another instance of a double use, and, when they require special adaptation to the new arrangement and occasion, it still remains to inquire whether this has required invention. "It rarely happens that old instrumentalities are so perfectly adapted for a use for which they were not originally intended as not to require any alteration or modification. If these changes involve only the exercise of ordinary mechanical skill, they do not sanction the patent; and, in most of the adjudged cases where it has been held that the application of old devices to a new use was not patentable, there were changes of form, proportion, or organization of this character which were necessary to accommodate them to the new occasion." *Aron v. Railway Co.*, 132 U. S. 90, 10 Sup. Ct. 24.

We conclude that the patent is void for want of novelty, and that the decree should be reversed, with costs, and with directions to dismiss the bill.

PEDERSON v. JOHN D. SPRECKELS & BROS. CO.

(District Court, N. D. California. May 24, 1897.)

No. 11,212.

TOWAGE—INJURY TO MATE OF TOW—LIABILITY OF TUG OWNERS.

A schooner was taken in tow by a tug. The mate of the schooner superintended the fastening of the line on the schooner, and caused it to be passed through the breast chock instead of the forward chock, and made fast to the pawl bitt, instead of to the windlass bitt, which would have given a straighter lead, and been in accordance with better seamanship. In the towing, the breast chock gave way, and the rope struck the mate, throwing him against the capstan, and breaking his leg. *Held*, on the evidence, that the breaking of the chock was due to this manner of fastening, and not to excessive speed of the tug, and that the tug owners were not liable.

Libel in personam to recover damages in the sum of \$20,000 for alleged negligence in towing the schooner *S. Danielson* at an excessive speed, thereby breaking the breast chock on the schooner, and throwing the libellant against the capstan, breaking his leg.

H. W. Hutton, for libellant.

Delmas & Shortridge, for respondent.

MORROW, District Judge. This is a libel in personam by Louis A. Pederson to recover damages in the sum of \$20,000 from the John D. Spreckels & Bros. Company. The libellant was the mate of the schooner *S. Danielson*. At the time of the accident, which occurred on the morning of the 6th of August, 1895, the schooner was being towed in the waters of the Santa Barbara Channel by the tug *Vigilant*, owned by the respondent. The towline was made fast to

the pawl bitt, and had been passed through the side or breast chock on the port bow. There were two chocks on the port bow,—the forward and side or breast chock. On the starboard side, there was only one chock,—the breast chock. What had become of the forward chock, or how it had been removed, does not appear. The libellant, as mate of the schooner, had himself supervised the manner of making the towline fast to the schooner, and at the time of the accident was standing between the bitt and the chock, on the inboard side of the towline, engaged in parceling the line. The towing had been going on for a short period of time, variously estimated by the witnesses at from 4 to 20 minutes, when the chock through which the line had been passed broke or was carried away, and libellant was struck by the line, thrown against the capstan, and his leg broken. That limb was so severely injured that amputation was made necessary. It is claimed on behalf of the libellant that the accident was caused by the negligence of those in charge of the tugboat, in towing at such an excessive speed that the chock through which the towline had been passed was pulled in two, thereby causing the towline to catch libellant's leg and throw him against the capstan, resulting in the serious injury referred to. The respondent denies any negligence in towing at an excessive speed, and claims that the accident was caused primarily by the contributory negligence of the libellant himself, to which the bad steering on the part of the schooner, as contended, also contributed. The questions involved are purely of fact, and involve, to a great degree, the credibility of the witnesses on both sides. The first question is as to whether the line was made fast properly to the schooner by those on board of her, who were acting under the mate's orders. Evidence was introduced on behalf of the respondent tending to show that when a line is made fast to the pawl bitt, as it was in the case at bar, it should be passed through the forward chock; and, if it is made fast to the windlass bitt, it should be passed through the side or breast chock. It is considered better seamanship to pursue this method, for the reason that the lead will be more straight, and the strain on the chock and the lead itself less. In the case at bar, as previously stated, the towline was passed through the breast chock, and made fast to the pawl bitt, which was not in accordance with good seamanship. As it was made fast to the pawl bitt, it should have passed through the forward chock, or, being placed through the breast chock, it should have been made fast to the windlass bitt. Either one of these ways would have obviated the unequal and unnecessary strain which results when the line is passed through and made fast as it was in this case. As this was done under the orders of the libellant, who himself supervised making fast the vessel's end of the towline, it results that, if the carrying away or breaking away of the breast chock was caused proximately by the unequal and unnecessary strain placed upon it, this would debar the libellant from recovering any damages for his injuries from the respondent company, for the reason that he contributed to the accident and injury to himself. Aside from the fact that the libellant personally directed how the towline should be made fast to the schooner, it is well settled that the tow is generally held responsible

for the management of her end of the towline. As was said in *The Merrimac*, 2 Sawy. 586, 17 Fed. Cas. 126:

"While in this case the tow had her master and crew on board, yet they had nothing to do with the navigation of either vessel, except to steer the tow in the wake of the tug, to work her pump, and handle her end of the towline."

See, also, upon the general duties of the tow, *The Margaret*, 5 Biss. 353, 16 Fed. Cas. 713; *Sproul v. Hemmingway*, 14 Pick. 1; *The Ciampa Emilia*, 46 Fed. 866; *The Jacob Brandow*, 39 Fed. 831; *The Invertrossachs*, 8 C. C. A. 87, 59 Fed. 194.

I am convinced, from the evidence, that the manner in which the towline was made fast, and passed through the breast chock on the schooner, was what caused the unequal strain on the chock and carried it away. It is, however, strenuously contended by counsel for the libellant that the efficient and proximate cause of the breaking or carrying away of the breast chock was the excessive speed at which the tug was towing the schooner. Testimony was introduced, in support of this contention, tending to show that the tug was going at the rate of 9 to 10 miles an hour, and that this speed, under the circumstances, was excessive, and caused the breaking of the chock. This testimony, however, is flatly contradicted by witnesses on behalf of the respondent, whose testimony strongly tends to show that the tug was going no faster than six or seven miles an hour, and that this rate, under the conditions of weather then prevailing, was reasonable and proper. The weather was calm and pleasant; the water smooth. The schooner's register was 87 tons gross, 83 tons net, 91.9 feet in length, 27.6 feet in breadth, and 6.8 feet in depth. On this particular occasion she carried 5 tons of iron. She was about 10 years old. Whether or not there was anything faulty about the chock itself, does not appear from the evidence. It seems, however, that the forward chock on the starboard bow was gone. When this happened, or what caused its disappearance, does not appear. Upon the whole of the evidence presented on this point, I am inclined to accept the testimony of the witnesses for the respondent as being more reliable and accurate. It is true that there are some discrepancies and contradictions in the testimony, but, upon the whole of the evidence, I come to the conclusion that the tug was going not more than seven miles an hour, and that this, under the circumstances then prevailing, was not an unreasonable and improper rate of speed, and was not the proximate cause of the breaking of the breast chock. It is further claimed by respondent that bad steering by the captain of the schooner, who was in charge of the helm, contributed to the breaking of the chock, by increasing the strain thereon. But, however that may be, I am satisfied that the accident was due, for the most part, to the manner in which the line was passed through the breast chock, and made fast to the pawl bitt. There is no question as to the sufficiency or stability of the rope. To whom it belonged,—whether to the schooner, or to the California Iron & Wrecking Company,—is not entirely clear; but one thing is certain, and that is that it did not belong to the tug. It was a new rope, having been used but a few times before this occasion. It broke some 15 minutes after the accident which befell the libellant. Coun-

sel for libelant claims that this indicates that the tug was going at an excessive speed, for the reason that a new rope would not break unless the strain upon it were of an extraordinary nature. But there is testimony which tends to show that the rope, after the chock broke, was subjected to chafing, and that its breaking was caused by this fact, and not from any great or extraordinary strain placed upon it by towing at an excessive speed.

Counsel for libelant has cited many cases to support his contentions. I fail, however, to see how any of them can be deemed applicable to the facts of this case. There can be no question about the general principles applicable to the case at bar. In the first place, it is well settled that tugs engaged in towing vessels are not common carriers; that they are not insurers, but are bound simply to use ordinary care and skill in towing. *The Webb*, 14 Wall. 406; *The Margaret*, 94 U. S. 494. In the second place, the burden is cast upon the libelant to show, by a fair preponderance of evidence, that the respondent has been guilty of negligence which proximately caused the accident and injury to libelant. *Shear. & R. Neg.* §§ 12, 14. No presumption of negligence can fairly be said to arise in this case from the mere fact that the libelant was injured. This is not a case where it can fairly be predicated, from the evidence, that the thing which caused the injury to libelant was under the management or exclusive control of the respondent, bringing the case within the rule laid down in *Byrne v. Boadle*, 2 Hurl. & C. 722; *Scott v. Docks Co.*, 3 Hurl. & C. 596, 601; *Kearney v. Railway Co.*, L. R. 5 Q. B. 411; s. c., affirmed L. R. 6 Q. B. 759; *Howser v. Railroad Co.*, 80 Md. 146, 30 Atl. 906; *Dixon v. Pluns*, 98 Cal. 384, 389, 33 Pac. 268. The accident and injury took place on board the schooner, and not on the tug. The towline was furnished by the vessel, and not by the tug; and it was made fast under the directions and personal supervision of the libelant, the mate of the schooner, and not by virtue of any order, supervision, or advice from those having charge of the tug. Upon the entire evidence in the case, I am of the opinion that the libelant has failed to prove by a fair preponderance of evidence that the towing of the schooner by the tug *Vigilant* was negligent, and was the efficient, proximate cause of the accident and injury which befell the libelant. The libel will be dismissed, with costs.

HURLBUT et al. v. TURNURE et al.

(Circuit Court of Appeals, Second Circuit. May 26, 1897.)

1. GENERAL AVERAGE—SHORT COAL SUPPLY—RESPONSIBILITY OF SHIP.

A mere deficiency of five or even ten tons, below the customary and probably adequate supply of coal for the contemplated voyage, does not make the ship an insurer against damages, so as to exempt the cargo from a general average charge in respect to damages not arising from the deficiency. 76 Fed. 587, affirmed.

2. SAME—PORT OF REFUGE EXPENSES.

A steamship which fails to take the customary supply of coal for the voyage must be presumed to voluntarily assume the risk of putting into a port of refuge to complete her supply; and she will therefore be charge-

able with the port of refuge expenses, even if, as it turns out, she would have been obliged, because of delays from adverse storms, to seek such port for a further supply, though she had started with the usual quantity. 76 Fed. 587, affirmed.

8. SAME—BILL OF LADING.

A provision in the bill of lading authorizing the vessel to "call at any port or ports whatever" does not enable her to escape responsibility for the expense of putting into a port of refuge, in consequence of having taken an inadequate coal supply. 76 Fed. 587, affirmed.

4. SAME.

A steamship bound from a Cuban port to New York had but 9½ days' supply of coal, whereas the customary supply was for 10 days. Ordinarily, the voyage would have taken 8 days, but she encountered a hurricane, which delayed her so that she was obliged, from lack of coal, to put into Newport News, which she reached in 12 days, having consumed considerable quantities of ship's materials and cargo. The bills of lading authorized her to call at any port or ports whatever. *Held*, that the ship must bear, as particular average, the expense of putting into Newport News, and also the loss of ship's materials and cargo during the time the coal she ought to have taken would have lasted, but that the remainder of the loss was a general average charge. 76 Fed. 587, affirmed.

Appeal from the District Court of the United States for the Southern District of New York.

Convers & Kirlin, for libelants.

Edmund L. Bayliss and Walter F. Taylor, for respondents.

Before WALLACE, LACOMBE, and SHIPMAN, Circuit Judges.

PER CURIAM. The steamship *Dunedin*, upon her voyage from Cienfuegos, Cuba, to New York, in October, 1891, encountered very severe weather, and was compelled to put into Newport News for coal. Before she reached that port, she had burned some of her materials and some of her cargo for fuel. The libel was brought before the district court for the Southern district of New York upon a general average bond to recover the respondents' share of a general average assessment made upon the steamship and her cargo for the expenses thus thrown upon each, and for the port of refuge expenses. The bill of lading of the respondents' sugar contained a clause authorizing the vessel to call at any port or ports for any purpose.

The facts in regard to the voyage and the seaworthiness of the vessel are accurately stated by the district judge, as follows (76 Fed. 587):

"The steamer left Cuba on the 3d of October, with a cargo of merchandise, including sugar of the respondents and others. An ordinary passage with her cargo, and in the probable condition of her bottom (not newly scraped), would have been eight days, or a few hours over, excluding any specially unfavorable weather. Her consumption of coal was 12 tons per day; and the evidence does not warrant my finding that on leaving Cienfuegos she had over 115 tons,—a supply for, say, 9½ days. She was 12 days, however, in reaching Newport News, still 1 day's sail from New York. On the 4th of October (the second day out), on rounding St. Antonio, she met head winds and seas, and on the 9th and 10th a northeast gale. This, on the 11th, became a hurricane, which continued through the 12th and 13th, and carried her back on her course, so that she was unable to reach Newport News until the 15th of October. On the morning of the 11th, with only 18 tons of coal left, the engineer began to use ashes and ship's material along with the coal, and on the 12th, with but 12 tons of coal remaining, the use of sugar as fuel, along with coal, began. During the last half day, on the 15th, before reaching

Newport News, only sugar fuel, according to the captain's testimony, was used."

We agree with the district judge in his further finding that 115 tons of coal was not a reasonable supply for the voyage, at that season of the year, from Cienfuegos to New York, but that 10 days' supply, or 120 tons, should have been taken in order to comply with the demands of reasonable prudence. The assessment which had been made charged the cargo with the value of all the ship's material and sugar which had been used as fuel, and with the port of refuge expenses. The respondents' share amounted to \$473.01. The ship was 12 days in reaching Newport News, with 9½ days' supply of coal, when she should have had 10 days' supply. The district judge refused to allow the expenses of going into Newport News, and charged against the ship one-fifth of the value of the burned sugar, ship's material, and oil which were consumed for fuel, and of the damage to other sugar incident to getting fuel out of the hold during the hurricane. He was of opinion that this one-fifth represented the damage resulting from her failure to take in 10 days' supply, and that "the residue, equivalent to 2 days' consumption of fuel, with the incidental damage to other bags, remains a proper subject of general average," excluding, however, the expenses of putting into Newport News. A restatement of the general average upon these principles made the amount of \$369.86 due, as principal, to the libelants from the respondents. From the decree of the district court for the payment of that sum, interest and costs, each party appealed, and each was dissatisfied with the district judge's conclusions of fact. But, if those conclusions were correct, the libelants were of opinion that the expenses incident to putting into Newport News, as well as the value of all the consumed materials and cargo, should be charged in general average, while the respondents urged that, inasmuch as the vessel put to sea in an unseaworthy condition, none of the expenses were chargeable, and that, if an apportionment of the loss might be proper under other circumstances, there was in this case no way of distinguishing the loss due to the perils of the sea from the loss due to unseaworthiness.

The district judge carefully discussed in his opinion (76 Fed. 587) the questions of law in the case, and, inasmuch as his reasoning is adequately and clearly stated, we shall simply announce our concurrence in his conclusions, which are repeated, in substance, as follows:

1. A mere deficiency of five tons, or even of ten tons, below the customary and probably adequate supply of coal, does not make the ship an insurer against the damages which did not arise from the short supply, "so as to exempt the cargo from a general average charge not arising from this deficiency." The vessel would ordinarily have reached New York in 8 days. She reached Newport News in 12 days, and was then 1 day's sail from New York. If she had had an adequate supply of coal, she would still have been obliged to burn materials and cargo, and to put into a port of refuge. All the consequences of her default that can properly be allowed are the charges of putting into this port, and so much of the loss of material and cargo as arose during the half day for which the supply

that she ought to have taken would have lasted, and, "if these charges are put upon her, she is made to bear the whole consequence of the neglect."

2. But it is said that the ship ought not to bear the charges of putting into port, because she would have been obliged to turn into a port in any event. She was neglectful of her duty to take the usual supply of coal, and therefore must be presumed to have voluntarily taken the risk of putting into some port in order to complete her supply, if circumstances should require it. "By her short supply at the start, having voluntarily, in effect, agreed to go into Newport News at her own expense for more coal, if it should be needed, she cannot be allowed to escape that implied agreement, and throw the cost of that item into general average."

3. The ship must make good the consumption of material and cargo for fuel, and the damage to cargo incident thereto, for such period as the deficient amount of coal would have rendered unnecessary, if it had been taken on board.

4. The bill of lading, authorizing the vessel "to call at any port or ports for whatever purpose," was not a provision to enable the vessel to escape from the natural consequences of her own neglect of duty. The customary voyage was from Cuba directly to New York. "It is not reasonable, and the clause cannot be intended to release the ship from the performance of any of her ordinary duties in preparing for the voyage, or to authorize the ship to sail voluntarily from the port of departure with a short supply of coal, and thus deliberately to create a necessity for calling at intermediate ports not mentioned in the bill of lading, and contrary to the customary course of the voyage."

The decree of the district court is affirmed, without interest, and, as neither appeal is sustained, without costs of this court.

THE MONTICELLO.

PACIFIC IMP. CO. v. HATCH.

(District Court, N. D. California. May 3, 1897.)

1. SALVAGE—DEGREE OF DANGER—COMPENSATION.

That a vessel is in part disabled, and that the state of the wind and sea is such as would in time probably cause her to drift ashore, is no ground for greatly increasing the compensation, when it is certain that assistance would in any event have reached her before the danger became imminent.

2. SAME—SALVAGE SERVICES—COMPENSATION.

Where a steamer with a disabled boiler was proceeding under a jib sail, and was in no danger of going ashore before assistance sent for would arrive, *held*, that the taking of her in tow by a passing steamer, in the ordinary weather of the season, if a salvage service at all, was of a very low order, and, the time consumed being some five hours, the sum of \$350 would be allowed; the saving vessel being worth with her cargo about \$445,000, and the salvaged vessel about \$12,000.

3. SAME—TOWAGE COMPENSATION.

The towage into port of a disabled vessel by a freight or passenger steamer, which is necessarily delayed somewhat thereby, even if under circumstances scarcely rising to the dignity of a salvage service, will be compensated at a somewhat greater rate than that of mere towage by tugs intended for the purpose.

Libel for salvage services. Stipulated value of Monticello was \$12,000. She had no cargo or passengers, and was out of commission. She was in no particular or immediate danger, and tugs from San Francisco were on their way up the coast to tow her, and would have reached her some four or five hours after she was taken in tow by the San Benito. The Monticello was disabled, her boiler having become broken down, and she was being navigated with but one sail,—the jib. She was from 8 to 15 miles from the coast. The service lasted about seven hours and a half. No dangers or risks attended the performance of the service. Three hundred and fifty dollars allowed as salvage.

J. E. Foulds, for libelant.

Thos. D. Riordan and Edward Lande, for claimant.

MORROW, District Judge. This is a libel for salvage services alleged to have been rendered the steamship Monticello on July 25, 1895, by the steamship San Benito. The claimant contends that the services rendered were simply towage services. The libelant contends, and introduced testimony tending to show, that the steamship San Benito was on her regular voyage from Tacoma, in the state of Washington, to the port of San Francisco; that at about 2:30 in the morning of July 25, 1895, while on her course between Point Arena and Point Reyes, about 100 miles from the port of San Francisco, lights were observed by those on board the San Benito, which were taken to be signals of distress; that upon investigation it was discovered that the steamer Monticello was disabled, her boiler having broken down; that at the time the wind was strong from the west northwest, and a rough sea was running, and it is claimed that the Monticello was in imminent danger of being driven ashore; that after several unsuccessful attempts a boat was lowered from the San Benito, and a tow line sent aboard the Monticello, which was made fast to the tow rope, and the disabled vessel was taken in tow by the San Benito, and successfully towed into San Francisco. It is further claimed that the service rendered to the Monticello was unusually hazardous, and that, in addition to the risks thereof, the voyage of the San Benito was delayed so that when she finally arrived at the port of San Francisco the tide had ebbed to such an extent as to make it impossible for her to reach her dock, by reason whereof she was compelled to anchor in the stream, and did not reach her dock until 11 a. m. next day, thereby losing some 20 hours' time. The claimant, in support of his contention, introduced testimony tending to show that the services rendered were simply towage services; that the Monticello was never at any time in a position of immediate danger or peril; that one of her boilers gave out; that it would have taken some 10 or 12 hours to have fitted up the other boiler for use; that the accident took place about abreast of Mendocino City, some 25 or 27 miles north and west of Point Arena, and that the vessel was about 18 miles from shore; that a drag was rigged up, and the vessel laid to until after daylight, when the drag was taken in, and the jib set, and the vessel kept on her course; that she was spoken by different vessels, some

going in opposite, and others in the same, direction; that assistance was offered, but declined, the captain of the Monticello stating that he simply wanted a tug,—to report him for a tow in San Francisco; that such signals as were set or made were intended only for the purpose of getting a tug, and not because the vessel was in any particular or immediate danger; that the gasoline schooner Bessie K. offered her assistance, and made some efforts to tow the Monticello, but gave it up after her lines had parted, and left the disabled steamer when she observed the steamer San Benito near by; that the latter vessel was first observed by those on board the Monticello between 2 and 3 o'clock of the morning of July 25, 1895, having been attracted by the lights displayed by the Monticello; that she came up and inquired what was wanted, and that the captain of the Monticello said he wanted a tug; that, owing to the wind and mist then prevailing, no answer was heard; that the San Benito disappeared in the mist; that about 7 o'clock the San Benito again came up, and after some maneuvering got a line on board the Monticello; that this occupied the best part of an hour, and the actual towing began about 8:30 o'clock; that there was little difficulty, and no particular danger, in getting the tow line aboard; that the towing took about seven hours and a half, and that the vessels reached the port of San Francisco about half past 2 in the afternoon of the same day; that the towage was unattended with any perilous or dangerous features. In the amended answer the claimant tendered the sum of \$200 as payment in full for towage services.

The important question to determine is whether the services rendered were salvage or towage services. It would be useless to take up time in attempting to reconcile, if, indeed, such could successfully be done, the variances between the witnesses on both sides. I am of the opinion that both sides have, perhaps in some particulars unconsciously, exaggerated their version of the situation. To determine the true state of facts is attended with no little difficulty. After a careful consideration of all the circumstances of the case, I do not think that the Monticello was in any great, imminent danger, at the time she was taken in tow by the San Benito, of going ashore. It is true, she was disabled, and that she could do but little more than keep her steerageway, under the conditions then existing, her sailing powers being limited to her jib. There is a direct conflict between the witnesses as to how close the disabled steamer was to the shore, it being testified by the witnesses for libellant that she was at times as near as 5 miles to the shore, and by those for the claimant 15 miles at the most. It was probably somewhere between the two extremes, varying as the vessel drifted. The wind was W. N. W., which would tend to cause her to drift towards the shore. But that the weather was unusually rough or dangerous I do not think is satisfactorily established by the testimony. It was the usual weather prevalent at that time of the year on the Pacific coast. That it was such as would in all probability have driven the Monticello ashore before the arrival of the tugs which had been sent for, and which, it is in evidence, reached the Monticello a few hours after she was taken in tow by the San Beni-

to, is certainly not supported by any reasonable view to be taken of the testimony. The towing began about 8:30 o'clock, according to the captain of the Monticello. The tugs came up between 12 and 1 o'clock. So that the conclusion is inevitable that, even if the wind and sea were such as to cause a drift of the disabled steamer towards the shore, yet it was not sufficient to place the vessel in danger of going on shore before the tugs would have come up. Although the Monticello was first discovered by the San Benito about 2 o'clock a. m., she did not begin to tow the vessel until some time between 7 and 8 o'clock, according to the captain of that vessel, and meanwhile, during the five hours that elapsed, it does not appear that the drift of the disabled vessel was such as to excite any grave apprehensions for her safety under the conditions then existing. It appears, from the testimony of the captain of the San Benito himself, that at 7 o'clock the wind and sea had subsided. That other assistance was then near at hand is, as stated, clearly established by the testimony. The effect of this proof is, of course, to reduce the merit of the services rendered by the San Benito. It is always considered by courts of admiralty an important element in fixing the compensation to be awarded. The *Suliste*, 5 Fed. 99; The *O. C. Hanchett*, 22 C. C. A. 678, 76 Fed. 1003; The *H. B. Foster*, Fed. Cas. No. 6,290; The *Saragossa*, Id. 12,334. The port of San Francisco was about 100 miles away. Powerful, swift, and thoroughly equipped tugboats were there, ready at a moment's notice to respond to the call for a tow,—particularly to a vessel in a disabled condition. The towing service of the San Benito consumed from 7 to 8 hours, and covered about 80 miles. It was unattended with any risks or dangers to either vessel. It is claimed, however, that the San Benito shifted a part of her cargo in maneuvering for the purpose of passing a line to the Monticello. I do not think that the evidence justifies the inference that this shifting was of any serious consequence. It certainly did not interfere with the towage. Her cargo consisted of coal, and such shift of a portion of it as occurred seems to have been very easily remedied. It is further contended that the San Benito was delayed some 5 hours while lying by the Monticello, and that for that reason she could not reach her discharging place before the tide had ebbed that day, which necessitated a further delay of some 20 hours, causing a loss of a day's earnings, which amounted to between \$600 and \$700. The stipulated value of the Monticello is \$12,000. She had no cargo or passengers. She was out of commission, and was simply being brought down from Seattle, Wash., to the port of San Francisco. She was built in 1892; had a net tonnage of 174.92; was 114.6 feet in length, 22 feet in breadth, 8.8 feet in depth, and was a single-screw steamer. The San Benito is an iron-screw vessel, her registered net tonnage being 2,810.67; she is 340 feet in length, 17.07 feet in depth, and has a beam of 41 feet. She carried on this particular voyage 4,700 long tons of coal. Her value was about \$425,000, and that of her cargo about \$20,000. Her average daily earnings, as stated, amounted to between \$600 and \$700 per day. No agreement was entered into between the masters of these two vessels as to the compensation to be given for the service. One of the most difficult and trying ques-

tions which courts of admiralty have to deal with is in determining whether a service rendered to a vessel is, under the particular state of facts presented, a towage or a salvage service. The line of demarkation between the two, under certain conditions, is exceedingly vague and uncertain. The difficulty which underlies the whole proposition is well stated by Mr. Chief Justice Waite, sitting as circuit justice, in the case of *The Emily B. Souder*, 15 Blatchf. 185, Fed. Cas. No. 4,458. He says:

"Care should be taken, in cases of this kind, not to establish a precedent which will tend to discourage merchant steamers from rendering assistance at sea when there is real or apparent danger, but it is equally important not to encourage claim for salvage remuneration when only towage service is required or contemplated."

Under the facts of the case cited, which are very similar in their general features to those in the case at bar, the services were held to be towage, and not salvage, and the sum of \$1,000 was allowed on property valued at \$250,000. I am of the opinion that the service rendered in the case at bar, if it can be deemed a salvage service at all, is of a very low order. The *Monticello* was not in any immediate peril or danger, nor does the evidence indicate that she would have been in a dangerous position before the arrival of the tugs which had been sent for. The *San Benito* did not experience any risk or peril in rendering the service, and beyond a delay of five hours, a slight shift of her cargo, the chafing of her hawser, and the loss of some rope, does not appear to have suffered any particular inconvenience. It was testified that the charge for towage services by a tug from the locality where the *San Benito* towed the *Monticello* would be from \$125 to \$250. The claimant has tendered the sum of \$200. I am of the opinion, however, that, under the circumstances, the *San Benito* is entitled to more than the amount tendered, and something more than the ordinary towage compensation. As is well said by Mr. Chief Justice Waite in *The Emily B. Souder*, *supra*:

"While the employment was for towage alone, it does not necessarily follow that the *Monterey* is confined, in her recovery, to an amount which would be considered a reasonable compensation for the same service by a tug fitted for and engaged in that kind of business. She is entitled to a reasonable remuneration for what she has done. Her service was an unusual one. The towage was not ordinary, but extraordinary. It interfered with the business in which she was engaged. She went out of her way to see what was wanted. This involved delay, and delay increased the expenses of her voyage. To some extent, it interfered with her business and incommoded her passengers. Under such circumstances, it is clear that neither party could have understood that the ordinary charges for towing would be a sufficient remuneration for what was to be done. As the service was to be extraordinary, it is fair to presume that it was expected the compensation would be something more than ordinary. This, not because the service was for salvage, but because of its unusual character as towage."

This reasoning is peculiarly applicable to the service rendered in the case at bar. I shall allow the sum of \$350, which amount will cover the damage done to the hawser, and the loss of the rope. A decree will be entered in accordance with this opinion.

THE JOHN SHAY.

KEATING v. THE JOHN SHAY.

(District Court, E. D. Pennsylvania. May 14, 1897.)

MARITIME LIENS—STEVEDORES IN HOME PORT.

Stevedores loading or unloading a vessel in the home port are not entitled to a lien.

This was a libel in admiralty by Joseph Keating, a stevedore, against the schooner John Shay, to enforce an alleged lien against her. The cause was heard upon the following exceptions to the libel:

"First. Because the allegations thereof do not disclose any admiralty or maritime lien or claim upon the said vessel whereupon an attachment should be founded.

"Second. Because the alleged services were rendered to a domestic vessel in her home port and are not the subject of an admiralty lien.

"Third. Because the said libel was filed by libelant without entering stipulation for costs."

Jos. Hill Brinton, for libelant.

The general trend of authority makes the claim of a stevedore analogous to a seaman's claim for wages even in the home port, and establishes a lien on the vessel therefor.

In *The Senator* (1876) 21 Fed. 191, Judge Welker held that the services of the stevedore were necessary to the general business of the transportation of the cargo, and contributes to the reward of capital employed in maritime service. That they should be regarded as a maritime service, and the stevedore furnished with a remedy against the vessel.

"I am aware that there are decisions opposed to the right to proceed in rem for this class of service; but they do not seem to be founded on sound principle, and I do not feel it to be my duty to follow them. There does not seem to be any difference in principle between that service and the service performed by the sailor, the lighterman, the man who sets the rigging, who scrapes the bottom or paints the side of the vessel, or by him who furnishes supplies or tows the vessel out or into the port. They are all necessary to the general business of the transportation of the cargo, and contribute to the reward of capital employed in maritime service, and alike should be regarded as maritime service, and furnish a remedy against the vessel."

In *Roberts v. The Windermere* (1880) 2 Fed. 722, Judge Choate decides that a stevedore's claim for services constitutes a maritime service.

The River Queen (1880) 2 Fed. 731, Judge Choate held that the weighing, inspecting, and measuring of the cargo of a vessel performed partly on land and partly on shipboard constitutes a maritime service for which a lien attaches irrespective of the port of the vessel.

Judge Thayer held in *The Wyoming* (1888) 36 Fed. 495: "In this district it has been heretofore held that such services [stevedores] are of maritime character, and that a lien exists therefor, even in the home port, when the service is shown to have been rendered on the credit of the vessel, or when such fact is fairly inferable from the circumstances under which the service was rendered."

In *The Seguranca* (1893) 58 Fed. 908, Judge Brown draws a distinction between a contractor who, pursuant to his general business, furnishes watchmen or stevedores to a vessel in her home port, (as a lien for such services is similar to any other repairs or supplies in the home port), and that of a watchman or stevedore when employed by the ship's representative on her credit, in which case, even in the home port, they may have a lien for their wages in enabling the ship to earn her freight as analogous to the wages of a seaman to pilotage, towage, or wharfage. He therein cites with approval *The Trimountain*, 5 Ben. 247, Fed. Cas. No. 14,175.

John A. Toomey, for claimant.

The first paragraph of the libel alleges that "the schooner John Shay is, and at the time hereinafter mentioned was, an American vessel hailing from and registered at Philadelphia," so that the question presented is whether a stevedore who discharges a vessel in her home port is entitled to a lien for his services which can be enforced in the admiralty.

Such a lien arises only when the services are rendered to a foreign vessel. *The George T. Kemp* (June, 1876) 2 Lowell, 483, Fed. Cas. No. 5,341; *The E. A. Barnard* (June, 1880) 2 Fed. 712; *The Windermere* (May, 1880) 2 Fed. 722; *The Canada* (April, 1881) 7 Fed. 119; *The Hattie M. Bain* (May, 1884) 20 Fed. 389; *The Velox* (Aug., 1884) 21 Fed. 479; *The Director* (Feb., 1888) 34 Fed. 57; *The Scotia* (Aug., 1888) 35 Fed. 916; *The Gilbert Knapp* (Jan., 1889) 37 Fed. 209; *The Main* (June, 1892) 2 C. C. A. 569, 51 Fed. 954; *Norwegian Steamship Co. v. Washington* (June, 1893) 6 C. C. A. 313, 57 Fed. 224.

No well-considered case, in which a stevedore recovered for his services rendered to a vessel in her home port, can be produced which would justify the court in changing the law as laid down by this court in the case of *The E. A. Barnard*, 2 Fed. 712.

Judge Brown, after deciding in *The Hattie M. Bain*, *The Velox*, and *The Scotia*, supra, that a lien was given to stevedores for services to a foreign vessel, in the case of *The Seguranca*, 58 Fed. 908, while dismissing the libel, attempts to extend the lien for services to a vessel in her home port, because the services are maritime in their nature. The authorities which he relies on however to sustain his contention are either cases of the distribution of remnants where no owner appeared, as *The Trimountain*, 5 Ben. 247, Fed. Cas. No. 14,175, the cases of foreign vessels, as *The Erinagh*, 7 Fed. 231, *The Mattie May*, 45 Fed. 899, or cases in which it does not appear whether the vessel was foreign or domestic—as *The Onore*, 6 Ben. 564, Fed. Cas. No. 10,538; *The River Queen*, 2 Fed. 731, and *The Senator*, 21 Fed. 191. In the case of *The Wyoming*, 36 Fed. 493, the libel was dismissed; it does not appear whether the vessel was foreign or domestic, and simply refers to a manuscript decision recognizing the right to a lien for services in the home port.

The contention of Judge Brown that a maritime service in the home port gives rise to a lien which can be enforced in the admiralty, is opposed to the highest authority. In the case of *Ex parte Easton*, 95 U. S. 69, decided October, 1877, which was a case of wharfage, it is said at page 75: "These remarks are sufficient to show that wharves, piers, or landing places are well-nigh as essential to commerce as ships and vessels, and are abundantly sufficient to demonstrate that the contract, for which, if the vessel or water craft is a foreign one, or belongs to a port of state other than where the wharf is situated, a maritime lien arises against the ship or vessel in favor of the proprietor of the wharf."

Following this decision Judge McKennan in the case of *Monongahela Navigation Co. v. The Bob McConnell*, which was decided March, 1880, in the Western district of Pennsylvania, and reported in 1 Fed. 218, held that lockage in a public navigable river was a purely maritime service, but that a lien therefor did not arise when the services were rendered to a vessel in her home port.

Within two months after this last decision this court decided the case of *The E. A. Barnard*, 2 Fed. 712, which practically denied the stevedore a lien at the home port of the vessel. This last case is referred to by Judge Jenkins in the case of the *Gilbert Knapp* (Jan., 1889) 37 Fed. 209, who charges that this court in deciding *The E. A. Barnard* failed to refer to *The Windermere* and *The Senator*. Of course the court could not refer to either of them, because they had not then been published—and although the case of *The Senator* had been decided in June, 1876, it did not appear in print until 1884—when it was published in 21 Fed. 191, among the cases purporting to have been decided in August and November, 1884. Even if both these cases had been known to this court it could not have had any effect on the decision in *The E. A. Barnard* because *The Windermere* was the case of a foreign vessel and in *The Senator* it did not appear whether the vessel was foreign or domestic. However Judge Jenkins agrees with this court that no lien is given to a stevedore for services rendered to a vessel in her home port and says at page 214: "It

does not necessarily follow, the contract being maritime that a lien upon the vessel is allowed"—and that the services of a stevedore stand in no such relation to the ship as those of a mariner.

BUTLER, District Judge. The libel and exceptions raise the question, are stevedores employed in the home port of a vessel entitled to a lien? It seems to be settled that they are not. The subject is well discussed and the authorities cited on the one side and the other, in the proctor's brief annexed, and I therefore incorporate it in this opinion. The contract is maritime; but this fact does not control the question. Contracts for supplies and other necessities, are maritime; but when furnished in the home port no lien attaches. In the absence of express stipulation, liens attach only where the supplies are furnished, or services rendered, on the credit of the vessel. In the home port they are presumed to be furnished or rendered on the credit of the owners. Liens are not favored, and are, therefore, allowed only where the necessities of the vessel and the interests of commerce render them necessary. No case is found in which a lien for stevedores' services in the home port, has been allowed, as the libellant's intelligent proctor, admits. He relies however on expressions found in some cases where the question was not directly involved. The obiter dicta of judges are not of much value; very often they are misleading. The libel must be dismissed.

THE HERCULES.

THE SEA QUEEN.

In re SHIPOWNERS' & MERCHANTS' TUGBOAT CO.

(District Court, N. D. California. May 28, 1897.)

TOWAGE—DUTY OF TUG—BUOY MARKING OBSTRUCTION.

The master of a tug plying in a busy harbor is not justified in relying absolutely upon the presumption that a buoy, placed by the government to indicate a dangerous obstruction to navigation in such harbor, is in its proper position, but is bound, especially when towing a large ship past the obstruction, to observe the bearing of such buoy, and watch for any change in its position, and to be so familiar with the actual location of the obstruction as to be put on his guard by a displacement of the buoy amounting to 200 feet in distance and making a difference of a point and a half in its bearing.

Page, McCutchen & Eells, for petitioner.
Andros & Frank, for claimants.

MORROW, District Judge. A petition for limitation of liability, under sections 4282-4285, Rev. St., was filed December 30, 1895, by the Shipowners' & Merchants' Tugboat Company, owner of the steam tugs Hercules and Sea Queen. The petition asked for a limitation of liability with respect to the Hercules. By an amended petition, filed January 10, 1896, the Sea Queen was also included. The petition and amended petition were filed, in view of certain claims for damages having been made against the tugs, aggregating about \$20,000, to limit the liability of the owner to the value of said tugs, if

it should be determined that there is any liability. The principal claim for damages against the tugs is that involved in a libel instituted in this court by Arthur Sewall and others against the steam tugs Sea Queen and Hercules, in the sum of \$20,000, for alleged negligence on the part of those in charge of said tugs in towing the ship Benjamin F. Packard on a rock in the Bay of San Francisco. The further prosecution of this suit was restrained and enjoined by an injunction issued to the petitioner on April 9, 1896, and a monition was issued, returnable July 14, 1896, citing all persons claiming any damages for any loss arising out of the stranding of the ship Benjamin F. Packard to appear before Southard Hoffman, a commissioner, and make due proof of their respective claims, and answer the petition for a limitation of liability. Two claims have been presented,—one, as has been already stated, by Messrs. Arthur Sewall and others, claiming damages in the sum of \$20,000. The other claim is presented by the firm of Balfour, Guthrie & Co., in the sum of \$484.54, for damages to a portion of the cargo of wheat, alleged to have been caused, also, by the negligent stranding of the ship by the tugs.

The petition and amended petition set up, in brief, that certain claims have been made upon the steam tugs Sea Queen and Hercules, owned by the petitioner, for damages alleged to have arisen from the stranding, on Mission Bay Rock, on December 3, 1895, of the ship Benjamin F. Packard; that the said stranding was not caused by any incompetency or negligence of the master of the steam tug Hercules, or the unseaworthiness of said tug; that the Sea Queen took no part in the actual towing of said ship, but was simply attached by holding lines to the ship, having been somewhat disabled by unseating her funnel before the towing had commenced in striking against the ship's mainyard; that the cause of the stranding and damage to the ship and cargo was the fact, solely, that the buoy, which indicated where the submerged Mission Bay Rock was located, had, for some cause unknown to the petitioner, been moved, and was not, at the time of the towage aforesaid, in the place in which it had been for many years previous to the date of the stranding, or in which it was designated by the chart as being, and in which the master of the Hercules believed it to be; that, on the contrary, the said buoy had been moved from its said usual place and designated point to a distance of more than 200 feet from the position which it had once occupied, and to a point considerably to the southward of the northwesterly side of said rock; that, in consequence of the said change of the danger buoy, the master of the tug Hercules was deceived as to the course that he should take in moving the said ship, so that the course actually taken by him, though apparently, by reason of the actual location of the buoy, a distance of nearly 200 feet from the rock, was in fact in the direction of the rock; that whatever loss or damage or injury was done to the ship Benjamin F. Packard or to the cargo was done without the privity or knowledge of the petitioner.

The answers filed by both of the claimants set up, substantially, that the stranding of the ship Benjamin F. Packard, and the conse-

quent damage to the ship and her cargo, were caused by the careless, negligent, and unskillful manner in which those having charge of the tugs attempted to perform said service. With respect to the position of the buoy, the answer of Messrs. Sewall and others denies:

"That the accident to said vessel was caused entirely, or at all, by reason of the fact that said buoy had been removed from the place it had at some other time occupied, or that said accident was not brought about by any incompetency or negligence of said master of said tug."

With reference to the averments in the amended petition that the Sea Queen did no towage service to said ship, the answer of the same claimants denies, on information and belief:

"That the said tug Sea Queen did no towage service to said ship thereafter and before the stranding of said ship, or that said tug was merely attached to said vessel while the funnel of said tug was being replaced. On the contrary, they aver, on information and belief, that said tug Sea Queen was, immediately after said ship had been started away from said wharf, engaged in towing her in connection with said tug Hercules; that said tug Hercules was made fast on the quarter of said ship, and the said Sea Queen was made fast near the bow of said ship; and that, immediately after getting clear of said wharf, both of said tugs were under steam, and engaged in towing the said vessel at the time of said accident."

From the issues as thus made up three questions arise: (1) Whether the stranding of the ship Benjamin F. Packard arose or was caused by any negligence on the part of both of the tugs, or either of them, in towing the ship; (2) whether the Sea Queen participated or had anything to do with the towing of the ship; and (3) whether the liability of said tugs, or either of them, should be limited to their value, or whether there was such privity or knowledge on the part of the owners of the tugs as to justify holding them personally responsible, and denying their petition for a limitation of liability.

The principal question of fact involved, upon the determination of which the right of the petitioner on the one hand to a limitation of liability or a decree absolving it from all liability, and the right of the claimants on the other hand to recover against the petitioner, alike depend, is whether the stranding of the ship on Mission Bay Rock, while being towed, was caused by the negligence, carelessness, and unskillfulness of those in charge of the towing, or whether, under the circumstances, it was excusable. Considerable testimony has been introduced by both sides. The leading facts are these: On December 3, 1895, the ship Benjamin F. Packard was lying on the north side of Long Bridge wharf, in the Bay of San Francisco. She was starboard to the wharf, and headed outward, to the southeastward. She had a gross tonnage of 2,130.21 and a net tonnage of 2,025.72, and was 244.2 feet in length, 43.3 feet in breadth, and 26.8 feet in depth. She was built in 1883 at Bath, Me. At the time of the stranding she was partially loaded with a cargo of 2,800 or 2,900 tons of wheat and barley. It became necessary to move her from the wharf into the stream for the purpose of completing her loading. The Ship-owners' & Merchants' Tugboat Company was employed to perform that service. The steam tug Sea Queen went to the ship, and reached her some time between 10 o'clock and 10:30 of the morning of the 3d of December, 1895. The ship was to be towed out on the ebb tide. It ap-

pears that the Sea Queen, in going around the ship, fouled the mainyard of the latter, and her funnel or smokestack was unseated. Besides this, the collision broke the whistle pipe, and put the escape pipe out of condition. The smokestack guys, excepting one, were carried away, and several injuries of a minor character sustained. This disabled the Sea Queen for towing purposes. As the captain of the Packard was anxious to go out on that tide, the master of the Sea Queen, accompanied by the captain of the ship, went to a telephone office on the wharf and requested that another tug be sent out. Thereupon, the steam tug Hercules was sent out. While the latter tug is not quite as large nor as powerful a tug as the Sea Queen, still it satisfactorily appears that she was amply sufficient to tow the Packard; certainly so under the conditions then prevailing. The registered dimensions of each tug are as follows: The Hercules was 90 feet in length, 21 feet in breadth, and 11.9 feet in depth. She had a gross tonnage of 96.71, and a net tonnage of 48.36. The Sea Queen was 100.5 feet in length, 22 feet in breadth, and 11.8 feet in depth. She had a gross tonnage of 111.15, and a net tonnage of 55.58. The horse power of each tug, as testified to, was: The Hercules, 635; the Sea Queen, 691. The weather was good, and the tide, as stated, ebb,—just a light ebb when the towing actually began. Meanwhile efforts had been made to set up the smokestack of the Sea Queen, which, it appears, had been only partially successful. The tug Hercules was made fast for towing at the port quarter. After the accident to the Sea Queen, the latter was moved abreast of the forerigging, under the foreyard, and on the same side on which the Hercules was made fast. Both tugs were heading with the ship.

There is a conflict in the testimony as to whether the Sea Queen was made fast for towing purposes, and as to whether she actually rendered any assistance in towing. It will, therefore, be necessary to determine this question at the outset. The testimony on the part of the petitioner tends to show that she was not made fast for towing; that at no time until after the accident did she assist in the towing; that when the towing began she was made fast by two small lines, called "holding lines," and shortly after the towing began by one small line only. To use the language of her master:

"After knocking over the smokestack, I hauled up alongside the forerigging of the ship. I got one headline out onto the shankpainter bitt that they use to hang the anchor in. That was what the headline was fastened to. The sternline consisted of what we use for a messenger, a three or three and one-half inch line with a hook in it, and that hook was hooked into the second or third chain plate in the main rigging. It was not fast at all."

The testimony on the part of those on board the ship tends to show that the Sea Queen was made fast for towing purposes, and that she did render towage services. But this testimony is unsatisfactory and in some respects unreliable. The captain of the ship states unequivocally that the Sea Queen was made fast when the towing first began, and that she was not afterwards moved forward, whereas several of the witnesses on board the ship testify that the Sea Queen was first moved forward some 35 or 40 feet and then made fast for towing. This conflict between their statements in

this and other respects does not commend their reliability as witnesses on this question. It may be that these witnesses did not notice very particularly how the Sea Queen was made fast, whether for towing purposes or not. Perhaps, the fact that the Sea Queen accompanied the ship when the towing began, and was made fast to her by the two small ropes referred to, led these witnesses on board the ship to believe that the Sea Queen was actually towing. But, in my opinion, they were mistaken. The positive, unequivocal, and corroborated testimony of the witnesses for the petitioner who testified on this point is to the effect that the Sea Queen, at no time during the towage prior to the stranding, did any towing; that, while her engine was not disabled for towing, in other respects she was not in a condition to tow; that her whistle pipe was broken, and she could not have given the proper signals had any been required; that she was not made fast for towing; that she was simply made fast, so as to remain by and keep up with the ship until the latter had been towed to a proper anchorage in the stream, when it was intended to make a further effort to right the smokestack by using the ship's yard; that the small ropes by which she was hanging onto the ship were not fit nor used for towing; that after the towing began, and the wharf had been cleared, the tug Hercules backed, and that the effect of this movement was to throw the backwater towards the stern of the Sea Queen, which gave her the appearance of towing; that she was not towing, but, on the contrary, when the backwater affected the stern of the Sea Queen, it caused the small "holding on" line, which extended from the stern of the Sea Queen to the second or third chain plate in the main rigging, to be wrenched from its place,—that is, the hook attached to this small line was straightened out completely, and lost its hold; that this caused the tug Sea Queen to surge ahead a few feet, and widened the distance between the stern of the tug and the side of the ship; that thereafter the tug was only holding on by one small line, the one extending from the forward end of the tug to the shankpainter bitt; that this one line, in the manner in which it was made fast, was absolutely useless for towing.

Without further entering into detail in the testimony, or attempting to reconcile the various conflicting statements of the witnesses on this point, I am convinced that the Sea Queen was not made fast for towing, and that she did not, in fact, tow or attempt to tow the ship until after the latter had struck and become fast on the rock, when for the first time she left her position forward on the port side of the ship, and went around to the starboard of the vessel, and made ineffectual attempts, in conjunction with the Hercules, to tow the ship off the rock. In this connection, the testimony of Henry P. Marshall, captain of a tugboat belonging to a competing line of tugboats, is very significant. He appears to be an absolutely disinterested witness. He noticed the ship Packard, with the tugs Hercules and Sea Queen, while he was towing a vessel in that locality himself. He observed the Sea Queen both before the towing began and afterwards. He swears that she was not made fast for towing, and that the position she occupied on the port side of the ship un-

der the forerigging was not a proper place for towing, and that a tug in that position could not render much assistance to a ship. The further fact that the tug Hercules was perfectly able and thoroughly equipped to do the towing herself strengthens the conviction I hold that the Sea Queen did not do any towing, and did not contribute in any degree to the stranding of the ship on Mission Bay Rock. All the orders were given by the master of the Hercules, and he swears that he gave no orders for towing to the master of the Sea Queen, and the latter testifies that he received no orders to assist in the towing, and in this respect they are corroborated by other witnesses. It is true that, after the ship struck the rock, and became fast to it, the Sea Queen left her place on the port side of the ship, and made fast to the starboard quarter, and attempted to assist in towing the ship off the rock. But there is nothing inconsistent in this with the fact that she did not do any towing previously. As stated, her engine was not disabled, but her smokestack was out of its place, and had been only partially restored, and her whistle pipe was broken. This damage did not interfere with her using the engine to tow when it became absolutely necessary to save the ship, if not from any great danger, at least from damage by remaining on the rock for any length of time. It is to be observed that she did not require her whistle in this particular, as she might have required had she been navigating the harbor. Her towage was of a stationary nature, if it can so be termed; that is, it was devoted to getting the ship off the rock.

The question, as to whether or not the Sea Queen participated in the towing prior to the stranding, or in any wise contributed thereto, having been settled, I now proceed with the statement of the principal facts. The towing by the Hercules began, according to the testimony of her master, precisely at 12:10 of that day. Nearly opposite the wharf at which the ship had been docked, some 475 feet away, are a number of submerged rocks known as "Mission Bay Rocks." On the northernmost one of these rocks is a ledge or pinnacle upon which, or as near thereto as is practicable, a buoy is placed, known as "Mission Rock Buoy." It is in about 12½ feet of water, and is designated in the official publication, by the government, of the "List of Beacons, Buoys, and Day-Marks, on the Pacific Coast of the United States, Corrected to December 1, 1894," as follows:

"Name of station or locality of aid: 'Mission Bay Rock.' Color of aid: 'Red and black horizontal stripes.' Description of mark or aid: '3d class nun buoy.' Compass bearings and distances of prominent objects from the aid: 'Oakland Harbor Lighthouse, N. E. ¾ N. Potrero Point, S. S. E. ¼ E. Point Avisadero, S. E. ¼ S.' General remarks: 'Near the shoalest part of the rock, on which is a depth of 12½ feet at mean low water. May be passed on either side by giving it a good berth.'"

It is not denied that, on the occasion when the ship struck this shoal, the buoy, through some cause or other, had been moved or displaced some 200 feet away and southeast from its designated place. Nor is there any dispute about the fact that the master of the Hercules did not know that the buoy had been displaced. Upon leaving the wharf, the master of the Hercules gave orders that the wheel

of the Packard be put hard a-port. The object of this was to hold her bow against the tide, which was ebbing, and which would strike her starboard bow. In this way she was kept straight, and her quarter cleared the wharf without any trouble. Having towed clear of the wharf, the master of the Hercules stopped, backed, and steadied his wheel. This was for the purpose of stopping the vessel from reaching too far ahead, and its effect was to swing the vessel around to port, and let her drop down clear of the buoy, which would then be upon his starboard bow. When the master of the Hercules considered that the ship was a sufficient distance from the buoy to pass by and get around the submerged rock in safety, he sent the ship ahead, and almost immediately after the vessel fetched up; that is, the stem of the ship struck, and became fast upon the rock. All this occupied about five minutes; that is, from the time they left the wharf to the time when the ship struck Mission Bay Rock, as stated. Attempts were made by both the Hercules and the Sea Queen to tow the vessel off, and they were afterwards assisted by other tugs, but these efforts were unsuccessful at that time. The ship was afterwards pulled off at the next flood tide. She was found to be considerably damaged, to be leaking badly, and was towed upon the Mission mud flats. A portion of her grain was damaged by water. In this statement of facts I have made no attempt to go into details, nor to explain or reconcile contradictions, inconsistencies, and inaccuracies. I have simply stated the principal facts as I have, after careful consideration, found them to be.

We come, now, to the important question in the case, and that is whether or not the master of the Hercules was guilty of negligence in towing the ship on Mission Bay Rock. It is contended, on the part of the petitioner, that the accident was excusable and inevitable, owing to the fact that the buoy had been removed and was misplaced, thereby deceiving the master of the tug as to the course which he should take in towing past the rock. On the other hand, it is contended by the claimants that, although the buoy had been removed some 200 feet from its habitual and correct position, yet that the master of the tug should have noticed this displacement of the buoy, and that he was bound to know, at least approximately, the locality of the submerged rock. The determination of this question involves the duty of the tug towards her tow. It may be observed that no question is raised as to the competency of the master of the tug, nor of the fact that the general course he attempted to take with the ship would have been proper had not the buoy been displaced. It appears, from the testimony, that the captain of the ship preferred a tug of greater power than the Hercules. But the evidence shows conclusively that the Hercules was sufficiently powerful and well-equipped to tow the ship without any assistance whatever from the Sea Queen, and that the service would have been easily and satisfactorily rendered had it not been for the stranding of the ship on the rock referred to. There is no question but that the tide and weather were favorable and conducive to safe towage. In fact, the only question upon which it is sought to base negligence on the part of the master of the Hercules is whether he should

not have noticed the displacement of the buoy, and should have been sufficiently familiar with the position of the hidden rock to have avoided it with safety.

The general principles, which apply to the duties of tugs, are aptly stated by the supreme court, in *The Margaret*, 94 U. S. 494, as follows:

"The tug was not a common carrier, and the law of that relation has no application here. She was not an insurer. The highest possible degree of skill and care were not required of her. She was bound to bring to the performance of the duty she assumed reasonable skill and care, and to exercise them in everything relating to the work until it was accomplished. The want of either in such cases is a gross fault, and the offender is liable to the extent of the full measure of the consequences. * * * She was bound to know the channel, how to reach it, and whether, in the state of the wind and water, it was safe and proper to make the attempt to come in with her tow."

In *The Effie J. Simmons*, 6 Fed. 639, it was held that a tug is bound to know the nature of the bottom, as well as the depth of the water in which it is being employed.

In *The Henry Chapel*, 10 Fed. 777, it was said by Nelson, District Judge:

"The rule of law is perfectly well settled that a tug undertaking to tow a vessel in navigable waters is bound to know the proper and accustomed water ways and channels, the depth of water, and the nature and formation of the bottom, whether in its natural state, or as changed by permanent excavations. When all these conditions, as they exist, admit of safe towage, the tug is responsible for any neglect to observe and be guided by them."

In *The Vigilant*, 10 Fed. 765, a tug was held liable for the loss of her tow in consequence of stranding her upon a depression or hole in the surface of the bar over which she was being towed.

In *The Robert H. Burnett*, 30 Fed. 214, it was said that a tug "was bound to use reasonable skill and care, and to know the condition of the bottom and depth of water of the river which she was navigating." The tug was held liable for not being aware of the existence and location of a well-known reef. The court said:

"The captain of the tug testifies that he had been running on the river for a year or more, but that he had no knowledge of the position of this rock, and had never heard of the reef. This admission of ignorance of notorious facts, about which there can be no question, leaves him without any excuse for going so near to the western shore as he did."

See, also, *Cushing v. The John Fraser*, 21 How. 184; *The Quickstep*, 9 Wall. 665; *The Cayuga*, 16 Wall. 177; *The New Philadelphia*, 1 Black, 62; *Brown v. Clegg*, 63 Pa. St. 51; *Wooden v. Austin*, 51 Barb. 9; *Wells v. Steam Navigation Co.*, 8 N. Y. 375; *The Narragansett*, 20 Fed. 394; *The Ellen McGovern*, 27 Fed. 868; *In re Humboldt Lumber Manuf'rs' Ass'n*, 60 Fed. 428, 443.

Applying the law as established by these cases, it follows that the master of the *Hercules* should have had such familiarity with the location of Mission Bay Rock, even though the buoy, indicating where it was, had been displaced some 200 feet. That distance, at the short range from Long wharf, where the towage began, was sufficient to have been observed by a careful pilot. The difference in position between the buoy from the place where it should have been

to where it was, from Long wharf, was about 20° of arc or nearly 2 points of the compass. The displacement was in a southeasterly direction, and the distance when riding with an ebb tide was about 170 feet, and when riding with a flood tide was about 210 feet, from the pinnacle. This displacement was certainly sufficient to apprise the master of the Hercules that something was wrong with the position of the buoy, if he had given it any attention whatever. It should have put him on inquiry. He did not take any bearings to ascertain whether the buoy was in the correct position.

It is claimed that he had no opportunity, and that he was not required to, as he had a right to rely upon the buoy; that it was a signal of danger placed by the government, which was presumed to be correct. While it is true that there is a presumption that the buoys correctly indicate the places of danger, still it does not justify navigators, particularly masters of tugs, who are selected and employed for their supposed familiarity with obstacles to navigation in crowded harbors, in following blindly these signals of danger. On the contrary, the very efficiency of the tugboat service requires that masters should be on the watch for any change in signals of danger, so that the places of danger themselves may be avoided, and property and perhaps life saved from loss. It is a well-known fact that buoys are apt to be moved, and this fact should put masters of tugs on the alert to ascertain whenever a displacement has occurred. In the case at bar it would seem, from the testimony of the master of the Hercules, that he did not even look to see whether the buoy was in place or not. He testified, on cross-examination, as follows:

"Q. In the place where it [the buoy] was on the day of the accident, December 3, 1895, was it further out than the 12½-foot rock,—I mean, further to the eastward? A. I did not notice it being out. Q. Did you take any notice at all to see where it was? A. No, sir; to tell the truth, I did not,—not then. I was too busy about the ship."

Certainly there was no more important duty devolving upon the captain of the tug than to ascertain the location of an obstruction he was about to move around with a large ship. The master of the tug Sea Queen himself admits that he did not look to see whether the buoy was in its proper place, or whether it had been moved away. However, as he was not in command of the towage service, and as his tug did not contribute to the towing, any inattention or failure to observe the displacement of the buoy is immaterial, so far as the result of the case is concerned. But it tends to show that too much reliance is placed by masters of tugboats on the correctness of the positions of buoys.

Upon all the facts of the case, I think that the stranding of the ship Benjamin F. Packard was due to the negligent towing on the part of those in charge of the tugboat Hercules in the particular above indicated. But, as there is no proof of any privy or knowledge of this negligence on the part of any of the members of the company, the owner of the tug, the liability will be limited to the appraised value of the tug,—the sum of \$4,000. A decree will be entered in accordance with the views expressed in this opinion.

THE ARMONIA.

THE REDRUTH.

CORY et al. v. PENCO.

(Circuit Court of Appeals, Third Circuit. May 3, 1897.)

1. COLLISION—NEGLIGENCE OF PILOT—EVIDENCE.

The evidence should be very persuasive to induce the belief that a skilled pilot, whose incentive to caution is manifest, and who, presumptively, is not usually negligent, had, in disregard of sufficient warning, failed to take the most ordinary care to prevent his vessel from colliding with one at anchor.

2. ADMIRALTY APPEALS—ASSIGNMENTS OF ERROR.

It may well be doubted whether an averment of error should be sustained, even in admiralty, which is founded on the omission of the court to find a fact which was not in issue, nor material to the issues, as made by the pleadings, and on its failure to adjudicate a question which was not even suggested for its consideration.

3. COLLISION—DAMAGES—PROOF OF PAYMENT OF BILLS.

In showing damages resulting from a collision, it is sufficient *prima facie* proof for libellant to produce the bills claimed to have been paid, and witnesses who testify that they paid them, without calling those to whom payment was made.

4. SAME—DAMAGES FOR DETENTION.

A vessel injured by collision through the fault of the other vessel is entitled to the amount of loss actually sustained in consequence of the detention occasioned by the collision.

5. SAME.

Where a vessel anchored in a usual place of anchorage at night, with proper lights burning and a proper watch, was run into by a steamer, *held*, that the presumption applied that the moving vessel was in fault, without showing wherein her fault consisted. 67 Fed. 362, affirmed.

Appeal from the District Court of the United States for the Eastern District of Pennsylvania.

This was a libel by Domenico Penco, master of the bark *Armonia*, against John Cory & Sons, owners of the steamer *Redruth*, to recover damages resulting from a collision. The district court rendered a decree for the libellant (67 Fed. 362), and the respondents appealed. After the record was brought up from the court below, the appellants were permitted by the court to file additional assignments of error. 22 C. C. A. 675, 76 Fed. 997.

J. Parker Kirlin and Henry R. Edmunds, for appellants.

Edward F. Pugh and Henry Flanders, for appellee.

Before ACHESON and DALLAS, Circuit Judges, and BUFFINGTON, District Judge.

DALLAS, Circuit Judge. This is an appeal from a decree in admiralty. We are all convinced, upon separate consideration of the evidence, of the correctness of the conclusions of the learned judge of the district court upon every material question of fact on which he based his decision.

It is impossible to fix with precision the spot at which the *Armonia* was anchored, but it is not requisite to do so. It is enough to say, and of this we have no doubt, that she was not, as the appellants

contend, anchored in midchannel, but was anchored at a point some distance to the westward thereof, and where such vessels were accustomed to anchor. Any attempt to place her entirely outside of the channel would have been both unusual and hazardous. It is, however, insisted that, by lying where she did, she violated certain statutory enactments of the state of Delaware. A sufficient reply to this contention, and therefore the only one which need be made, is that neither of the enactments referred to is applicable to this case. The *Armonia* was not "in the range line of any range lights," for, as testified by witnesses on both sides, there are no range lights at that part of Delaware Bay. The statute is addressed to navigators, and to them the words "range lights" have a plain and distinct meaning. As said by a pilot who was called for the appellants, "A range light is two leading lights, one after another," and that the "red cuts" referred to in the testimony are lights of an entirely different class is so well known that, if the evidence had not been conclusive on the subject, the fact, perhaps, might have been judicially noticed. The *Armonia* was not anchored "in any river or creek." Neither was it necessary that, "to leave a free passage," she should anchor "out of the channel," "near the shore," and "parallel with the channel." She was therefore not at any place to which the terms of the Delaware statute respecting rivers and creeks relate, or to which its manifest object is pertinent.

The contradictory statements of the witnesses as to whether the *Armonia* had an anchor light up at the time of the collision fully justify the remark of the learned judge below, "that it is difficult to avoid the conclusion that some of them have intentionally falsified." The weight of the evidence is, however, with the appellee, and our deduction therefrom—that the *Armonia* did, at the time of the collision, have an anchor light set and burning—is accepted with especial confidence because the answer as originally filed admits that there was such light, and objects only that it was not sufficiently bright. It is true that this answer was not verified by the respondents, but by their proctor, but it also appears that it was based upon "statements made by the pilot and officers of the steamship *Redruth*"; and it is a quite significant circumstance that the statement which was thus made accords with the evidence for the appellee as to the nature of the complaint which was made upon the same subject immediately after the occurrence of the accident. The amended answer was also prepared upon information derived from the pilot and others who were on the deck of the *Redruth*, and we cannot avoid the conclusion that its allegation that the *Armonia* did not have up an anchor light is less likely to be correct than the circumstantial admission of more than a year before, that there was such a light.

By leave of this court, the appellants, after the record had been brought up, assigned further error as follows:

"(a) For that the court omitted to find and hold that the only negligence, if any, of those on board the *Redruth*, which contributed to the collision, was that of a compulsory pilot.

"(b) For that the court omitted to find and hold that the respondents and appellants, in an action in personam, were not liable for damages caused by the negligence of a pilot compulsorily employed."

Both of these specifications rest upon the allegation that the only negligence which contributed to the collision was that of the Redruth's pilot, and to this we cannot assent. The pilot was on the bridge, where he should have been. It does not appear that he permitted his attention to be diverted from the navigation of the ship, and there is nothing in this record which would justify us in finding that he had timely notice of the proximity of the Armonia, and yet failed to keep clear of her. The evidence, we think, should be, indeed, persuasive to induce belief that a skilled pilot, whose incentive to caution is manifest, and who, presumptively, is not usually negligent, had, in disregard of sufficient warning, failed to take the most ordinary care to prevent his vessel from colliding with one at anchor. The brief of the appellants bases their contention upon this question of fact on a supposed finding of the district court in their favor, but there is no such finding. The decree, of course, attributes the fault to the Redruth, but it contains no specific finding of fact whatever. In his opinion, it is true, the learned judge said that he inclined to believe that the ship's fault consisted in her failure to give proper attention to the report of her lookout; but he thought it unnecessary to determine the matter, and was not asked to do so, and the fact is that the point raised here by the added specifications was not thought of by any one in the court below. The respondents took the position, at first, that the anchor light of the Armonia was insufficient, and, subsequently, that she had no anchor light at all; and not until both of these positions had been found to be untenable, and after the record had been removed to this court, was the inconsistent assertion made that the injury inflicted had resulted solely from misconduct of the pilot in disregarding an anchor light which was in fact seen and reported by the lookout on the Redruth in ample time to have enabled her to clear the Armonia. Had this defense been set up by the answer, and the proofs been directed to it, the case, no doubt, would have been differently presented upon both sides. The allowance which was accorded, to file the additional specifications, adds nothing to their force; and it may well be doubted whether, under the circumstances, an averment of error should be sustained, even in admiralty, which is founded upon the omission of the court to find a fact which was not in issue, nor material to the issue as made by the pleadings, and upon its failure to adjudicate a question which was not even suggested for its consideration. But, aside from this, we do not think that the proofs absolve the crew of the Redruth from all responsibility. The master, except so far as her navigation was concerned, was in command of the vessel. The Oregon, 158 U. S. 186, 15 Sup. Ct. 804. He was not on deck. The second mate was on the bridge, but he, as well as the pilot, appears not to have observed the Armonia's light. If he saw it, he certainly should have directed attention to it. If he did not see it, it cannot be fairly said that the pilot, who was also on the bridge, was peculiarly to blame for not seeing it. There was but one forward lookout. He testifies that 15 or 20 minutes before the collision he reported a land light, and this the pilot confirms by stating that at that time a light house was reported. The lookout also testifies that he afterwards reported two

or three lights right ahead, but he also says that he thinks the *Armonia* had no anchor light, and therefore, even at the time of testifying, he could not have supposed that he had reported it; and the pilot positively swears that the *Armonia* was never reported at all, and that he was the first to see her. It is not necessary to discuss the evidence further. There would be, as the learned judge of the district court suggested, much difficulty in determining with particularity what the fault consisted in, and this is not extraordinary, inasmuch as, when the evidence was taken, no one supposed it to be important that it should be so determined. It may be that the lookout did not see the *Armonia*'s light, or that, seeing it, he gave no notice, or a misleading one; but, be this as it may, it certainly does not appear that the pilot, in the face of a full discharge of duty by all others on board the *Redruth*, so negligently navigated her as to cause a collision which he might readily have avoided.

The appellants complain of the action of the court below in its allowance of certain items as damages, and of its disposition of the question of costs. We have examined these several objections in detail, but find no reason for rejecting the report of the commissioner, which was confirmed by the district court. The conclusions reached by him were in every instance the result of careful and intelligent investigation, and we have not been convinced that he committed any error of fact or in law, to the injury of the appellants. The ground of exception which has seemed to us to be most serious is that there was no competent proof of several of the items which were sustained. The libellant, as to the items referred to, produced the bills claimed to have been paid, and witnesses who testified that they had paid them. He did not call those to whom payment had been made, but we are of opinion that it was not, for the purpose of making out a *prima facie* case, requisite for him to do so. The course pursued accords with the decision of the circuit court in *The America*, 4 Fed. 337, where (the evidence being similar to that received in this instance) Judge McKennan said: "This was primary proof of the expenditure, of its purpose and its necessity, and, unless answered by counter proof, was altogether sufficient to justify the allowance of such payments." The amount allowed for delay does not seem to be excessive. The demurrage rate fixed by the charter party under which the *Armonia* was then sailing was shown, and there was evidence that this was also the market rate, as well as the customary rate of this vessel. The commissioner declined to adopt the contention of either party. He thought the libellant asked too much, and the respondent conceded too little. In this he was clearly right; but it was not pretended that no allowance whatever should be made, and the evidence, at least, does not indicate that the sum which he allowed was greater than the amount of the loss actually sustained in consequence of the detention occasioned by the collision, and for this the libellant is entitled to be compensated. We therefore entirely agree with the learned judge of the district court in thinking that the conclusion reached by the commissioner ought not to be disturbed. The decree is affirmed.

THE CITY OF NAPLES.

THE CITY OF SHEBOYGAN.

HART v. THE CITY OF NAPLES.

(Circuit Court of Appeals, Seventh Circuit. June 12, 1897.)

No. 265.

COLLISION—STEAMER AND SAIL IN SLIP—BREAKING ADRIFT IN GALE.

A sailing vessel, which leaves a probably safe mooring, and, in the face of a dangerous and increasing gale, comes into a slip, and moors under the lee of a steamer already there, in such a position that, if the lines of the latter part, a collision will be probable, assumes the risk of injury to herself from such a collision, where all reasonable and ordinary precautions are taken by the steamer by putting out additional fastenings. The steamer is not bound, under such circumstances, to change her position in the midst of the storm, in order to avoid responsibility for a collision, made possible by the action of the other vessel.

Appeal from the District Court of the United States for the Northern District of Illinois.

Wm. H. Condon (Sullivan & McArdle and Harvey D. Goulder, on brief), for appellant.

Charles E. Kramer, for appellee.

Before WOODS, JENKINS, and SHOWALTER, Circuit Judges.

SHOWALTER, Circuit Judge. Late at night on the 19th day of April, 1893, the steamer City of Naples collided with the schooner City of Sheboygan, then moored on the west side of the Lighthouse slip in the port of Chicago. The schooner, laden with 17,000 bushels of corn, and bound for Port Huron, in the state of Michigan, sank as the result of the collision. This proceeding was instituted by John Hart, owner of the schooner. After a hearing in the district court, the libel was dismissed, with costs against the libelant. Pending the hearing, John Hart died, and his administratrix, who prosecutes this appeal, was substituted.

The slip spoken of in the record as the Lighthouse slip is rectangular in form, and about 275 feet wide from west to east. The precise length from north to south is not stated. The indications from the record are that the length is about 400 feet. The south side of this slip is open, that being the place of entry. What is or was called the "Peshtigo Slip" comes into the Lighthouse slip from the west, its northern boundary or pier being in line with the northern pier of the Lighthouse slip. The distance from the northern end of the west boundary of the slip last named north to the northern boundary of the Peshtigo slip—in other words, the width of the Peshtigo slip across its entrance into the Lighthouse slip—is not stated; but the Peshtigo slip was wide enough to permit the entry and passage by one another, lengthwise, of large vessels. On the day and night in question a flotilla of scows, some 8 or 10, each 30 or 40 feet wide and 60 or 80 feet long, lay in the eastern end of the Peshtigo slip, and across the northern portion of the Lighthouse slip. The eastern pier of the slip last named was about 20 feet wide.

How far it projected above the ordinary water line is not stated. From the southern terminus of this eastern pier another pier extended easterly, perhaps 800 feet, into the open sea. The latter pier was higher by 3 feet than the eastern pier of the Lighthouse slip. On the day and night in question the large schooner *Golden Age* lay along the southern side of this latter pier, her bow to the east and her stern 50 feet from the exterior angle made, as described, by the two piers. On this corner stood a stout spile, whereto was fastened one or more lines from the *Golden Age*. Thus placed, and with lines to other spiles further east on the pier, the *Golden Age* safely rode out the storm which prevailed on the afternoon and night of the 19th of April, 1893, as mentioned later in this opinion. The southwestern angle of the Lighthouse slip is the eastern terminus of the northern boundary of the Chicago river. Between the southern pier or boundary of the Peshtigo slip and the said northern pier or boundary of the river, extends a tongue of dry land to the western pier or boundary of the Lighthouse slip. For two or three weeks prior to the 19th day of April, 1893, the steamer *John B. Lyon* lay in the Lighthouse slip alongside the eastern pier, and moored thereto. On the day in question she lay with her bow projecting south of or across the southern boundary or line of entrance into the slip. She was made fast by lines at intervals to the pier, her bow lines being attached to the spile above mentioned as holding the stern lines of the *Golden Age*. On the morning of the said 19th of April, the steamer *City of Naples* arrived in the port of Chicago. For want of an accessible berth up the river, which was at that time crowded, and by direction of the harbor master, the *Naples* entered the Lighthouse slip, and tied up alongside the *Lyon*, her bow to the north, and projecting 60 or 65 feet beyond the stern of the *Lyon*, and her fantail, according to some testimony, on a line with—according to other testimony projecting a few feet beyond—the bow of the *Lyon*. The *Naples* was a large vessel, 320 feet over all, with 42-foot beam. The top of her pilot house was 48 feet, and her forward upper deck 35 feet, above the water. She drew 11 feet aft and $4\frac{1}{2}$ feet forward. The *Lyon* was 255 feet long, and was loaded. The testimony does not affirmatively show exceptional weather conditions when the *Naples* first took this position. At noon on that day there was a gale from the east of 40 miles an hour. The velocity of the wind increased through the afternoon and night. At dark the velocity was 52 miles an hour. Shortly before 2 o'clock that night the velocity was 72 miles an hour, still directly from the east, and across 60 miles of open sea. The direction and force of this storm were unusual and extraordinary, even at that season of the year. At the hour last mentioned the water was, and had for some time been, pouring over the eastern pier of the Lighthouse slip, and threatening to cast against or upon or over that pier the barge *Mike Corry*, which, under stress of the storm, had drifted, dragging two anchors, from the outside into that vicinity. The night was dark and cold, and rain was falling.

It will be seen from what has been said that the after portion of the *Naples*, which lay deep in the water, was immediately in the

lee of the pilot house and texas of the Lyon, the comparatively high pier which extended easterly, and the stern of the Golden Age; while the bow of the Naples, with the structures thereon, was exposed to the full force of the blast from the east, the lower pier on that side and the low after portion of the Lyon, as far as it extended, affording little or no shelter. Shortly before 1 o'clock that night, and when the velocity of the storm had reached 64 miles an hour, the after lines of the Naples first snapped, then her lines amidships. Her bow lines held, but her stern went adrift, under the driving force of the wind. Between 3 and 4 o'clock in the afternoon the mate had replaced the six-inch line first used at her bow with a nine-inch hawser, carrying one end of the latter forward of the bow and attaching it to a stringer on the east pier near the north corner of the slip, and carrying the other end aft to another stringer, so that the bow might be held in position and the ranging of the vessel prevented. Before 6 o'clock two additional lines (making three at that place) were extended from the timberhead of the Naples forward of the boiler house, diagonally across the Lyon, and with a straight and unobstructed lead to the spile already mentioned near the southeast angle of the slip. Other lines, afterwards increased to the number of five or six, led from the stern of the Naples across to, and were made fast on, the bow of the Lyon. These latter were five-inch lines. Those forward of the boiler house were six-inch lines. Some of these lines were entirely new, and all were good lines. When asked why he did not extend his lines from the stern of the Naples to the spile on the pier, the mate answered that he could not do so without passing them around the projecting stem of the Lyon. The testimony is that all of the lines which the Naples had—and she was supplied with a full complement, according to the witnesses—were in use when her stern went adrift.

About dark, or a little before, on that day, the Sheboygan, which had up to that time been moored to the north pier of the river west of the Lighthouse slip,—a place where she could have remained in safety, being there end on to the storm and, apparently, less exposed than the Golden Age,—left that position, and, intent, apparently, upon greater safety, was towed into the Lighthouse slip. She there took a berth, and was tied up alongside the western pier, and immediately west and under the lee of the Naples. When this was done, the velocity of the wind was at least 50 miles an hour, and constantly increasing. When towards 1 o'clock that night the after lines of the Naples parted, as already said, her stern, by stress of the storm, was driven away from the Lyon and against the Sheboygan, doing some trifling damage. Her engines were at once started, her helm put hard a-starboard, and by force of her rudder against the current of her wheel her stern was carried towards the Lyon, and some 20 or 30 feet from the side of the Sheboygan. Here she remained, steaming against the force of the storm, and driven a little forward with her bow wedged among the scows, for nearly an hour, when one of her rudder chains was broken, apparently by some obstruction, supposed to be a floating timber, getting caught in her wheel. The rudder no longer responded against the current made by the wheel,

and her stern was thrown once more against the Sheboygan, striking the schooner well forward, and making the hole which sank her 20 minutes later. The Naples was driven still further forward by the slanting force of the wind. Her engine had been stopped when the rudder chain broke. It is testified that up to this time her bow lines, or one of them, still held. However that may be, and whether the stringers on the pier, to which the ends of the hawser were attached, were pulled loose then or before, it is certain that no damage resulted to the Sheboygan through any default in the forward lines or fastenings of the Naples. Her bow, as stated, was wedged tightly between the scows. The second mate at this time cut the lines which held the scows, and thereupon the bow of the Naples swung round, and she drifted into the Peshtigo slip, driving the flotilla of scows ahead of her. Before the stern lines of the Naples first parted, she had signaled repeatedly for a tug by blowing her whistle. When she first went adrift, she signaled again; and, while steaming against the wind, as described, after the initial collision, she whistled repeatedly. But no tug came until after the final collision. It is testified, however, that under the conditions then existing—or as they had been since 9 o'clock that night—it would hardly have been possible for a tug to render any assistance. During the interval, while the Naples was held away from the Sheboygan by her wheel and rudder, her crew, some of whom climbed down on the scows, and thence reached the pier, attempted to get lines out once more, but were unable to do so.

Under the circumstances above detailed, what was the extent of the obligation due from the Naples to the Sheboygan? The *Vivid*, 1 Asp. 601, was a collision case. The schooner *Vivid* was moored with her bow towards the shore. She was held by her starboard anchor, the chain thereof leading aft, and a spring line from her starboard quarter to said anchor chain, and by a line or warp fast to a capstan on shore. The schooner *Victor*, with her bow also to the shore, lay west of the *Vivid*, securely moored, and held in position by means of shore and anchor lines. The wind, being from the south, freshened, changed, and blew strong from the southeast. The lines of the *Vivid* were then made taut and her line to the shore was moved to another capstan further away from the *Victor*; but her stern, in spite of her fastenings, was blown around to the westward, and in collision with the *Victor*. Her port counter striking the starboard quarter of the *Victor*, the latter vessel was thereby sunk. The fastenings of the *Vivid* proved insufficient to hold her in position under stress of the wind. A line from her starboard quarter to the shore, or a second anchor, would have held her. Moreover, these means, or either of them, were then available. But such means were unusual or extraordinary, and were not needed in the first instance to keep her in position. The court (Sir R. J. Phillimore) ruled that the *Vivid* was not bound to use these extraordinary precautions, and dismissed the libel. The ground of this ruling was that, after the *Vivid* had taken her berth, and made fast, as described (but before the change in the wind), the complaining vessel, *Victor*, took the berth which made the collision possible. In other words,

and in the language of the sea, the Victor had given the Vivid a foul berth. The Victor, it may be said, had the right to be where she was, but she took the risk of the collision. She could not impose on the Vivid any duty to use extraordinary precautions. Both vessels were engaged in unloading coal, and for this purpose their fastenings were meant to hold them in the positions described with their bows to the shore. In the case at bar the Sheboygan became voluntarily a part of the dangerous situation. When she took a berth under the lee of the Naples, the crew of the latter vessel were already getting out additional lines. The storm was fairly on, and increasing in violence. That a collision, possibly disastrous to one vessel or the other, would take place if the stern of the Naples were blown adrift, was a consequence easily discernible. The Naples was not in relation with the Sheboygan at all, and owed no duty to her until she chose to take the new berth at nightfall. Could the Sheboygan by this maneuver create, as against the Naples, any obligation beyond that of using reasonable and ordinary precautions with the means available in her then position, and in the then state of her environment, to prevent collision? Let it be conceded—though the evidence upon the point is conflicting—that by some use of her hawser (which was 720 feet long) different to that in fact made, it was possible to have held the Naples fast; or that, after the Sheboygan had taken her berth, the Naples might, in the face of the storm, have loosed her moorings and found a place of safety elsewhere, either in the river or in the Peshtigo slip; or that she might have moved further forward on the east side of the Lighthouse slip, and attained more secure fastenings, though this could hardly have been done, is she therefore liable to the Sheboygan? In the light of the case above cited, and on what would seem the rational view of the matter, we think not. To hold a vessel at her moorings is not the ordinary or appropriate function of a hawser. The hawser in this instance was voluntarily put out to hold the forward portion of the Naples before the Sheboygan came into the situation. It thereafter remained where it had been put. We cannot say from the evidence that this, under the circumstances, was not the reasonable and proper use of the hawser. The position of the Naples, the berth occupied by her, and its environment, were apparent to the Sheboygan when the latter vessel came into the place of danger. Is it law that the Naples became at once bound to change her position, or else be responsible for a collision which the maneuver of the Sheboygan made possible under weather conditions then present? It is suggested that when the rudder chain broke—and the evidence is that this chain had been inspected within a week, and was then sound and staunch—the crew should have shipped the tiller. It is said that by this means the rudder could have been brought again under control, and the Naples kept away from the side of the Sheboygan. As indicating the fury of the storm, a few minutes after the Naples first parted from the Lyon the strong and sound after timberhead of the latter vessel snapped under the strain of her lines, and her stern was blown from the pier till she went aground. When the rudder chain of the Naples broke, as above stated, the velocity of the wind

had increased to 72 miles an hour, and the stern of the Naples was then only 20 feet, or thereabouts, away from the Sheboygan. We cannot say, and no witness has testified, that under the circumstances as shown in the evidence it would have been practical to arrest the swift movement of the vessel, and avoid the threatened collision, by any substitution of other steering apparatus in the emergency of the broken rudder chain. There is no satisfactory basis for any finding of negligence on this account; nor can it be fairly concluded that the crew of the Naples, at any time after the Sheboygan came into the slip, so far failed in reasonable endeavors and precautions with the means at hand as to make the Naples liable to the Sheboygan. The decree of dismissal is affirmed.

JENKINS, Circuit Judge. I concur in the result reached, but upon the ground that under the circumstances no fault is cast upon the City of Naples. The harbor above the bridge was closed to her by reason of the congestion of shipping there. She was, therefore, compelled to seek such shelter as was afforded by the Lighthouse slip. The testimony declares that she used all proper and necessary appliances for secure mooring both before and during the storm. Indeed, it cannot be justly said that any proper effort was wanting to secure her in her position during the prevalence of the gale. If fault there was, it arose from taking a position outside the Lyon; but that would seem to have been a necessity of the situation. It does not satisfactorily appear that she could have done otherwise.

I have doubted whether the City of Naples was not in fault for failure to ship her tiller, and start her engines after her rudder chains broke, and thereby keep her stern away from the Sheboygan. The evidence upon this point is quite meager and unsatisfactory, and but little stress seems to have been placed upon it. At the time of the breaking of the rudder chains the stern of the City of Naples was but 20 or 30 feet away from the Sheboygan, and, in a gale of wind of 72 miles an hour driving her stern directly towards the Sheboygan, it may be doubted if the maneuver of shipping her tiller, starting her engines and obtaining sufficient headway to prevent the collision, could have been successfully adopted. At all events, the evidence upon that subject is too inconclusive to warrant a finding of fault. As I read the testimony, there was nothing, other than the prevalence of the gale, to indicate to the master of the Sheboygan, when she moved into the slip and moored at the dock opposite to the City of Naples, that the latter was either insecurely moored, or was liable to part her lines. I therefore reserve my judgment whether the ruling in the case of *The Vivid*, referred to in the opinion of the court, is applicable here. I do not know that the doctrine of "foul berth" has been applied to vessels moored to a dock.

THE ROCHESTER.

THE AMARETTA MOSHER.

DUNHAM v. THE ROCHESTER.

(District Court, N. D. Illinois. March 1, 1897.)

COLLISION—STEAMER AND SAIL—LOOKOUTS.

Where a schooner, shortly after leaving port, collided with a steamer coming in, *held*, on the evidence of the probabilities of the case, that the collision was due to the fact that all the schooner's crew, except the master at the wheel, were engaged in setting sail, and that, the master's vision being obstructed by the sails, he several times left the wheel to play at random, while he ran forward to observe the approach of the steamer, and that the consequent yawing of the schooner then misled the steamer into the belief that the schooner had changed her course.

These were cross libels to recover damages resulting from a collision.

Charles E. Kremer, for libelants.

George S. Potter, for claimant.

GROSSOUP, District Judge (orally). On the evening of November 4, 1895, at about 8:30 o'clock, the schooner Amaretta Mosher, belonging to the libelants, and leaving this port and the steamer Rochester coming into this port, came into collision when about two miles off shore, and about seven miles from the mouth of the river. The schooner had no cargo of any consequence, and carried seven men. The steamer was partly loaded. The wind was from the south; the night was clear; and the course of the schooner was almost before the wind. This case presents the usual difficulties of collision cases. The collision itself is, to a certain degree, unaccountable. The schooner was proceeding northward, a point or a point and a half to the westward. The steamer was proceeding southward several points to the eastward when they sighted each other. If the story of both crews be assumed to be true, they were in such a relation to each other that, if they had maintained their then course, the steamer would have crossed the bow of the schooner, and been to the eastward of her, in ample time to have avoided any trouble. But it appears that, just before the collision occurred, the steamer, for some purpose, changed her course from eastward of south to a little westward of south, and that near about the same time the schooner apparently changed her course from westward of north to a little eastward of north, and the collision occurred by reason of these changes of the direction of either both of the vessels or of one of the vessels. The witnesses on board the steamer insist that they were proceeding to the eastward of south, and were on the starboard side of the schooner, seeing her green light, when suddenly the red light of the schooner appeared, showing that she had changed her course, and was coming in their direction. Under the rules of navigation, it is the duty of the steamer to give the highway to sailing vessels. In obedience to this rule, she ported her helm, and attempted to pass to

the westward of the schooner, although her normal direction was to the eastward.

The crew, on the part of the schooner, insist that they saw the steamer in ample time; that they saw her crossing the schooner's bows; and that, suddenly, and without any change of her own course, they observed that the steamer had changed her course, and was coming down upon them. Now, there are two theories advanced for this singular conduct upon the part of the steamer. The one is, on behalf of the schooner, that, as a matter of fact, the steamer did not sight the schooner until she was just upon her; that she then saw her green light, it is true, and the change from the green light to the red light, which indicated a change in the course of the schooner; that this, in fact, was not a change of her course, but was only due to the fact that she was yawing,—that is, her bow was veering from right to left, whereby she showed first one light, and then the other; but that the steamer was so near upon her that her master had no time to stop and deliberate, and, not distinguishing between yawing and a change of course, suddenly changed his course, which brought him into direct collision with the schooner. On behalf of the steamer it is contended that this cannot be true, but that the schooner leaving port had engaged all her men at work setting sail, and that this included, for the most part of the time, the lookout, whose duty it was to stand upon the deck of the vessel, and that the master who was at the wheel, in the rear of the vessel, and whose vision was obstructed to a great extent by the sails, was the only one who was on the lookout; that it was suddenly seen that the steamer was close to her, and was passing across her bow; that the master, for the purpose of ascertaining what the steamer's course and intention was, left the wheel, and ran to the fore of the cabin, and looked at her under the sails; that he did this not once, but twice or three times; and that, when he was doing this, the wheel was necessarily playing at random, and leaving the schooner to take her course at random; and that it was the abandonment of the wheel which caused the schooner to appear to the steamer to have changed her course to the eastward.

As I say, if I took the direct testimony of the witnesses in this case, and attempted to be guided by their testimony alone, I would come to a disagreement. My best judgment is, looking at it from all the circumstances connected with the case, that the better reasoning is with the theory propounded by counsel for the steamer. I must presume that the steamer did not purposely run down the schooner. The further presumption that she was upon her before she knew it, and mistook these changes of lights for the mere yawing of the schooner, is ingenious, and may possibly be true, but it is not what the truth naturally would be. On the contrary, the master of the schooner admits that he left his wheel several times to go forward and look under the sails at the steamer. He also admits that the crew stopped work on the sails, and grew excited, when they saw the steamer was yawing before the collision. My own impression is that the schooner was without any lookout except that of the captain, and that the captain's disadvantageous situation obliged him

to leave the wheel, and thus to indicate to the steamer that she was changing her course, which would be the fault of the schooner. A decree may therefore be entered finding the schooner at fault, dismissing the libel, and sustaining the cross libel.

THE RABBONI.

THE NELLIE E. RUMBALL.

COFFIN v. STEWART (two cases).

STEWART v. COFFIN (two cases).

(Circuit Court of Appeals, First Circuit. April 29, 1897.)

Nos. 113 and 116.

COLLISION—DEFECTIVE LIGHT.

Where sailing vessels approach each other nearly head on, and one of them has a defective green light of obsolete make, so that, in spite of careful observations, the other sees only her red light, the latter cannot be held in fault for acting upon this indication, and the collision will be attributed to the deceptive lights.

Appeal from the Circuit Court of the United States for the District of Maine.

This was a suit in admiralty by Thomas J. Stewart and others, owners of the schooner *Rabboni*, against O. P. Rumball and others, owners of the barkentine *Nellie E. Rumball*, to recover damages for a collision. A cross libel was also filed by the respondents. The district court found that the *Rumball* was alone in fault, and decreed accordingly. 53 Fed. 948. On appeal to the circuit it was held that both vessels were in fault, and a decree for divided damages was accordingly entered. Id. 952.

Edward S. Dodge, for owners of the *Nellie E. Rumball*.

Eugene P. Carver (Edward E. Blodgett with him on the brief), for owners of the *Rabboni*.

Before COLT, Circuit Judge, and NELSON and ALDRICH, District Judges.

PER CURIAM. A substantial part of the testimony presented here on the part of the *Rumball* was not before the district court when the case was decided there, and the testimony of Axel Julius Coster, mate of the *Rumball*, was not before the circuit court at the time of the original decision therein; and here, upon a full and careful consideration of all the evidence and the arguments now presented, a conclusion is reached different from that in either the district or circuit court. The conclusion is that the trouble arose from the defective green light of the schooner *Rabboni*. It is believed that the *Rabboni* was approaching the *Rumball* head on, and the

testimony shows unquestionably that the Rumball at the time was maintaining a vigilant lookout, and was carefully observing the approach of the light of the vessel which it had sighted. It is clear that the only light sighted was the red light, which was brightly burning, and plain to be seen. The red being the only light shown, the Rumball had the right to conclude that the approaching vessel (the Rabboni) was crossing her course, and, acting upon this indication, the Rumball changed her course sufficiently to avoid the schooner Rabboni had she been crossing the course of the Rumball, according to the indications of the red light. The green lantern of the Rabboni was of obsolete make, being plain-faced, not ribbed, and, quite likely, poorly trimmed. At all events, from the defects in the lantern, or from some other cause, it was not visible to the careful observations of the Rumball until too late to avoid collision. It is probable—in fact, it is quite certain—that the change in the course of the Rumball was somewhat in accordance with the theory of the Rabboni, and that such change of course brought on the collision. This proposition would seem, on its face, to bring the Rumball into fault; but we must look for the cause. It is hard to believe—indeed, it is almost incredible—that the Rumball, in the face of two lights, or of a green light, changed her course so as to necessarily bring herself into collision with the approaching vessel. An explanation of this is found, as is believed, in the fact that the Rumball misapprehended the course of the approach of the Rabboni. She properly acted upon what she saw. Her calculations and maneuvers were warrantably based upon the indications presented by the Rabboni. That she was misled, and that she miscalculated and maneuvered so as to bring herself into contact with the Rabboni, was not her fault. It was the fault of the vessel approaching with faulty and deceptive lights. The decrees of the circuit court are reversed, and the cases are remanded, with directions to dismiss the libel of the owners of the schooner Rabboni, with costs, and in the libel of the owners of the barkentine Nellie E. Rumball to enter a decree for the libelants for the damage sustained by the barkentine in the collision, with interest and costs. Costs in this court are adjudged to the owners of the Nellie E. Rumball.

AND AFFIRMED THE VERDICT OF THE JURY IN THE CASE OF THE SCHOONER RABBONI.

The court further ordered that the costs of the appeal be paid by the owners of the schooner Rabboni, and that the costs of the libel of the owners of the barkentine Nellie E. Rumball be paid by the libelants. The court also ordered that the decree of the circuit court be reversed, and that the cases be remanded, with directions to dismiss the libel of the owners of the schooner Rabboni, with costs, and in the libel of the owners of the barkentine Nellie E. Rumball to enter a decree for the libelants for the damage sustained by the barkentine in the collision, with interest and costs. Costs in this court are adjudged to the owners of the Nellie E. Rumball.

GREENE COUNTY v. KORTRECHT.

(Circuit Court of Appeals, Fifth Circuit. May 25, 1897.)

--No. 574.

UNITED STATES COURTS—JURISDICTION—AMOUNT IN CONTROVERSY.

In an action on negotiable bonds which have matured, together with the coupons, neither the interest on the bonds after maturity, nor the interest on the coupons after their maturity, constitutes a part of the matter in dispute, in determining the jurisdiction of the circuit court, where the controversy arises between citizens of different states.

In Error to the Circuit Court of the United States for the Northern District of Alabama.

A. G. Smith, James Weatherly, H. C. Tompkins, and Ed. de Grafenreid, for plaintiff in error.

E. H. Cabiness and S. D. Weakley, for defendant in error.

Before PARDEE and McCORMICK, Circuit Judges, and NEWMAN, District Judge.

McCORMICK, Circuit Judge. This is an action of debt on negotiable bonds and the coupons thereto attached. The declaration counts separately on two bonds, each for the sum of \$500, which matured January 1, 1890. It also counts separately on 17 coupons attached to each bond, each for the sum of \$20, making 34 coupons in all declared upon, of the aggregate face value of \$680. The recovery sought is for this principal debt and interest on the bonds from their maturity, and on each of the 34 coupons from the date of their respective maturity.

The circuit courts of the United States have jurisdiction concurrent with the courts of the several states, in all suits of a civil nature, at common law or in equity, in which there shall be a controversy between citizens of different states, in which the matter in dispute exceeds, exclusive of interest and costs, the sum or value of \$2,000. Coupons on negotiable bonds represent interest on the bond accruing and made payable at stated times before the maturity of the bond. Each coupon is an independent contract stipulating for the payment of the installment of interest at the time named in each, respectively, and, after its maturity, bears interest, will support an action, and is subject to the statute of limitations, as a separable contract. The interest on the bonds accruing after maturity, and the interest on each coupon accruing after its maturity, has an accessory relation to the principal of the bond and of each coupon, respectively, and by the terms of the statute is excluded from the calculation of the amount declared on, in determining the jurisdiction of the circuit court. *Edwards v. Bates Co.*, 163 U. S. 269, 16 Sup. Ct. 967; *Brown v. Webster*, 156 U. S. 328, 15 Sup. Ct. 377; *Nesbit v. Riverside Independent Dist.*, 144 U. S. 610, 12 Sup. Ct. 746; *Amy v. Dubuque*, 98 U. S. 470; *Aurora v. West*, 7 Wall. 82. From the foregoing statement of the case, and the rule as deduced from the authorities cited, it is plain that the circuit court did not have juris-

diction of this case. The judgment of the circuit court is therefore reversed, and the cause is remanded with directions to dismiss the plaintiff's action without prejudice.

LANSING & CO. v. HESING.

(Circuit Court of Appeals, Seventh Circuit. May 28, 1897.)

No. 370.

APPEAL—DISMISSAL—INJUNCTION AGAINST PUBLIC OFFICER.

An appeal from an order denying an injunction against a postmaster will be dismissed without costs to either party, where, pending the appeal, the appellee has been succeeded in office by another.

Appeal from the Circuit Court of the United States for the Northern Division of the Northern District of Illinois.

This was a bill in equity by Lansing & Co., an Illinois corporation, dealing in grain, provisions, and other commodities, against Washington Hesing, who at the time the suit was instituted was postmaster of the city of Chicago, to enjoin him from withholding mail addressed to complainant, and from returning such mail matter to the senders thereof with the word "Fraudulent" marked on the outside thereof. The defendant, in his answer, justified his acts under an order known as a "fraud order," made by the postmaster general of the United States. Complainant having moved for an injunction pendente lite, the same was denied by the court, and it thereupon took this appeal. Pending the appeal the defendant resigned his office, and a successor was appointed.

Henry Stephen, for appellant.

John C. Black, for appellee.

Before WOODS, JENKINS, and SHOWALTER, Circuit Judges.

PER CURIAM. This appeal is from an order denying an injunction against the appellee as postmaster at Chicago. After the appeal was taken, the appellee resigned the office, and his successor has been appointed. On the authority of *U. S. v. Boutwell*, 17 Wall. 604, *Secretary v. McGarrahan*, 9 Wall. 298, and *U. S. v. Lochren*, 164 U. S. 701, 17 Sup. Ct. 1001, the appeal is dismissed, without costs to either party.

SMITH v. WESTERN UNION TEL. CO.

(Circuit Court, D. Indiana. May 8, 1897.)

No. 9,286.

COSTS—ATTORNEY'S DOCKET FEE.

An attorney's docket fee will not be allowed upon an order to remand to a state court, either under Rev. St. § 824, authorizing such an allowance where there has been a "final hearing" in equity, nor under the act of March 3, 1875, permitting the court, in remanding a case, to "make such order as to costs as shall be just."

Motion to Retax Costs.

Linton A. Cox, for plaintiff.

Chambers, Pickens & Morris, for defendant.

BAKER, District Judge. Some time since, the motion of the plaintiff to remand the above-entitled cause to the state court was sustained, and now the attorneys for the plaintiff move the court to retax the costs in this cause by adding to the sum already taxed the item of \$20 as a docket fee for the plaintiff's attorneys. They cite in support of their motion the case of *Josslyn v. Phillips*, 27 Fed. 481. The practice in this district, and, so far as the court is advised, in the entire Seventh circuit, has been uniformly to allow no docket fee where a motion to remand has been sustained. By section 824 of the Revised Statutes a docket fee of \$20 is allowed when there has been a trial by a jury in a case at law, and when, in equity or admiralty, there has been a final hearing. I understand that the term "final hearing" means a trial or hearing of the cause upon its merits. An order to remand certainly would not come within any reasonable construction or interpretation of the words of section 824, and it seems to me that the construction given by Judge Brown to the words referred to by him in the act of March 3, 1875, is a broader one than the words contemplate. It is certain that the act of 1875 does not, in express terms, authorize the allowance of a docket fee; and, if one were allowed under the provisions of that act, it would have to be granted, in the nature of a discretionary allowance. In my judgment, the practice of the court so long continued ought not to be changed; and in this view Judge WOODS, of the circuit court, concurs.

UNITED STATES v. NORTH BLOOMFIELD GRAVEL-MIN. CO.

(Circuit Court, N. D. California. June 8, 1897.)

1. CONSTITUTIONAL LAW—POWER OF CONGRESS OVER NAVIGABLE WATERS—OBSTRUCTIONS TO NAVIGATION.

Congress has absolute power, in the interests of interstate and foreign commerce, over the navigable waters of the United States, and may declare what may or may not constitute obstructions thereto.

2. OBSTRUCTIONS TO NAVIGABLE WATERS—REGULATION OF HYDRAULIC MINING.

The act of March 1, 1893 (27 Stat. 507), creating the California debris commission, and prohibiting and declaring unlawful hydraulic mining "directly or indirectly injuring the navigability" of the Sacramento and San Joaquin river systems, and requiring persons or corporations desiring to carry on hydraulic mining in the territory drained by those river systems to file a petition, setting forth the facts, to obtain permission from the debris commission to carry on such mining, etc., is to be construed as entirely prohibiting any hydraulic mining in said territory until such application has been made and permission given. And the fact that prior to the passage of said act the United States had filed a bill to restrain a certain corporation from carrying on hydraulic mining so as to interfere with the navigability of such rivers, and that a decree had been entered adjudging that impounding works erected by the company pending the suit were sufficient to remove all injurious matter, and that the company could not thereafter be restrained under the then existing law, is no defense to a suit by the United States to enforce compliance with the act of 1893.

H. S. Foote, U. S. Atty., and Samuel Knight, Asst. U. S. Atty.
C. W. Cross and Chas. A. Garter, for respondent.
Robert T. Devlin, *amicus curiæ*.

ROSS, Circuit Judge. This case was submitted upon bill and answer. It involves the construction of the act of congress entitled "An act to create the California debris commission and regulate hydraulic mining in the state of California," approved March 1, 1893. 27 Stat. 507. The bill alleges the appointment and qualification of the commissioners provided for by that act, and the entry upon its duties by the commission. It alleges that the defendant company is, and was at the times mentioned in the bill, the owner and in possession of certain mining ground situated on or near the Yuba river and its tributaries, within the territory drained by the Sacramento and San Joaquin rivers, and is, and was during the times mentioned, engaged in working its mining ground by the hydraulic process; that the waters of the Sacramento river flow into Suisun Bay, and thence through the Straits of Carquinez into San Pablo Bay, and thence through the Golden Gate into the Pacific Ocean; that Feather river flows into the Sacramento, and that Yuba river flows into the Feather; that all of these rivers were, at the time of the cession of the territory of Upper California to the United States by the republic of Mexico, to wit, February 2, 1848, and ever since have been and now are, public navigable rivers, and free highways for the uses and purposes of commerce and navigation, and during all of the time mentioned were, and still are, navigable, and navigated by steamboats and other vessels, drawing from 8 to 16 feet of water, and engaged in commerce and navigation within the state of California; that the Sacramento river during all of the time mentioned was, and still is, so navigable and navigated by steamboats and other vessels from its mouth to the mouth of Middle creek, in Shasta county, above the point of confluence of the Sacramento and Feather rivers; that the Feather river during the same time was, and still is, so navigable from its mouth to the mouth of the Yuba river, and that the Yuba river during the same time was, and still is, navigable from its mouth to a point about one mile above its mouth; that all of the rivers mentioned have their principal sources in the western slope of the Sierra Nevada Mountains, which lie to the east and northeast of the Sacramento valley, through which the Sacramento river flows, and in a small part in the eastern slope of the Coast Range Mountains, which lie to the west of the Sacramento Valley; that all of the waters of the western slope of the Sierra Nevada Mountains which lies opposite the Sacramento valley are tributary to the rivers mentioned, and that they have their sources in lakes, springs, small streams, and canyons, which receive their waters from the rain and snow which fall each year to a great depth upon the mountains; that the defendant company, in working its mining ground, so dumps and discharges the debris therefrom as that the same, or a portion thereof, is ultimately carried and flows into the Yuba river and its forks, and, with the debris from other mining works operated by the same process, is thence so carried and flows

into the Feather, Sacramento, and other streams forming a part of and tributary to the Sacramento river system, and thence into the other waters, bays, and straits already mentioned; that hydraulic mining as now, and for more than 20 years last past, practiced and understood in the state of California, is a process of gold mining by which hills, ridges, banks, and other forms of deposits of earth which contain gold are mined and removed from their position by means of large streams of water, which, by great pressure, are forced through pipes terminating in nozzles known as "monitors" or "little giants"; that the water is discharged from such nozzles with great force, by a water pressure of from 50 to 400 feet per second, against and upon the hills, ridges, banks, and other deposits, which are usually shattered or broken up by means of blasts of powder, and softened by running water over and along such shattered or broken banks of earth, and undermined by streams of water flowing at the foot of such banks, thus caving down and washing off portions thereof before water is discharged from the nozzles against them; that the clay, sand, gravel, stones, rocks, and boulders of which such gold mines are composed, known as "mining débris," together with the gold contained therein, are carried and moved by the streams of water into and through flumes, sluices, and other conduits at or adjacent to the respective mining claims,—the gold being arrested therein, and the débris being carried by the water through the flumes, sluices, and conduits, and dumped or discharged into impounding basins or reservoirs, and that a part of such débris is thence carried and flows into the adjacent streams or canyons; that the larger and heavier portions of the débris are deposited in such impounding basins or reservoirs, and the smaller and lighter portions, being not less than 50 per cent. thereof, are carried down the streams, and lodged in the rivers and other channels and upon the lands adjacent thereto; that a portion of such mining débris, ever since the commencement of hydraulic mining within the state, has, during a large part of each year, been deposited and lodged, and is still being deposited and lodged, in the beds and channels of the rivers mentioned, and will continue to be so deposited and lodged while such hydraulic mining continues. The bill next alleges that the defendant company has failed and neglected and refused to file with the California débris commission a verified or any petition setting forth such facts as will comply with the act of congress upon the subject, and with the rules prescribed by the commission, and has not, nor has any one on its behalf, executed and acknowledged the conveyance mentioned in that act, and, notwithstanding such neglect and failure, that the defendant company has continued to mine, and is now engaged in mining, its mining ground by the hydraulic process. The prayer of the bill is for a writ of injunction perpetually enjoining the defendant, its agents, grantees, lessees, and employés, from operating or allowing to be operated by the hydraulic process its mining ground, until it shall make, present, and file with the débris commission the petition set forth in the aforesaid act of congress, accompanied by the conveyance therein mentioned, and otherwise conform to the

rules and regulations prescribed by the commission by virtue of that statute.

The answer of the defendant company admits the appointment of the commissioners, and their qualification and organization as alleged, and its failure to file with the commission the petition and conveyance mentioned in the act, and the fact of its mining its ground by the hydraulic process notwithstanding. It alleges that its mines and works are all situated adjacent to Humbug creek, a small tributary of one of the main branches of the Yuba river, and within the territory drained by the Sacramento river system. It admits the fact of the navigability of the Sacramento, Feather, and Yuba rivers, but denies the extent of the navigability alleged in the bill. It admits the sources of the rivers as alleged. It denies that it so dumps and discharges the débris from its mines and works, or any thereof, in such manner that the same, or any material portion of it, is ultimately carried or flows into the Yuba, Feather, or Sacramento rivers, or other streams forming a part of or tributary thereto, or upon the lands adjacent thereto; but avers that only a trifling quantity of the débris from the defendant's mining ground escapes from or passes beyond the impounding works and reservoirs of the defendant company, and that the same consists solely of light, flocculent matter of about the same specific gravity as water, and so finely comminuted as to readily float in and be moved by the slightest movement of the water in which it is suspended, and that all of the matter so escaping from or passing beyond the defendant's impounding works is carried in suspension in the streams of water until it reaches the Suisun Bay, and that from the head of Suisun Bay, by the tidal currents and movements of the water of that bay, of the Carquinez Straits, San Pablo Bay, and the Bay of San Francisco, and the tidal currents passing in and out of the Golden Gate, it is all carried and swept into the ocean at distances remote from the land or navigable streams of the state of California, and does not deposit in any place where it either injures, or threatens to injure, any navigable waters within the jurisdiction of the United States. The answer further denies that any portion of the débris from the defendant's mines or mining works, at any time since the passage of the act of congress in question, has been deposited or lodged in the beds or channels of either of the rivers named, and denies that any of such débris will be so deposited or lodged while it continues the mining of its ground by the hydraulic process. The answer further avers that about the years 1887 and 1888 the defendant erected upon its mining ground, which had been conveyed to it for placer mining purposes by the government of the United States, extensive, complete, and expensive impounding works, which have ever since been so maintained as to successfully, completely, and permanently impound all of the mining débris resulting from its mining operations, upon its mining ground, except such light and inconsiderable portion of the débris therefrom as will not settle in water when affected by the least motion, nor when such water is at rest, unless the same be maintained in a condition of rest for a long period of

time, and that such light and flocculent matter, when it passes from the defendant's impounding works, flows into Humbug creek, which creek flows with a rapid current into the South Yuba river, and that the South Yuba river flows with a rapid current into the Main Yuba river, and that the Main Yuba river flows with a rapid current into the Feather river, and that the Feather river flows with a rapid current into the Sacramento river; that the Sacramento river, with a moderate current, flows into Suisun Bay, and that from the head of Suisun Bay to the waters remote from the Golden Gate the waters are constantly agitated and rapidly moved by tidal currents, and that the light and flocculent matter which so escapes from the defendant's impounding works is carried by the currents of the streams mentioned, and by the tidal currents in the other navigable waters named, out of the Golden Gate, and to localities remote from the shores of the Pacific Ocean, and that no part thereof does injure or threatens to injure, either by itself, or in connection with débris from other mines, any of the navigable waters mentioned in the bill, or any other waters. The answer further alleges that on the 25th day of June, 1888, the United States filed in this court its bill in equity against this defendant, containing all of the averments of the present bill, except the allegations with regard to the act of congress of March 1, 1893 (which was not then in existence), and the appointment of the members of the commission thereby created; and the allegations with respect to the failure of the defendant to file with the commission the petition and conveyance required by that act; that thereafter, and on July 1, 1889, the defendant filed its answer to that bill of complaint, alleging the construction and maintenance of the aforesaid impounding works, and that thereby the débris from its mining ground was sufficiently and permanently impounded and restrained, as is alleged in the present answer, and that thereby the navigable waters mentioned were prevented from being injured or threatened with injury from the débris from the defendant's mines; that thereafter a trial was duly had upon the issues framed in the cause, upon which trial it was duly adjudged that the defendant's mining by the hydraulic process did not injure or threaten to injure the navigable streams, or any of the navigable waters, of the state of California, or any of the lands adjacent thereto, and that the defendant could continue its hydraulic mining operations by the use of its said impounding works without injuring or threatening to injure any of the navigable waters of the state of California, and without injuring or threatening to injure the navigability of any of the navigable streams of the state, and that ever since that time the defendant has maintained its said impounding works, and its hydraulic mining operations have ever since been conducted in the same manner (and in no other manner) that it was in that action adjudicated they might be without injury to any waters or lands; that the mining ground and works described in the bill in the present suit and in the bill in the former suit are the same.

As the case is submitted on bill and answer, such of the averments of the latter as are inconsistent with the allegations of the bill,

as well as the affirmative matter set up in defense of the suit, must be taken as true. It is thus made to appear that none of the débris from the mining ground or works of the defendant company is lodged or deposited in any of the navigable waters mentioned in the bill, or upon any land adjacent thereto; but, on the contrary, that such light, flocculent matter as escapes from the mines and impounding works of the defendant company is carried in suspension by the moving streams and waters into the Pacific Ocean beyond the jurisdiction of the United States. If, however, congress has, in the exercise of its power to declare what may or may not constitute obstructions thereto, by its act, prohibited the putting into the said navigable waters any such light, flocculent matter, there can be no doubt, I think, of the power of a court of equity to prevent, by writ of injunction, the unlawful act. In *re Debs*, 158 U. S. 565, 599, 600, 15 Sup. Ct. 900. The absolute power and control of congress over the navigable waters of the United States in the interest of commerce with foreign nations and among the several states, and its right to declare what may or may not constitute obstructions thereto, is thoroughly settled. *Miller v. Mayor, etc.*, 109 U. S. 385, 3 Sup. Ct. 228; *Cardwell v. Bridge Co.*, 113 U. S. 205, 5 Sup. Ct. 423; *Escanaba & L. M. Transp. Co. v. City of Chicago*, 107 U. S. 678, 2 Sup. Ct. 185; *South Carolina v. Georgia*, 93 U. S. 4; *Gilman v. Philadelphia*, 3 Wall. 713. Subject to this power on the part of congress, all of the navigable waters within the state of California are common highways. The state was admitted into the Union upon the condition, among other conditions, "that all of the navigable waters within the said state shall be common highways and forever free, as well to the inhabitants of said state as to the citizens of the United States, without any tax, duty, or impost therefor." 9 Stat. 452, 453. The important question in the case is, what has congress enacted in respect to the navigable waters mentioned in the bill, in connection with mining by the hydraulic process? There is but one act upon the subject, and that is the one the construction of which is here involved. To properly construe it, the conditions giving rise to its enactment must be considered. Long-continued mining by this process, in the territory drained by the rivers mentioned, had resulted in depositing in them and upon much of the adjacent land vast quantities of débris, thereby, to a great extent, impeding the navigation of the waters, and rendering valueless large quantities of otherwise fertile lands. This unfortunate condition of affairs necessarily gave rise to many and bitter contests in the courts between the conflicting interests. Some of the suits were brought in this court, and many of them in the courts of the state, resulting, ultimately, wherever it was shown that such hydraulic mining was causing injury to the public streams or waters, or to other's lands, in perpetually enjoining such mining. One of such suits was brought against the present defendant in this court to enjoin it from working by the hydraulic process the same mining ground it is now operating. That suit resulted in a decree enjoining the defendant from so working its mining ground; but the decree contained a provision to the effect that if, in the future, the defendant corporation should show to the court that it had constructed impounding reservoirs

which would successfully impound its mining débris, the decree might be modified so as to permit the operation of the mine. That case was tried and decided by Judge Sawyer, and is reported in 18 Fed. 753, under the title of *Woodruff v. Mining Co.* Some time after the making of the decree the defendant established a system of impounding works, and commenced again its mining operations. That action on the part of the defendant resulted in a suit brought in this court by the United States against the defendant to obtain an injunction prohibiting it from continuing its hydraulic mining operations. After a trial of that case, in which much testimony was introduced (53 Fed. 625), this court (Judge Gilbert presiding) found that by the construction and use of its impounding works the defendant prevented the escape of any débris from its mine into the navigable waters of the rivers mentioned that would tend to impair or injure their navigability, and therefore denied the injunction prayed for. In neither of these decisions was mining by the hydraulic process regarded, in and of itself, as unlawful. That it is not unlawful, but highly useful and commendable, when properly conducted, and without injury to the property or rights of others, hardly needs judicial decision. In *Yuba Co. v. Cloke*, 79 Cal. 239, 243, 21 Pac. 740, 741, the supreme court of California said:

"It seems to us it must be conceded that the business of hydraulic mining is not within itself unlawful or necessarily injurious to others. The unlawful nature of the business results from the manner in which it is carried on, and the neglect of parties engaged therein to properly care for the débris resulting therefrom, whereby it is allowed to follow the stream, and eventually cause injury to property situated below."

Nobody wanted gold mining by the hydraulic process stopped so long as it could be prosecuted without injury to the navigable waters, or to the property or rights of others. And so an effort was made by the parties most directly interested—the miners and agriculturists—to induce congress to legislate upon the subject, which effort resulted in the passage of the act of March 1, 1893. As enacted, after creating the California débris commission, and providing for the appointment of its members, and for the filling of vacancies occurring therein, and for the exercise of the powers conferred upon it, under the direction of the secretary of war and the supervision of the chief of engineers, and authorizing the commission to adopt rules and regulations not inconsistent with law, to govern its deliberations and procedure, the act declared the jurisdiction of the commission, in so far as the same affects mining carried on by the hydraulic process, to extend to all such mining in the territory drained by the Sacramento and San Joaquin river systems in the state of California. It declared, for the purposes of the act, "hydraulic mining" and "mining by the hydraulic process" to have the meaning and application given to those terms in the state of California. That meaning is sufficiently set out in the bill in the present case. The act prohibited and declared unlawful such hydraulic mining "directly or indirectly injuring the navigability of said river systems, carried on in said territory, other than as permitted under" its provisions. Sections 3, 22. But this was by no means the extent of the act or of its prohibition. Its very

purpose was to provide a means by which such mining could be carried on in the territory named without injuring the navigability of the said river systems, directly or indirectly. Recognizing the great damage that had been done to the navigable waters mentioned by hydraulic mining in the past, it created a commission of skilled officers to exercise the powers conferred upon it under the direction of the secretary of war and the supervision of the chief of engineers of the army, and by section 4 of the act made it the duty of the commission to mature and adopt, from examinations and surveys already made, and from such additional examinations and surveys as the commission should deem necessary, such plan or plans—

"As will improve the navigability of all the rivers comprising said systems, deepen their channels, and protect their banks. Such plan or plans shall be matured with a view of making the same effective as against the encroachment of and damage from débris resulting from mining operations, natural erosion, or other causes, with a view of restoring, as near as practicable and the necessities of commerce and navigation demand, the navigability of said rivers to the condition existing in eighteen hundred and sixty, and permitting mining by the hydraulic process, as the term is understood in said state, to be carried on, provided the same can be accomplished without injury to the navigability of said rivers or the lands adjacent thereto."

By section 5 of the act it is made the duty of the commission to—

"Further examine, survey, and determine the utility and practicability, for the purposes hereinafter indicated, of storage sites in the tributaries of said rivers and in the respective branches of said tributaries, or in the plains, basins, sloughs, and tule and swamp lands adjacent to or along the course of said rivers, for the storage of débris or water or as settling reservoirs, with the object of using the same by either or all of these methods to aid in the improvement and protection of said navigable rivers by preventing deposits therein of débris resulting from mining operations, natural erosion, or other causes, or for affording relief thereto in flood times, and providing sufficient water to maintain scouring force therein in the summer season; and in connection therewith to investigate such hydraulic and other mines as are now or may have been worked by methods intended to restrain the débris and material moved in operating such mines by impounding dams, settling reservoirs, or otherwise, and in general to make such study of and researches in the hydraulic mining industry as science, experience, and engineering skill may suggest as practicable and useful in devising a method or methods whereby such mining may be carried on as aforesaid."

Sections 9 and 10 of the act are as follows:

"Sec. 9. That the individual proprietor or proprietors, or, in case of a corporation, its manager or agent appointed for that purpose, owning mining ground in the territory in the state of California mentioned in section three hereof, which it is desired to work by the hydraulic process, must file with said commission a verified petition setting forth such facts as will comply with law and the rules prescribed by said commission.

"Sec. 10. That said petition shall be accompanied by an instrument duly executed and acknowledged as required by the law of the said state, whereby the owner or owners of such mine or mines surrender to the United States the right and privilege to regulate by law, as provided in this act, or any law that may hereafter be enacted, or by such rules and regulations as may be prescribed by virtue thereof, the manner and method in which the débris resulting from the working of said mine or mines shall be restrained and what amount shall be produced therefrom; it being understood that the surrender aforesaid shall not be construed as in any way affecting the right of such owner or owners to operate said mine or mines by any other process or method now in use in said state: provided, that they shall not interfere with the navigability of the aforesaid rivers."

Subsequent sections provide for a joint petition by the owners of several mining claims so situated as to require a common dumping ground or restraining works, and for proceedings of the commission thereon, including the provision contained in section 14, that upon the completion of such work as may be authorized and required by order of the commission—

"If found in every respect to meet the requirements of the said order and said approved plans and specifications, permission shall thereupon be granted to the owner or owners of such mine or mines to commence mining operations, subject to the conditions of said order and the provisions of this act."

Section 15 is as follows:

"Sec. 15. That no permission granted to a mine owner or owners under this act shall take effect, so far as regards the working of a mine, until all impounding dams or other restraining works, if any are prescribed by the order granting such permission have been completed, and until the impounding dams, or other restraining works, or settling reservoirs provided by said commission have reached such a stage as, in the opinion of said commission, it is safe to use the same: provided, however, that if said commission shall be of the opinion that the restraining and other works already constructed at the mine or mines shall be sufficient to protect the navigable rivers of said systems and the work of said commission, then the owner or owners of such mine or mines may be permitted to commence operations."

And by section 17 it is declared:

"That at no time shall any more débris be permitted to be washed away from any hydraulic mine or mines situated on the tributaries of said rivers and the respective branches of each, worked under the provisions of this act, than can be impounded within the restraining works erected."

From these provisions (and there is nothing in the act to the contrary) it seems quite clear to me that its real intent and meaning is to prohibit and make unlawful any and all hydraulic mining in the territory drained by the Sacramento and San Joaquin river systems in the state of California directly or indirectly injuring the navigability of said river systems, and to permit it in all cases where the work can be prosecuted without such injury to the navigability of the said river systems, or to the lands adjacent thereto; that, in order to properly determine the facts upon which the legislative will is to act, a skilled commission is created, whose duty it is to ascertain and determine what will or will not cause the prohibited injury, and to prescribe the character of impounding works, and the extent to which hydraulic mining in the territory described may be carried on without causing such injury. To give effect to this manifest purpose, congress, in effect, enacted that until the commission should find that such mining can be carried on without causing the prohibited injury, all hydraulic mining within the territory drained by the Sacramento and San Joaquin river systems is unlawful; for by section 9 it is in terms declared that any person or corporation owning mining ground in that territory, "which it is desired to work by the hydraulic process, must file with said commission a verified petition setting forth such facts as will comply with law and the rules prescribed by said commission," accompanied by the instrument described in the next section; that is to say: "An instrument duly executed and acknowledged as required by the law of the said state, whereby the owner or owners of such mine or mines surrender

to the United States the right and privilege to regulate by law, as provided in this act, or any law that may hereafter be enacted, or by such rules and regulations as may be prescribed by virtue thereof, the manner and method in which the débris resulting from the working of said mine or mines shall be restrained and what amount shall be produced therefrom; it being understood that the surrender aforesaid shall not be construed as in any way affecting the right of such owner or owners to operate said mine or mines by any other process or method now in use in said state: provided, that they shall not interfere with the navigability of the aforesaid rivers." The plain meaning of the provision that any person or corporation owning mining ground within the territory drained by the rivers mentioned, which it is desired to work by the hydraulic process, must file a certain described petition, is that, unless such petition be filed, such ground shall not be worked. Confirmation of this is found in the express declaration contained in section 17, "that at no time shall any more débris be permitted to be washed away from any hydraulic mine or mines situated on the tributaries of said rivers and the respective branches of each, worked under the provisions of this act, than can be impounded within the restraining works erected," and in other clauses of the act already cited.

As has been already observed, the right of congress to say what may or may not constitute an obstruction of the navigable waters between the states or connecting with the ocean is well settled. Light, flocculent matter escaping from one or more mines worked by the hydraulic process and carried into such waters may not tend to injure their navigability, but such matter, in connection with similar matter from a great many other mines, may do so. It was the right of congress to put a stop to the working of all mines that contribute in any degree to such injury, and to prescribe the conditions upon which such work so contributing might be prosecuted. In some of the contests that were brought before the courts prior to the passage of the act in question it was held that any and all persons and corporations contributing to the injury should be enjoined. *Woodruff v. Mining Co.*, supra; *People v. Gold Run Ditch & Min. Co.*, 66 Cal. 138, 4 Pac. 1152, and cases there cited. In the case of *Miller v. Mayor, etc.*, 109 U. S. 385, 3 Sup. Ct. 228, congress had passed an act (15 Stat. 336) authorizing the construction of a bridge over East river between the cities of New York and Brooklyn, and declaring that when completed it should be—

"A lawful structure and post road for the conveyance of the mails of the United States. Provided, that the said bridge shall be so constructed and built as not to obstruct, impair, or injuriously modify the navigation of the river; and in order to secure a compliance with these conditions the company, previous to commencing the construction of the bridge, shall submit to the secretary of war a plan of the bridge, with a detailed map of the river at the proposed site of the bridge, and for the distance of a mile above and below the site, exhibiting the depths and currents at all points of the same, together with all other information touching said bridge and river as may be deemed requisite by the secretary of war to determine whether the said bridge, when built, will conform to the prescribed conditions of the act, not to obstruct, impair, or injuriously modify the navigation of the river."

The second section of the act was as follows:

"That the secretary of war is hereby authorized and directed, upon receiving said plan and map and other information, and upon being satisfied that a bridge built on such plan, and at said locality, will conform to the prescribed conditions of this act, not to obstruct, impair, or injuriously modify the navigation of said river, to notify the said company that he approves the same, and upon receiving such notification the said company may proceed to the erection of said bridge, conforming strictly to the approved plan and location. But until the secretary of war approve the plan and location of said bridge, and notify said company of the same in writing, the bridge shall not be built or commenced; and should any change be made in the plan of the bridge during the progress of the work thereon, such change shall be subject likewise to the approval of the secretary of war."

It was contended by the plaintiff in the case, who sought to restrain the building of the bridge, that congress could not leave it to the secretary of war to determine whether the proposed construction would be an obstruction to the navigation of the river; but the court answered:

"By submitting the matter to the secretary, congress did not abdicate any of its authority to determine what should or should not be deemed an obstruction to the navigation of the river. It simply declared that, upon a certain fact being established, the bridge should be deemed a lawful structure, and employed the secretary of war as an agent to ascertain that fact. Having power to regulate commerce with foreign nations and among the several states, and navigation being a branch of that commerce, it has the control of all navigable waters between the states, or connecting with the ocean, so as to preserve and protect their free navigation. Its power, therefore, to determine what shall not be deemed, so far as that commerce is concerned, an obstruction, is necessarily paramount and conclusive. It may, in direct terms, declare absolutely or on conditions that a bridge of a particular height shall not be deemed such an obstruction, and, in the latter case, make its declaration take effect when those conditions are complied with. The act in question, in requiring the approval of the secretary before the construction of the bridge was permitted, was not essentially different from a great mass of legislation directing certain measures to be taken upon the happening of particular contingencies or the ascertainment of particular information. The execution of a vast number of measures authorized by congress, and carried out under the direction of the heads of departments, would be defeated if such were not the case. The efficiency of an act as a declaration of legislative will must, of course, come from congress, but the ascertainment of the contingency upon which the act shall take effect may be left to such agencies as it may designate. *South Carolina v. Georgia*, 93 U. S. 13."

So here congress has created a commission, under the direction of the secretary of war and the supervision of the chief of engineers of the army, to ascertain and determine whether the various hydraulic mines within the territory drained by the Sacramento and San Joaquin river systems can be operated by means of impounding reservoirs and other works without injury to those navigable waters; and, if so, the act of congress permits them to be operated in such a prescribed way as will prevent any such injury. Until the matters of fact committed to the commission have been ascertained, and the extent and methods of the work so prescribed, the act of congress prohibits the operation of any mine by the hydraulic process within the territory drained by the Sacramento and San Joaquin river systems from which any debris matter flows into those waters. This, in my opinion, is the true construction of the act, and to it, as thus construed, I see no constitutional objection. It is too late now for

any one to question the power on the part of congress to declare that débris of any character, or other thing, constitutes an obstruction to the navigable waters within its control, and to prohibit the use of such waters by any such débris or other thing. The power to absolutely prevent the use of such waters for the objectionable purposes necessarily includes the power to prescribe the terms and conditions upon which they may be so used. The provision of section 10 of the act, requiring the surrender to the United States of the right to regulate the manner in which the débris resulting from the working of such mine or mines shall be restrained, and what amount shall be produced therefrom, only constitutes one of the conditions to such use required by congress. As congress already had that power of regulation, it needed no conveyance from the mine owner to vest it. For this reason the insertion of that requirement by congress as a condition to the granting of a permit to mine by the hydraulic process does not render the act obnoxious to any of the objections urged against it.

A decree will be entered for the complainant as prayed for.

MERCANTILE TRUST CO. v. FARMERS' LOAN & TRUST CO. et al.¹

(Circuit Court of Appeals, Eighth Circuit. May 24, 1897.)

No. 800.

1. RAILROAD RECEIVERS—ADOPTION OF LEASES.

Receivers of a mortgaged railroad have the option to assume or to renounce within a reasonable time the leases of branch railroads which they find in the possession of the mortgagor, and are directed to operate.

2. SAME—LIABILITY FOR DEFICITS.

The expenses and deficits incurred by the receivers of an insolvent corporation, in lawfully operating another railroad which has been operated by the insolvent corporation under a lease which it was the duty of the receivers to renounce, are chargeable to the leased railroad, and not to the railroad of the lessee, where the receivers have not assumed the lease.

3. SAME—EXPENSES—PREFERENTIAL CLAIMS.

The moneys expended and the liabilities incurred by the receivers or trustees in the management of property intrusted to them constitute preferential claims upon the trust estate, which must be paid out of its proceeds before they can be distributed to the beneficiaries.

4. SAME—DISCRETION OF COURT—APPEAL.

When the question of the renunciation or adoption by the receiver of a railroad of the leases of branch lines has been submitted to the court which appointed the receiver, and, after full investigation by a master and the submission to him of conflicting evidence bearing upon the question, has been decided by such court, its decision, being upon a question of business policy and not of law, and administrative rather than judicial in its nature, should not be disturbed by an appellate court, unless it appears that the discretion of the lower court was abused.

Appeal from the Circuit Court of the United States for the Eastern District of Missouri.

Edward C. Henderson, for appellant.

John W. Noble and George Zabriskie (George H. Shields was with them on the brief), for appellees.

Before SANBORN and THAYER, District Judges.

¹ Rehearing pending.

SANBORN, Circuit Judge. This is an appeal from an order denying the petition of the receivers of the St. Louis & San Francisco Railway Company for leave to renounce the leases of four railroads, which had been taken by that company before the receivership, and directing them to pay the rent reserved by these leases during the receivership from the income or the proceeds of the property of the lessee company before applying any of them to the payment of the bonds secured by its consolidated mortgage. 71 Fed. 601. It was upon the consolidated mortgage that the foreclosure proceedings in which these receivers were appointed was based. That mortgage was subsequent in date to the four leases, and these leases secured bonds which were issued under first mortgages upon their respective lines, which were made simultaneously with the leases. The history of these transactions was this:

In 1886 and 1887 the corporations which owned these leased railroads demised them to the San Francisco Company for long terms of years, and at the same time delivered to that company a large majority of their stock, so as to give it complete control of their corporations and their property. Each of these lessors, at the time it made its lease, made a mortgage upon its railroad to secure bonds which it issued, and by the terms of the lease appropriated to the bondholders a sufficient amount of the rent reserved to pay the interest on the bonds as it matured. The San Francisco Company covenanted, in each of these leases, to pay the taxes on the leased premises, to operate the leased railroad, and to pay certain rents, which it agreed should in no event be less than the interest on the first mortgage bonds of the lessor. The names of these leased lines, their length, and the amount of their outstanding first mortgage bonds, which were secured by these simultaneous leases, were as follows: Salem Branch, 54 miles, \$810,000; Beaumont Branch, 61.86 miles, \$744,000; Anthony Branch, 59.35 miles, \$732,000; Midland Railroad, 107.20 miles, \$1,608,000. The annual interest upon these bonds, and hence the minimum annual rental which the San Francisco Company agreed to pay for the use of these railroads, was \$193,380, in addition to the taxes upon and the expenses of operating them. That company took possession of these railroads under these leases, and operated them until they were taken from it by the receivers in this case under the order of the court below, procured by the Mercantile Trust Company, the trustee named in the consolidated mortgage, and the appellant in this case. The consolidated mortgage was made by the San Francisco Company on June 11, 1891, to the Mercantile Trust Company, to secure an issue of \$50,000,000 of bonds, \$14,357,500 of which have been issued and are outstanding. It described and conveyed to the trust company, for this purpose, 989.23 miles of railroad owned by the San Francisco Company, all its leasehold estate in the four leased railroads, a large majority of the capital stock of the four lessor companies, and all the equipment and other property which pertained to what was known as the "Frisco System" of railroads. It provided that the trustee should certify and deliver the aggregate amount of \$36,074,500 of the bonds secured by it in exchange for the underlying

bonds of some of the railroads of its system, among which were those secured by the first mortgage bonds of these four leased lines. In this mortgage the San Francisco Company agreed to pay the taxes upon, to maintain, repair, and renew the equipment upon, and to operate, the four leased lines. The mortgage provided that, in case of a default by the mortgagor in the performance of any of its covenants, which should continue for six months, the trustee, upon the request of the holders of the greater amount of the outstanding bonds secured by it, but not otherwise, should "then have or be entitled to possession of all the railroads [that is, all the railroads covered by this mortgage, including both those owned and those leased by the San Francisco Company], and conduct the business of the railway company, and exercise the franchises pertaining thereto, and receive all the tolls, rents, income, and profits from said railroad and other property, and the interest upon all bonds and the dividends upon all shares of capital stock then held by the trustee under the provisions of this mortgage, and from such receipts shall pay all expenses of taking possession of said railroads and other property, and operating said railroads, and conducting said business, and the expenses of such repairs, replacements, alterations, additions, and improvements to the mortgaged property as the trustee shall deem needful, and all taxes due upon any of the mortgaged property, and all amounts due for interest or principal of any of the bonds or other obligations of the railway company secured by any mortgages or pledges prior in lien to this mortgage, and, after deducting such expenses and payments, and retaining a reasonable compensation for the services of the trustee in connection with the making of said entry, and taking possession of said railroads and other property, and operating the same, and conducting the said business, shall apply the net income to the payment of any interest previously due, or becoming due, during such possession, on bonds secured by this mortgage, in the order in which such interest shall have become due, ratably, to the persons entitled to such interest, and to apply any remainder of said income to the payment of the principal of said bonds, if then due, with all interest accrued and unpaid thereon, ratably, to the owners of said principal and interest, without discrimination or preference." It provided that, if default should continue for six months after the trustee had made written demand of payment or performance, it should, upon the request of the holders of the greater amount of the outstanding bonds secured by the mortgage, but not otherwise, "cause all of the railroads and other property then secured by this mortgage, including all shares of capital stock and bonds held in trust under the provisions hereof, to be sold as one property at public auction, at the city of St. Louis, in the state of Missouri," and that said sale should be made subject to all prior mortgages, liens, and pledges set forth in the consolidated mortgage.

On December 21, 1893, the Mercantile Trust Company filed its bill in the court below to foreclose the consolidated mortgage, on the ground that the San Francisco Company had made default in the payment of taxes upon the mortgaged property. It is alleged in its

bill that the railroads owned and controlled by and the four railroads leased by the San Francisco Company formed a trunk line, that this fact was one of the most important ingredients of its value, and that its severance would result in a ruinous sacrifice to every interest in the property. It prayed for the foreclosure of the mortgage, for the sale of all the mortgaged property, and for the appointment of receivers to hold and operate the mortgaged railroads during the pendency of the suit. The defendant filed an answer practically admitting the allegations of the bill, and on the same day the court appointed receivers, and directed them to take possession of and operate as one property all the railroads constituting the Frisco System, including those owned and those leased by the San Francisco Company. The trust company subsequently filed a supplemental bill founded on a default of the mortgagor in the payment of the interest due in April, 1894, and that bill was ordered to be taken pro confesso as against the San Francisco Company on April 4, 1895. On December 8, 1894, pursuant to prior orders extending their time to do so, the receivers filed a petition in this foreclosure suit for permission to renounce the leases on the four branch roads, on the ground that none of them earned an amount sufficient to pay its operating expenses, the taxes upon it, and the current rent reserved in its lease. The petition was referred to a master, to hear, determine, and report "whether it was to the advantage of the trust confided to the receivers that the leases should be disaffirmed." The master gave notice of this hearing to the lessor companies, and to the trustee of every mortgage upon any part of the Frisco System. The trustees of the first mortgages upon the four leased lines and the trustee of the consolidated mortgage appeared before the master and were heard. The amounts of the annual taxes upon the branch railroads, the expenses of operating them, their respective earnings for different periods, and the earnings and expenses of operating the entire system, were proved. Testimony was introduced relative to the character, and the past, present, and probable future productiveness of the country through which the leased lines extend. Experts gave their opinions as to the value of the use of some of these railroads to the Frisco System, and, after considering all the evidence and arguments of counsel, the master reported that neither of the leased lines earned an amount sufficient to pay the taxes upon it, its operating expenses, and the rent reserved in its lease, but that the unity of the property covered by the consolidated mortgage constituted one of the chief elements of its value, that to permit its severance would result in a ruinous sacrifice to every interest in it, that it would bring a much larger price at the foreclosure sale if that sale carried to the purchaser the right to the leases unincumbered by any forfeiture of them, that it was to the advantage of the trust confided to the receivers that the leases should not be disaffirmed, and that the receivers ought to pay any deficiencies caused by operating the leased lines out of the income derived from the entire system. To this report the appellant excepted. The court below overruled its exceptions, confirmed the report, adjudged that the receivers were liable for the rentals reserved in the leases of the four

branch lines for the time during which they had possession of them, that those rentals were a lien on all the income and all the property in their hands superior in equity to that of the consolidated mortgage, and that the receivers should pay them out of the income or out of the proceeds of the sale of the property before applying either to the payment of the debt secured by that mortgage. This is the order which is challenged by this appeal.

Many questions have been discussed in the briefs and arguments of counsel in this case, but the decision of one will dispose of them all. That question is: Ought this court to reverse the decision of the court below, that the leases of the four branch lines ought not to be renounced by the receivers? Counsel have devoted much time and space to the consideration of the question whether or not the income of the entire property covered by the consolidated mortgage was sufficient to pay its operating expenses and the rents reserved under these leases during the receivership. That question is immaterial. If the leases should have been renounced, no part of the deficiencies resulting from the operation of the leased lines can be charged against or paid out of the income or out of the proceeds of the corpus of the trust estate, but these deficiencies must all be paid by the railroads which respectively caused them. *Ames v. Railway Co.*, 74 Fed. 335, 338, 339, 344; *Ames v. Railway Co.*, 60 Fed. 966, 970, 971; *Railroad Co. v. Humphreys*, 145 U. S. 82, 96, 12 Sup. Ct. 787; *Express Co. v. Railroad Co.*, 99 U. S. 191; *Railroad Co. v. Humphreys*, 145 U. S. 105, 113, 12 Sup. Ct. 795; *U. S. Trust Co. v. Wabash W. Ry. Co.*, 150 U. S. 287, 14 Sup. Ct. 86; *Central Trust Co. v. Wabash, St. L. & P. Ry. Co.*, 23 Fed. 863; *Central Trust Co. v. Wabash, St. L. & P. Ry. Co.*, 34 Fed. 259; *Farmers' L. & T. Co. v. Northern Pac. R. Co.*, 58 Fed. 257, 266; *New York, P. & O. R. Co. v. New York, L. E. & W. R. Co.*, 58 Fed. 277, 280, 281. On the other hand, if the court below properly accepted and adopted the leases, the rents reserved under them became an integral part of the operating expenses of the trust estate in the hands of the receivers, as much as the wages of hired men, the rent of leased engines or cars, the traffic balances due connecting railroads, or any other ordinary expense of operation; and in this way the claims for these rents secured a preference in payment, over those of all the *cestuis que trustent*, out of the proceeds of the railroads, as well as out of their earnings during the receivership. The moneys expended and the liability incurred by receivers or trustees in the authorized operation, preservation, and management of the property intrusted to them constitute preferential claims upon the trust estate, which must be paid out of its proceeds before they can be distributed to the beneficiaries of the trust. *Butler v. Cockrill*, 36 U. S. App. 702, 20 C. C. A. 122, 130, 73 Fed. 945, 953; *Ames v. Railway Co.*, 74 Fed. 335, 345; *Mechem, Ag.* § 684; 2 *Jones, Liens*, §§ 1175, 1177; 2 *Lewin, Trusts*, 639.

The only question in the case, therefore, is: Ought the finding of the court below, that it was to the advantage of the trust estate that the leases should be assumed by the receivers, and its direction that the receivers should not renounce them, to be reversed by this court?

There are two reasons why, in our opinion, this question should be answered in the negative:

1. The issue in the court below presented a question of business policy, and not a question of law. The decision and order of the court were administrative, rather than judicial. That court and its receivers were not liable for the debts nor bound by the obligations of the mortgagor when they took possession of its property. The receivers, under the direction of the court, had the option to assume or to renounce the leases of the branch roads, which they found in the possession of the mortgagor, within a reasonable time after their appointment. *Ames v. Railway Co.*, 60 Fed. 966, 970, 971, and cases there cited. In due time, they recommended the renunciation of these leases, and asked permission to execute it; but the master, after a full hearing upon the facts and the law, recommended their assumption. The question before the master and the court was, which course would be of greater advantage to the trust estate? This was a question of business policy, upon which the minds of reasonable men might well differ. None of the parties in interest had the absolute legal right to a determination of this question in either way. The appellant, by bringing its bill in the court below, had imposed upon that court the duty of deciding which course would be of greater benefit to the trust estate confided to the receivers. It decided that the assumption of the leases would be. One who invokes the aid of a chancellor to operate railroads, and to control and conduct vast business operations, on his behalf, ought not to be permitted to reverse the administrative orders of the court for mere mistakes of business judgment. Administrative orders, which involve mere questions of business policy in the conduct of a receivership, are largely discretionary, and should not be disturbed by an appellate court, in the absence of any abuse of the discretion of the chancellor. Since there was no abuse, but the most careful and deliberate exercise, of its discretion by the court below, we think the order appealed from should not be disturbed.

2. Again, the question involved in this order was carefully considered under conflicting evidence, and decided by the master and the court below. These decisions, under the settled rule of this court, are presumptively right, and unless an obvious error has intervened in the application of the law, or some serious mistake has been made in the consideration of the evidence, the order based upon them must stand. *Warren v. Burt*, 12 U. S. App. 591, 7 C. C. A. 105, 58 Fed. 101; *Plow Co. v. Carson*, 36 U. S. App. 456, 18 C. C. A. 606, 72 Fed. 387; *Trust Co. v. McClure*, 24 C. C. A. 64, 78 Fed. 209; *Tilghman v. Proctor*, 125 U. S. 136, 8 Sup. Ct. 894; *Kimberly v. Arms*, 129 U. S. 512, 9 Sup. Ct. 355; *Furrer v. Ferris*, 145 U. S. 132, 134, 12 Sup. Ct. 821. The consolidated mortgage, under which the appellant obtained the appointment of the receivers in this case, provided that, if the trustee named in it ever took possession of the mortgaged property under the terms of that mortgage, it should pay all the expenses of operating all the railroads covered by it, including the leased lines, all the taxes due on any of the mortgaged property, and all the amounts due for interest or principal of any of the

bonds or other obligations of the mortgagor, secured by any mortgages or pledges prior in lien to that of the consolidated mortgage, before that net income should arise which would be applicable to the payment of the debt secured by that mortgage, and that the trustee should cause all the mortgaged railroads, and all their capital stock held under the consolidated mortgage, to be sold as one property at public auction. The fact that the trustee did not enter into the possession of the trust estate in the manner prescribed in this mortgage, but applied to the circuit court for an earlier possession and a more secure administration of the trust, cannot be permitted to avoid the effect of these provisions of the mortgage. They impressed the entire mortgaged property—the entire Frisco System of railroads—with a trust in case of default on the part of the mortgagor, for the payment, first, of the expenses of operating the entire system, including the obligations of the mortgagor for the payment of the rent on the leased lines for the benefit of the bondholders secured by the first mortgages on those lines, and, second, for the payment of the indebtedness secured by the consolidated mortgage. The trustee named in the latter could not withdraw, or relieve the mortgaged property from this trust, by declining to take possession as trustee, and imposing that duty upon the receivers appointed by the court. The property stood charged with it, whether administered in or out of the court, and every bondholder under the consolidated mortgage had notice of this trust by the express terms of his mortgage.

The terms of this mortgage alone are amply sufficient to sustain the decision and order below. The salient facts of the case all tend to the same conclusion. The first mortgages upon and the leases of the four branch lines in 1886 and 1887, the provision of the consolidated mortgage which we have quoted, the allegations of the appellant in its bill that the unity of the railroads covered by the consolidated mortgage in one system was an important ingredient of their value, and that their severance would be ruinous to every interest in them, and the fact that these leased lines have been constantly operated by the San Francisco Company under their leases, show that the shrewd and experienced men who organized the Frisco System, those who made and accepted the consolidated mortgage upon it as security for more than \$14,000,000 of bonds, and the trustee under that mortgage itself, until 1894, believed that the retention and operation of these branch lines under their leases was a benefit to the railroad system covered by that mortgage, and acted upon that belief. We find nothing in the record in this case to convince us that the master or the court below made any mistake of fact or committed any error of law in coming to the same conclusion. The decree below must be affirmed, with costs; and it is so ordered.

SPRINGFIELD MILLING CO. v. BARNARD & LEAS MANUF'G CO.¹

(Circuit Court of Appeals, Eighth Circuit. May 10, 1897.)

No. 781.

1. EQUITY—CROSS BILL.

The office of a cross bill is either to warrant the grant of affirmative relief to the defendant in the original suit, to obtain a discovery in aid of the defense in that suit, to enable the defendant to interpose a more complete defense than that which he could present by answer, or to obtain full relief to all parties and a complete determination of all controversies which arise out of the matters charged in the original bill.

2. SAME—NEW ISSUES.

The issues raised by a cross bill must be so closely connected with the cause of action in the original suit that the cross suit is a mere auxiliary or dependency upon the original suit, but, subject to this qualification, new facts and new issues may properly be presented by a cross bill.

3. SAME—REMEDY AT LAW.

The objection that the defendant has a complete remedy at law for the wrong of which he complains in his cross bill cannot be sustained unless the remedy at law is "as practicable and efficient to the ends of justice and its prompt administration as the remedy in equity."

4. SAME—MECHANICS' LIENS.

Complainant filed a bill for foreclosure of a mechanic's lien for certain machinery erected in defendant's mill under a contract. Defendant, in addition to an answer which denied the performance of the contract and the fulfillment of certain guaranties contained in it, filed a cross bill which alleged the nonfulfillment of the guaranties, and also that complainant had damaged its mill, and that complainant was a nonresident, and without the jurisdiction of the court, and asked for the cancellation of the recorded lien, and for a judgment against complainant for the damages. *Held*, that such cross bill was within the established precincts of equity jurisdiction, and was entitled to a hearing upon the merits of its allegations.

5. SALES—ACTION FOR PRICE—PARTIAL PERFORMANCE—OFFSET.

An action upon a contract of sale for the purchase price may be maintained by one who has substantially, but not completely, performed it, if the purchaser has retained the benefits of such performance; but the amount of the recovery will be reduced by any damages suffered by the defendant which are the direct, natural, and immediate consequence of the plaintiff's failure to perform the contract in the agreed time and manner.

Appeal from the Circuit Court of the United States for the Western District of Missouri.

This is an appeal from a decree of foreclosure of a mechanic's lien. The Springfield Milling Company, the appellant, is a corporation of the state of Missouri, whose principal place of business is at Springfield, in that state, where it owns and operates a flouring mill. The appellee, the Barnard & Leas Manufacturing Company, is a corporation of the state of Illinois, and its principal place of business is at Moline, in that state, where it is engaged in the manufacturing and sale of plansifters and other machinery for mills. In December, 1892, the plansifter was a machine just invented for bolting flour, and the appellant was not familiar with it. It was a substitute for the reels which were generally used for that purpose, and which the appellant itself was then using. On December 29, 1892, the appellee contracted to remodel the mill of the appellant, to take out the reels, to supply the mill with plansifters and certain other machinery, and to put all this machinery in place and in operation in the mill. It guarantied "that the quality of the machinery so to be furnished will be such, when properly set up, connected, and operated, that it shall be capable of producing as good results as any other equivalent line of machinery, on the same kind and quality of wheat, and a capacity of 200 barrels in 24 hours"; "that said mill shall make a barrel of flour from 4 bushels and 30 pounds of No. 2 wheat, in standard grades of flour, as follows: Patent, 45 per cent.;

¹ Rehearing denied September 6, 1897.

extra fancy, 15 per cent.; low grade, 5 per cent."; and that the mill "will be capable of producing flour, both in quality and yield, as good as that made in any other mill of same capacity using the same kind and quality of wheat and an equivalent line of machinery." The appellee further agreed that in case the plansifter machines failed to produce the results guaranteed by it, or in case it failed to make them produce such results after a fair trial, then that it would remove them, or as many of them as were mutually agreed upon, from the mill, and replace them with a sufficient number of suitable reels. The appellant agreed to pay for the performance of this contract \$500 in cash on receipt of the bill of lading of the machinery, \$450 in cash in weekly payments during the process of placing the machinery in the mill, \$1,655.53 when the mill had fulfilled the contract for three consecutive working days, and \$1,100 in three months, \$1,100 in six months, and \$1,100 in nine months thereafter. It also agreed to transfer to the appellee certain old machinery then in the mill, to give notes for the \$3,300 deferred payments, to secure these notes by a mortgage upon the mill and the land upon which it stood, and to pay all expenses of foreclosure and collection, including plaintiff's attorneys' or solicitors' fees. Under this contract the appellee placed three plansifters and other machinery in the mill, and commenced to operate it on February 23, 1893. It would not fulfill the guaranties, and the Barnard Company required the milling company to take out four pairs of rolls and have them made true. This the milling company did, and returned them to their places in the mill by March 11, 1893. Still the mill failed to fulfill the guaranties. The appellee then took out the three plansifters, and put in their place three of a larger size, and a reel, to increase the capacity and service of the mill. The mill still failed to fulfill the guaranties, and the appellee required the milling company to take out two more sets of rolls and have them made true. This was done about the 1st of June, 1893, and it was not until June 29th of that year that the milling company first made the three days' test. The appellee then claimed that it had performed its contract. The appellant denied the claim. On August 1, 1893, the appellee exhibited its bill in this suit in the court below, in which it set forth the contract and alleged that it had complied with its terms; that the appellant became indebted to it in the sum of \$5,007.47½, under the contract, on June 29, 1893; that it had filed its account in the office of the clerk of the circuit court for the county of Greene, in the state of Missouri, had verified it by affidavit, and had given a description of the property upon which the mill stood, as required by the statutes of Missouri, in order to establish a mechanic's lien; and that it had employed attorneys to foreclose this lien, whose services were worth \$500; and it prayed for the adjudication of the indebtedness of the appellant, the establishment of its lien, and for such other relief as should be just and appropriate. The appellant answered this bill. In this answer it denied that the appellee had complied with the terms of the contract. It alleged that the remodeled mill did not fulfill the guaranties made by the appellee; that it did not have a capacity of 200 barrels of flour in 24 hours, or any greater capacity than 125 barrels in 24 hours; that it would not produce a barrel of flour of the grades guaranteed from 4 bushels and 30 pounds of No. 2 wheat, but required 4 bushels and 56 pounds to produce such a barrel of flour; and it set forth six other particulars in which it alleged that the Barnard Company had failed to fulfill its contract.

On December 22, 1893, the appellant filed a cross bill in this suit, in which it set forth, in substance, the complaint and answer in the original suit, and alleged the making of said contract, and the failure of the appellee to comply with its terms, substantially as stated in the answer. It further averred that during the time the appellee was attempting to complete the mill, and was experimenting with its new machines which it had placed in the mill, it had used and wasted a large amount of appellant's wheat, of the value of \$2,200; that the appellant was not familiar with the character of the plansifters, and the appellee was; that these machines, while running, have a powerful swinging and vibrating motion, which so racked and weakened the walls of the mill building that it was damaged in the sum of \$2,000; that, if the guaranties of the appellee had been complied with, the mill would have been worth \$20,000, while it is now worth but \$10,000; that the appellant was really not indebted to the appellee in any amount, but the Barnard Company was indebted to the

appellant in the sum of \$14,200, but that the appellee had nevertheless filed a claim of lien for more than \$5,000 against the mill, and was a nonresident of the state, and without the jurisdiction of the court. The prayer of the bill was that the appellant might have judgment against the appellee for \$14,200 damages, that the pretended lien asserted by the appellee against the property of the appellant might be canceled, set aside, and ordered to be discharged of record, and for such other relief as should be right and just. A demurrer to the cross bill was overruled, and an answer was interposed, and then all questions of law and fact in the case were referred to a special master, who heard the testimony and reported that the appellee was entitled to recover the amount claimed in its bill, less \$30 damages arising from its failure to furnish a flow sheet, and \$50 damages on account of defective and leaky spouting furnished, and that for the balance of \$4,886.39 for the machinery, and \$500 for attorney's fees, it was entitled to a decree of foreclosure of its mechanic's lien, and of sale of the property of the appellant. The master also reported that he had made no finding upon the issues raised by the cross bill, because, in his opinion, there was no equity in the bill, and it should be dismissed. Exceptions were taken to the findings and conclusions of the master, but upon hearing they were overruled, the master's report was confirmed, and a decree was rendered accordingly. The appeal in this case challenges the rightfulness of this decree.

J. E. Mellette, for appellant.

James R. Vaughan (A. W. Lyon with him on the brief), for appellee.

Before CALDWELL, SANBORN, and THAYER, Circuit Judges.

SANBORN, Circuit Judge, after stating the case as above, delivered the opinion of the court.

The office of a cross bill is either to warrant the grant of affirmative relief to the defendant in the original suit, to obtain a discovery in aid of the defense in that suit, to enable the defendant to interpose a more complete defense than that which he could present by answer, or to obtain full relief to all parties, and a complete determination of all controversies which arise out of the matters charged in the original bill. The fact that the cross bill fairly tends to accomplish either of these purposes is generally a sufficient ground for its interposition. It must seek equitable relief, but, subject to this qualification, a complainant who has brought a defendant into a court of equity in order to subject him to an adjudication of his rights in a certain subject-matter, cannot be heard to say that there is no equity in a cross bill which seeks an adjudication of all the rights of the parties to the original suit in the same subject-matter. The issues raised by the cross bill must be so closely connected with the cause of action in the original suit that the cross suit is a mere auxiliary or dependency upon the original suit, but, subject to this qualification, new facts and new issues may properly be presented by a cross bill. *Story*, Eq. Pl. §§ 398, 399; 1 *Beach*, Mod. Eq. Prac. §§ 433, 435; *Carnochan v. Christie*, 11 *Wheat.* 446; *Cross v. De Valle*, 1 *Wall.* 5; *Ayres v. Carver*, 17 *How.* 591, 595; *Meissner v. Buek*, 28 *Fed.* 161, 163; *Chicago, M. & St. P. Ry. Co. v. Third Nat. Bank*, 134 *U. S.* 276, 10 *Sup. Ct.* 550; *Davis v. Christian Union*, 100 *Ill.* 313; *Cartwright v. Clark*, 4 *Metc. (Mass.)* 104; *Derby v. Gage*, 38 *Ill.* 27; *French v. Griffin*, 18 *N. J. Eq.* 279; *Graham v. Berryman*, 19 *N. J. Eq.* 29; *Wickliffe v. Clay*, 1 *Dana*, 585, 589; *Allen v. Roll*, 25 *N. J. Eq.* 164; *King v. Insurance Co.*, 45 *Ind.* 43. Thus, in a suit to cancel deeds

made to secure a debt, the defendant may maintain a cross bill to reform the deeds, and to foreclose the mortgage which they evidence. *Carnochan v. Christie*, 11 Wheat. 446, 466. If an original bill is filed for specific performance of a contract, the defendant may properly exhibit a cross bill for the surrender and cancellation of the agreement. *Cross v. De Valle*, 1 Wall. 5, 14; *Meissner v. Buek*, 28 Fed. 161, 163. Where a suit in equity is instituted to vacate or set aside a lien upon property by judgment, mortgage, or otherwise, the defendant may maintain a cross bill to establish and foreclose the lien. *Railroad Cos. v. Chamberlain*, 6 Wall. 748; *Chicago, M. & St. P. Ry. Co. v. Third Nat. Bank*, 134 U. S. 276, 287, 288, 10 Sup. Ct. 550. The converse of this proposition is equally true. When an original suit is brought to establish and foreclose a lien upon the property of the defendant, he may properly exhibit a cross bill in that suit for the avoidance of the lien, and the cancellation and discharge of the record of it which clouds his title. *Graham v. Berryman*, 19 N. J. Eq. 29; *Wickliffe v. Clay*, 1 Dana, 589. This is the case which this record presents. The appellee filed in the proper public office a claim of a lien upon the property of the appellant for more than \$5,000, on account of materials it had furnished and services it had rendered in remodeling the appellant's mill, pursuant to a contract between the parties. It then brought this suit to establish and foreclose that lien. The appellant exhibited its cross bill in that suit for the cancellation of that lien and its discharge of record. The allegation of the existence of the mechanic's lien and the prayer for its foreclosure constitute the only ground for equitable relief presented by the original bill. The allegations of the cross bill that the debt claimed in the recorded statement of the lien did not exist; that the appellee was a nonresident of the state of Missouri, and without the jurisdiction of the court; that it had so failed to fulfill the guaranties of its contract that the mill it remodeled was worth \$10,000 less than it would have been if the contract had been complied with; that the appellee had wasted wheat of the appellant worth \$2,000 in useless experiments with its plansifters, and had racked and weakened the walls of the mill,—together with its prayer that the pretended lien might be canceled and discharged of record, certainly presented equities much stronger than those exhibited by the original bill, and brought the cross bill within the established precincts of equity jurisdiction. The owner of property may always maintain a suit in equity to clear the record of its title of invalid liens that apparently cover it, and there is much stronger reason for permitting him to do so by a cross bill when the holder of the pretended lien has sued him to enforce it. It is idle to argue that this appellant had an adequate remedy at law for the wrongs it pleads in the cross bill. It could obtain no decree of cancellation of the lien upon its property at law. It could not even maintain an action at law until it followed the appellee beyond the jurisdiction of the court of its residence into the state of Illinois. Does equity require a defendant who has a defense, counterclaim, or set-off to pay a debt secured by a lien upon its property to sit quietly by and see the lien foreclosed and his property sold because he can enforce his claim against the complainant in an action at law in an-

other jurisdiction? The remedy at law which precludes relief in equity must be "as practical and efficient to the ends of justice and its prompt administration as the remedy in equity." *Boyce's Ex'rs v. Grundy*, 3 Pet. 210, 215; *Oelrichs v. Spain*, 15 Wall. 211, 228; *Preteca v. Land-Grant Co.*, 4 U. S. App. 326, 330, 1 C. C. A. 607, 610, 50 Fed. 674, 676; *Foltz v. Railway Co.*, 19 U. S. App. 576, 8 C. C. A. 635, 641, 60 Fed. 316; *Hayden v. Thompson*, 36 U. S. App. 361, 17 C. C. A. 592, 594, 71 Fed. 60, 63. Would an action at law against the appellee in the state of Illinois, in addition to the suit in equity brought by the appellee in the state of Missouri, be as practical and efficient for the prompt administration of justice between these parties as the presentation and adjudication of all the controversies between them growing out of the contract in the single suit which the appellee brought in Missouri? These questions are susceptible of but one answer.

It is urged that the only claims presented by the cross bill that were not pleaded in the answer of the appellant to the original bill were those for the waste of the wheat and the injury to the walls of the mill; that these could not be considered in equity, and hence the cross bill was properly dismissed. The answer is: (1) The cross bill repleaded the defenses in the answer and prayed for affirmative relief,—the cancellation of the record of the lien. Those defenses, if sustained, warranted that relief, regardless of the claims for damages for the waste of the wheat and for injury to the walls of the mill, and a cross bill which warrants affirmative relief upon the same facts pleaded as a defense in the answer to the original bill is well founded. (2) The statutes of the state of Missouri provide that in any civil action, whether at law or in equity, a defendant may plead and prove as a counterclaim any cause of action, whether legal or equitable, which arises out of the contract or transaction set forth in the petition as the foundation of the plaintiff's claim. *Rev. St. Mo. 1889*, p. 542, § 2050. Under this provision of the statutes, a counterclaim for damages for injury to property in the performance of services may be maintained in an action for their price or value. *Emery v. Railway Co.*, 77 Mo. 339, 346. If the appellee had brought this suit in one of the state courts of Missouri, the appellant's claim for wasted wheat and damage to the walls of its mill could have been pleaded and proved as a counterclaim. One of the grounds of jurisdiction in equity is the prevention of a multiplicity of suits. The court below, sitting in equity, had taken jurisdiction of the parties and of the subject-matter of this action for a necessary purpose,—for the purpose of determining the validity of the lien claimed, and of enforcing or canceling it. No reason occurs to us why that court could not have heard and determined the appellant's claims for wasted wheat and for injured walls as well as any court of law in the state of Illinois. It was not necessary to a just determination of those claims to compel the appellant, who had been summoned into that court to answer the claim of the appellee for the performance of this contract, to commence and prosecute an action at law in the state of Illinois to recover its damages for the incomplete or negligent fulfillment of the terms of the same contract. It is the

province and the duty of a court of equity, which has properly acquired jurisdiction of a subject-matter for a necessary purpose, to proceed and do final and complete justice between the parties, where it can as well be done in that court as by proceedings at law. *Taylor v. Insurance Co.*, 9 How. 390, 404; *Illinois Trust & Savings Bank v. Arkansas City*, 40 U. S. App. 257, 22 C. C. A. 171, 76 Fed. 271, 288. The cross bill, therefore, should not have been dismissed without a hearing of the issues it presented, and the claims pleaded in it should have been considered and decided upon their merits. It prayed for affirmative equitable relief that was warranted by its allegations, and it enabled the court to grant full relief to all the parties to the original suit, and to completely determine all the controversies which arose out of the matters charged in the original bill, while this could not have been done upon a hearing of the issues presented by the answer.

Upon the merits of the case, the record discloses the fact that the appellant has received and retained substantial benefits from the performance of the contract in suit, but that the appellee has failed, at least in some particulars, to comply with the terms of the contract. The master and the court below found that the appellant had been damaged in the sum of \$80 by the defaults of the appellee, but they made no finding upon or decision of the issues presented by the claims of the appellant in the cross bill for the wasted wheat and the injury to the walls of the mill. The evidence of both parties, however, upon these issues, was taken and submitted to the master and to the circuit court, and has been certified to this court. In this state of the case, the only question remaining is, what amount of damages has the appellant sustained by the failure of the appellee to comply with the terms of the contract? An action upon a contract of sale, for the purchase price, may be maintained by one who has substantially, but not completely, performed it, if the purchaser has retained the benefits of that performance. The amount of the recovery, however, will be measured by the contract price, less the damages sustained by the defendant from the failure of the plaintiff to complete its performance in the agreed time and manner. *German Savings Inst. v. De La Vergne Refrigerating Mach. Co.*, 36 U. S. App. 184, 17 C. C. A. 34, 38, 70 Fed. 146; *Hammond v. Buckmaster*, 22 Vt. 375; *Dodsworth v. Iron Works*, 31 U. S. App. 292, 13 C. C. A. 552, 557, 66 Fed. 483; *Andrews v. Hensler*, 6 Wall. 254, 258; *Howard v. Hayes*, 47 N. Y. Super. Ct. 89, 103. Compensation for pecuniary loss that is the direct, natural, and immediate consequence of a breach of a contract of sale, or of a guaranty contained in such a contract, is the just and legal measure of a purchaser's damages. The damages recoverable of a manufacturer for the breach of a contract to furnish machinery, or for a breach of a warranty of its character or serviceableness, where he has agreed to furnish and place suitable machinery in operation for a known purpose, are not confined to the difference between the value of the machinery as warranted and as it proved to be, but include such consequential damages as are the direct, immediate, and probable result of the breach. *Accumulator Co. v. Dubuque St. Ry. Co.*, 27 U. S. App. 364, 379, 12

C. C. A. 37, 46, 64 Fed. 70, 79; 3 Pars. Cont. (7th Ed.) p. 212; 2 Suth. Dam. § 672; Mining Syndicate v. Fraser, 130 U. S. 611, 622, 9 Sup. Ct. 665; Poland v. Miller, 95 Ind. 387; Sinker v. Kidder, 123 Ind. 528, 530, 24 N. E. 341; Swain v. Schieffelin, 134 N. Y. 471, 31 N. E. 1025; Passinger v. Thorburn, 34 N. Y. 634; Ferris v. Comstock, 33 Conn. 513.

Guided by these rules, we have endeavored to ascertain the amount of damages to which the appellant is entitled on account of all the claims it presents in its answer and cross bill, and thus to put an end to this litigation. It has been a delicate and difficult task,—one that has entailed upon the court a careful and patient examination of all the evidence in the record; but the ends of justice and the interests of the parties seem to demand that their rights shall be finally determined, rather than that they should be subjected to the delay and expense of another hearing. The testimony is voluminous. On many important issues it is conflicting and evenly balanced, but there are a few salient facts established to a demonstration, and on these we rest our conclusions. The appellee undertook to remodel the mill of the appellant; to take out the reels which bolted its flour; to substitute its new machines, the plansifters, for these reels; to put in other machinery; to set all this machinery up and put it in operation, and with it to cause the mill to make 200 barrels of flour of certain standard grades in 24 hours. It knew, or ought to have known, the strength of the walls of the mill, the capacity of its plansifters, their weight, and the effect of their operation upon the walls of this building. If their weight and vibratory motion shook and shattered some parts of those walls, as the evidence tends to show they did, the appellee should have known that they would do so, and that the walls must be strengthened before it declared that the plansifters were suitable for use in this mill. It knew, or ought to have known, that any unnecessary delay in fulfilling the terms of the contract after the operation of the mill was stopped to permit the changes to be made must entail heavy losses upon the appellant. It knew, or ought to have known, that the production of flour of grades inferior to those guaranteed, and in smaller quantities per day than those warranted, during an experimental period of four months, must cause great damage to the appellant. Under these circumstances, the appellee took the reels out of the mill, and put in its new plansifters and the other machinery. It had the remodeled mill ready to operate, and it commenced to operate it, on February 23, 1893; but it did not complete the three days' test which the contract provided should determine that it was completed until June 29, 1893. In fact, it did not complete the mill, and it did not claim in its bill that it had completed its contract so that it was entitled to the money or the notes due to it upon its completion, until the 29th day of June, 1893. During all this time the mill had failed to fulfill the guaranties of the contract. Meanwhile the wheat of the appellant was ground into inferior flour, and a part of its value was lost, and the capacity of the mill, instead of reaching the guaranteed 200 barrels, varied from 145 to 175 barrels in 24 hours. The testimony that this failure was due to the fact that some of the old rolls in the mill

were not true, and would not properly crush the wheat, is not persuasive, (1) because the testimony is full and uncontradicted that the same rolls properly crushed the wheat and made flour of the proper grades when the old reels were in use, before the plansifters were introduced; and (2) because, after four sets of these reels had been taken out at the request of the appellee, made true, and replaced in the mill, on March 11, 1893, it took out all its plansifters, substituted larger ones, and put in a reel to increase the capacity and service of the mill. This was a convincing confession by the appellee of a mistake and a default in the performance of its undertakings. The fact has not been overlooked that the contract contains this provision:

"It is hereby agreed that said party of the first part is to use its best endeavors to have said articles ready for shipment at the time stated herein, and also they shall be of the stated quality; but it is not to be held liable for any pecuniary damages in either case, except to make good any unmerchantable defect which may be proved to exist in such articles when furnished, or be held for any damages incident to delay in starting up."

But this clause of the agreement could not relieve the appellee from the consequences of unreasonable delay, or a breach of the guaranties contained in the contract, after the machinery had been shipped, after it had been set up in the mill, and after the remodeled mill had been put into operation. This contract contained another stipulation to the effect that if the appellee failed to make its machines produce the guarantied results after a fair trial, it would remove them and replace the reels. A reasonable time—perhaps two weeks—might well be allowed to the appellee, after the mill was started, to get the machinery in perfect running order; but it is plain that the parties to this contract never intended to release the appellee from all damages for a breach of the contract, or of the guaranties which it contained, which continued for months after the machinery was in operation. The established facts to which we have adverted have forced us to the conclusion that in the time and manner of performing its contract the appellee made substantial failures. It would be an idle task to review the evidence on the various claims of deficiencies and defaults presented by the answer and the cross bill in this case. It is sufficient to say that in our opinion the record fairly shows that the appellant suffered damages, which were directly caused by the failure of the appellee to fulfill the terms of its contract, in the sum of \$2,000 more than was allowed to it by the master and the court below. Moreover, the \$500 for the attorney's fees of the appellee should not have been allowed to it in the decree, because the appellant offered before the suit was commenced to pay the claim of the appellee, less a reduction of the \$2,000 to which we have found it was entitled. The decree on the bill and cross bill must be reversed, with costs, and the case must be remanded to the court below, which should enter a decree, without further hearing, upon both bills, to the effect that the appellee recover judgment of the appellant for the sum of \$2,886.39, with interest from August 1, 1893, that the appellee is not entitled to \$500 as an attorney's fee, and that the costs in that court be taxed and paid and the executions be issued as directed in the original decree. It is so ordered.

CENTRAL TRUST CO. et al. v. CLARK.

(Circuit Court of Appeals, Eighth Circuit. May 17, 1897.)

No. 858.

1. INSOLVENT CABLE RAILWAYS—RECEIVERS—PREFERENTIAL CLAIMS.

A claim for the purchase price of a gear wheel and pinion, furnished to a cable street railway, and necessary for the operation of the cable by which its cars are moved, is entitled to be paid by a receiver of the road, appointed within six months after such wheel was furnished, in preference to bonds of the company secured by mortgage, especially when, immediately after obtaining possession of such wheel, the company has mortgaged it, with other property, to raise money to pay interest on the bonds.

2. SAME—PREFERENTIAL CLAIMS—JUDGMENTS.

When the holder of a claim against a railroad company, which, upon an adjustment of its indebtedness, would be entitled to a preference over its bonds secured by mortgage, has brought an action upon such claim before the commencement of a suit to foreclose the mortgage, he does not lose his right to a preference in the distribution of the proceeds of the sale of the company's property, by prosecuting his action on the claim to final judgment.

3. SAME—CLAIM FOR MACHINERY FURNISHED—OFFSET—DAMAGES.

One C. brought an action against the D. R. Co. to recover the price of certain machinery. A counterclaim for damages for delay in delivery was put in. Pending this suit, proceedings were taken to foreclose a mortgage on the railroad. C. obtained judgment against the railroad company, and also intervened in the foreclosure suit, claiming a preference for the price of his machinery over the bonds secured by the mortgage. It affirmatively appeared by the record of C.'s judgment that the issue raised by the counterclaim was never tried in that suit, and that the receivers appointed in the foreclosure suit were never made parties to it. *Held*, that the receivers were entitled to show, if they could, that the railroad company had been damaged by a delay on C.'s part in delivering the machinery.

Appeal from the Circuit Court of the United States for the District of Colorado.

The record in this case discloses, in substance, the following facts: Some time during the month of September, 1892, the Midvale Steel Company entered into a contract with the Denver City Cable Railway Company (hereafter termed the "Railway Company"), whereby it agreed to make and furnish to the railway company a large steel gear wheel and pinion, for the price of \$10,500. Before the gear wheel was completed, certain changes appear to have been made in the plans for constructing the same, in consequence of which changes the cost was largely increased. The wheel was completed and placed in position in the city of Denver on May 19, 1893, and it has since been used continuously, either by said railway company or its receivers, for the purpose of operating the steel cable by means whereof the cars of said railway company are propelled. The Midvale Steel Company assigned its claim for the construction of said wheel to Walter L. Clark, the appellee; and on August 17, 1893, Clark brought a suit at law thereon against the railway company in the supreme court of the state of New York. Service was lawfully obtained in said suit, and a judgment was rendered therein against the railway company, on February 19, 1895, in the sum of \$16,378.67, including interest. On November 10, 1893, the circuit court of the United States for the District of Colorado appointed George E. Randolph and Cornelius S. Sweetland, two of the appellants, receivers of all the property and effects of the Denver City Cable Railway Company, on a bill filed for that purpose by William Binney, who appears to have been either a stockholder or a creditor of said company. At a later date a bill was filed in the same court by the Central Trust Company of New York, one of the appellants, against said railway company, for the purpose of foreclosing three mortgages on the property of said railway

company, two of which were executed by said railway company on July 1, 1888, and the other on June 1, 1893. These mortgages secured a mortgage indebtedness consisting of bonds, amounting in the aggregate to something over \$4,000,000. In the last-mentioned suit an order was made on March 15, 1895, whereby the receivership of the property of said railway company, first created under the bill filed by said William Binney, was extended to the foreclosure suit, and whereby said suits were practically consolidated. Thereafter a decree of foreclosure and sale appears to have been rendered in said consolidated suit, under and by virtue of which decree all the property of said railway company, including the gear wheel in question, was sold for the sum of \$500,000. Subsequent to such sale, Walter L. Clark, the appellee, filed an intervening petition in said foreclosure suit, wherein, after reciting most of the aforesaid facts, he prayed, in substance, that the judgment by him recovered on February 19, 1895, in the supreme court of New York, for the purchase price of said gear wheel, might be paid in full out of the proceeds of the aforesaid mortgage sale, in preference to the claims of the mortgage bondholders. The circuit court sustained the claim of the intervenor, and directed that he be paid, out of the proceeds of the sale of the mortgage property, the sum of \$17,704.57, before any distribution of the proceeds of the sale was made among the mortgage bondholders. The Central Trust Company of New York, and George E. Randolph and Cornelius S. Sweetland, as receivers, have appealed from such order or decree.

William W. Field (Edward O. Wolcott and Joel F. Vaile with him on the brief), for appellants.

Charles H. Toll (D. V. Burns and C. W. Bangs with him on the brief), for appellee.

Before SANBORN and THAYER, Circuit Judges, and SHIRAS, District Judge.

THAYER, Circuit Judge, after stating the case as above, delivered the opinion of the court.

The appellants contend that the order made by the circuit court in the foreclosure suit, directing the payment of the intervenor's claim, should be reversed for three principal reasons: First, because the claim is not of a preferential character, and is not entitled to payment prior to the indebtedness of the railway company evidenced by its mortgage bonds; second, because the intervenor, by bringing a suit to collect his claim in the supreme court of the state of New York, waived his right to a preference, and voluntarily elected to place himself in the position of an ordinary judgment creditor; third, because the trial court erred in refusing to allow the appellants to recoup the damages which the railway company had sustained, in consequence of an alleged failure on the part of the Midvale Steel Company to make and deliver the gear wheel and pinion within the time stipulated in its contract. These propositions will be considered in the order above stated.

With respect to the first, we are of opinion that the intervenor's demand falls within the category of claims which have been generally recognized as of a preferential character, and equitably entitled to be paid in advance of the claims of mortgage bondholders. The gear wheel which was supplied by the Midvale Steel Company to the mortgagor company—that is to say, to the Denver City Cable Railway Company—was an important and essential part of its plant, without which the railway company could neither discharge its duties to the public, nor realize an income by the use of the mortgaged prop-

erty. It was necessary for the railway company to purchase a new gear wheel and pinion, in order that its cable road might be kept in operation, and that the company might preserve its franchises, and remain a going concern. The machinery in question enhanced the value of the mortgaged property by as much as such machinery was fairly worth in the market. It was delivered on May 19, 1893, less than six months before receivers were appointed, at the instance of a stockholder or creditor of the railway company; and the order appointing such receivers made it their duty to pay all demands of the class to which the intervenor's claim belongs, out of the current revenues and earnings of the property which was placed in their charge and under their control for the purpose of being preserved and operated. No exception appears to have been taken to the order of appointment under which the duty last aforesaid was imposed on the receivers. Moreover, the testimony contained in the record discloses the following significant facts: That on July 1, 1893, \$107,430 was paid as interest to mortgage bondholders who held bonds secured by the first and second mortgages which had been executed by the railway company, and that the money to pay this installment of interest was raised by the railway company by issuing its notes, and securing the same by a third mortgage on all of its property, which latter mortgage was executed on or about June 1, 1893. It thus appears that within less than 30 days after the gear wheel and pinion had been delivered by the Midvale Steel Company, and placed in operation, the railway company mortgaged the property so acquired, along with its other property, and used the proceeds of the mortgage to meet its interest obligations to the first and second mortgage bondholders. In view of these facts, we think, as before stated, that the intervenor's claim was of such a nature that a court of equity having in charge the administration of the fund realized by the sale of the mortgaged property was fully justified in according it a preference, and in directing its payment before any distribution of the proceeds of the sale was made among the mortgage bondholders. The circumstances under which the indebtedness in controversy was contracted were such as to bring the case fully within the doctrine which was stated by this court, after a full review of all the decisions, in *Trust Co. v. Riley*, 36 U. S. App. 100, 16 C. C. A. 610, and 70 Fed. 32, namely, that, in a suit brought to foreclose a mortgage lien upon the property of a quasi public corporation, it is competent for a court of equity to award a preference to a claim for property supplied or services rendered to such corporation, when it appears that the property so supplied or the services rendered were necessary to enable the company to discharge its public obligations, and remain a going concern, and when it is evident that the property or services in question enhanced the value of the mortgaged property, and thereby inured to the benefit of the mortgagees. The facts disclosed by the present record, and the facts which were conceded by counsel in argument, bring the case at bar clearly within the rule above stated, to say nothing of the other circumstance to which we have already alluded, that the machinery which was furnished to the mortgagor company was hypothecated by it very soon after it was acquired, to raise money wherewith to pay interest to

mortgage bondholders, most of which interest had accrued before the machinery was furnished. This circumstance alone would seem to render it just and equitable that the intervener's right to a preference should be upheld.

We are also unable to assent to the further proposition, stated above, that the intervener waived his right to a preference, and voluntarily elected to rely upon the credit of the railway company by suing that company in the courts of New York. The suit in New York was begun on August 17, 1893, before receivers of the railway company had been appointed by the circuit court of the United States for the District of Colorado. In bringing that suit, the intervener pursued the only course that was at the time open to him for the collection of his claim, and he was under no legal obligation to dismiss that action when receivers of the property of the railway company were subsequently appointed in Colorado, inasmuch as the order of appointment contemplated the further prosecution of pending suits in other jurisdictions, by expressly authorizing the receivers to intervene in the defense of any such suits against the railway company as were then pending and undetermined. We are unable to perceive any just or reasonable ground upon which it can be held that, because the intervener prosecuted the suit in New York to final judgment, he thereby relinquished his equitable right to insist upon a preference as against the mortgage bondholders. The recovery of the judgment did not alter the inherent character of his claim, nor extinguish his equity, nor operate to the prejudice of other creditors of the railway company. We are of opinion, therefore, that the intervener retained the same right after the recovery of the judgment as before, to insist that in the forum of equity, and in the distribution of the proceeds of the sale of the mortgaged property, his demand should be preferred over the claims of the mortgage creditors.

A more doubtful question than either of those heretofore decided is whether the trial court erred in refusing to allow the appellants to show that the Midvale Steel Company had failed to deliver the gear wheel and pinion to the railway company within the time specified in its contract, and that, in consequence of such default, the railway company had sustained a large loss, for which the Midvale Steel Company was justly accountable. The record shows that a counterclaim, founded upon an alleged failure of the Midvale Steel Company to comply with its contract in the respect last stated, was interposed by the railway company in the suit which was instituted by the intervener in the supreme court of New York. It further shows that said action was sent to a referee for trial, and that the referee reported that the defendant company had produced no proofs in support of its counterclaim, for which reason no finding was made thereon by the referee. It furthermore appears that the intervener took no steps to make the receivers of the railway company parties to said action, and that the receivers failed to enter their appearance therein, and that the judgment which was eventually entered on the referee's report was a judgment against the railway company alone. It is manifest, therefore, that there has been no actual trial of the issue touching the alleged breach of contract, and the question to be decided is

whether the trial court should have granted the appellants a hearing upon that issue. We may concede for present purposes that if the record in the New York suit showed that the merits of the alleged counterclaim had been investigated and determined in that suit, or even if it was silent on that subject, no further trial of that issue could be permitted; but, inasmuch as the New York record shows affirmatively that the issue with respect to the nondelivery of the gear wheel within the time limited was not in fact tried and determined, we are of opinion that it is a proper subject for consideration in the present proceeding. We rest our conclusion on this point, not altogether on the ground last indicated, but upon the principle that one who seeks relief purely upon equitable grounds should himself do what is equitable. In the present proceeding the intervener interposes a claim against the proceeds of the mortgaged property, and insists that it shall be paid prior to the mortgage indebtedness, not, however, because he has a lien upon the mortgaged property such as a court of law would recognize and enforce, but because of the circumstances under which certain machinery was supplied to the railway company. The intervener himself has no standing in court to maintain his claim to a preference without going behind the New York judgment, and showing the origin and nature of the demand on which the judgment rests. When, therefore, he invites an investigation of those questions for the purpose of establishing an equitable right to which the judgment alone would not entitle him, we think that the mortgage bondholders should be permitted to show, if they can, that they were not benefited to the extent of the full value of the machinery which was supplied to the railway company, but that, by reason of the failure to deliver the same within the contract period, the company sustained some loss. In the case of *Brownsville v. Loague*, 129 U. S. 493, 505, 9 Sup. Ct. 327, where the relator in a mandamus proceeding was compelled to go behind his judgment for the purpose of establishing his right to a levy of taxes to pay the same, and it appeared on such investigation that the bonds on which the judgment was obtained were issued without authority of law, it was held that the respondents could avail themselves of the fact thus developed, and a writ of mandamus was accordingly denied. We think that the principle which underlies that decision is applicable to the case in hand, and that it justifies an inquiry in this proceeding whether the intervener's demand ought not to be reduced in amount because of the alleged failure of the Midvale Steel Company to deliver the gear wheel and pinion within the contract period. It results from this view that the decree of the circuit court from which the appeal was taken must be reversed. The case is accordingly remanded to that court, with directions to cause an investigation, such as is above indicated, to be made, and to deduct from the amount of the intervener's claim such damages, if any, as it may appear that the Denver City Cable Railway Company sustained by the failure of the steel company to deliver the gear wheel and pinion within the contract period.

JONES v. SCHLAPBACK et al.

(Circuit Court, N. D. Georgia. October 8, 1896.)

SUITS AGAINST RECEIVERS—ACTS OF PRIOR RECEIVERS—INJUNCTION.

A receiver appointed by a federal court for a road formerly constituting part of a larger system is not liable to be sued in another court, without permission of the appointing court, for alleged wrongful acts committed in the operation of the road by the receivers of the whole system, whom he has displaced; and such a suit will be enjoined.

King & Spalding, for complainants.

Fonche & Fonche, for defendants.

NEWMAN, District Judge. This is a bill filed by Jones, as receiver of the Chattanooga, Rome & Columbus Railroad, against the defendants, to enjoin them from prosecuting a suit commenced and now pending in the city court of Floyd county, in this district, against said Jones, as receiver, for certain wrongful acts in building a dam and operating a pump in such a way as to flood the lands of plaintiffs, to their damage. The Chattanooga, Rome & Columbus Railroad had become, prior to 1892, a part of the Savannah & Western System of railroads, and the Savannah & Western had become a part of the Central Railroad & Banking Company of Georgia System. In 1892, H. M. Comer was appointed receiver of all the system of roads operated by the Central Railroad & Banking Company of Georgia. Subsequently, in May, 1893, the said H. M. Comer and Robert J. Lowry were appointed separate receivers of the Savannah & Western Railroad, and on the 1st of February, 1894, Comer and Lowry having resigned as receivers of the Chattanooga, Rome & Columbus Railroad, on a bill filed by the trustee for the underlying original bonds on the Chattanooga, Rome & Columbus Railroad, Eugene E. Jones was appointed receiver for the separate property of said Chattanooga, Rome & Columbus Railroad.

The suit in the city court of Floyd county shows on the face of the petition there filed, and such is virtually the concession in the answer filed to the bill, now under consideration, that its purpose is to make the receiver, Jones, liable for the acts of Comer and Lowry as receivers of the Savannah & Western Railroad. The contention is that Jones is the successor of Comer and Lowry, and this especially under the authority of *McNulta v. Lochridge*, 141 U. S. 327, 12 Sup. Ct. 11. In that case, Judge Cooley was receiver of the Wabash, St. Louis & Pacific Railway, and, he having resigned, John McNulta was appointed his successor. The suit was against McNulta for the act of Judge Cooley. In the opinion of the court it is said:

"We agree with the supreme court of Illinois that it was not intended by the word 'his' to limit the right to sue to cases where the cause of action arose from the conduct of the receiver himself, or his agents, but that, with respect to the question of liability, he stands in the place of the corporation. His position is somewhat analogous to that of a corporation sole, with respect to which it is held by the authorities that actions will lie by and against the actual incumbents of such corporations for causes of action accruing under their predecessors in office. *Polk v. Plummer*, 2 Humph. 500; *Jansen v. Ostrander*, 1 Cow. 670. If actions were brought against the receivership generally, or against the corporation, by name, 'in the hands of,' or 'in the posses-

sion of,' a receiver, without stating the name of the individual, it would more accurately represent the character or status of the defendant. So long as the property of the corporation remains in the custody of the court, and is administered through the agency of a receiver, such receivership is continuous and uninterrupted, until the court relinquishes its hold upon the property, though its personnel may be subject to repeated changes. Actions against the receiver are in law actions against the receivership, or the funds in the hands of the receiver, and his contracts, misfeasances, negligences, and liabilities are official, and not personal, and judgments against him as receiver are payable only from the funds in his hands. As the right given by the statute to sue for the acts and transactions of the receivership is unlimited, we cannot say that it should be restricted to causes of action arising from the conduct of the receiver against whom the suit is brought, or his agents."

Now, is Jones, as receiver of the Chattanooga, Rome & Columbus Railroad, such successor of Comer and Lowry, receivers of the Savannah & Western Railroad, so as to make him subject to suit for their alleged wrongful acts? It is said, in the quotation above made from the opinion in *McNulta v. Lochridge*, that actions against the receivers are in law actions against the receivership, or the funds in the hands of the receiver. Now, is the receivership the same? The property in the hands of the present receiver is not the same, but is much less than was that in the hands of Comer and Lowry. The "fund" is not the same, but is very much less than was that in the hands of the former receivers. In the case of *Central Trust Co. v. Chattanooga, R. & C. R. Co.*, 62 Fed. 950, it was held by this court that the receivership of Comer, holding and operating the Central Railroad, and of Comer and Lowry afterwards operating the Savannah & Western, and of Jones as receiver of the Chattanooga, Rome & Columbus, was such continuous possession by the receivers of the federal court as would prevent any interregnum such as would authorize a receiver appointed by the state court to acquire any right to possession. It was not held, and the court had no intention of holding, that Jones was the successor of Comer and Lowry, and of Comer, in any such sense as would make him, as receiver, liable for the acts of the former receivers of the larger properties mentioned. To make the receiver of this short and comparatively insignificant line liable for the acts of the receivers of a great system of road, even if it be confined to their acts in connection with this particular piece of property, would be a great wrong. The road was, at the time of the Savannah & Western receivership, being operated at the instance of, and for the benefit of, the creditors of the whole system, and to charge Comer and Lowry's acts to the present receivership, which is for the benefit of the creditors of this road only, would certainly be wrong.

It is true that, under Act 1887-88, the receiver of the circuit court may be sued in any court of competent jurisdiction for any act or transaction of his; and it is also true that, under the decision of *McNulta v. Lochridge*, supra, he is liable for the acts of his predecessors as receiver of the same property, where it is the same property, the same fund,—in other words, where it is a continuation of the same receivership, although it may be changed in its personnel. But the act does not authorize the receiver to be sued without leave of the court beyond this.

In *Central Trust Co. v. East Tennessee, V. & G. Ry. Co.*, 59 Fed. 523, in the circuit court, Circuit Judges Taft and Lurton, District Judge Barr presiding, the decision which had been formerly made enjoining suits against the receivers except in the court appointing them, was modified so as to permit suits against them for their acts and transactions in other courts of competent jurisdiction. The court says:

"It is enough, for a decision of the question now before us, to say that we are of opinion that the injunction against bringing suits without leave of the court should be modified, so as not to restrain suits growing out of acts and transactions in respect to the carrying on of the operations of the railroad. The act does not affect suits not having their origin in the operation of the railroad as by the receiver. With respect to all contracts and causes of action originating before the receivership, and all not arising out of an alleged liability of the receiver to the suitor, for some act or transaction of the receiver while carrying on the business of a common carrier, the injunction will stand."

Now, tested by this decision, which cites *McNulta v. Lochridge*, supra, and *Railway Co. v. Johnson*, 151 U. S. 81, 14 Sup. Ct. 250, are the plaintiffs in the state court entitled to maintain their suit against the receiver of this court? This proceeding did not originate in any act or transaction of the present receiver. The suit has its origin in a contract made in 1888, and on account of a dam and pump erected about the same time by the Chattanooga, Rome & Columbus Railroad Company, before this property went into the hands of any combination of railroads or of any receiver. The dam and pump, by all the pleadings and evidence here, seem to have been used continuously since that time by the company and the various receivers of the property. The suit does not seem to be, therefore, for such an act of the present receiver as would authorize its maintenance against him.

It is forcibly contended, also, that, upon the whole case as made here, the suit in the city court of Floyd county necessarily affects the rights of the receiver to hold and operate, and the extent to which he shall hold and operate, a certain part of the property placed in his hands by order of this court. The dam which accumulates the water, the water wheel and the pump which forced the water into a tank, constitute the subject-matter of complaint. The plaintiffs claim that their lands were improperly flooded, and the receiver contends that he is simply using that which passed into his hands as receiver, and that its use is necessary to the operation of the property which he manages by direction of the court. The right to flood this land is an easement which the receiver says appertains to the property placed in his hands by the court. There is much force, therefore, for the contention on the part of counsel for the receiver that this is a case which comes within the proviso to section 3, Act 1887-88, that:

"Such suits shall be subject to the general equity jurisdiction of the court in which such receiver or manager was appointed, so far as the same may be necessary to the ends of justice."

Necessarily this suit involves the acts of the former receivers and of the corporation. Indeed, the answer filed to the present bill practically concedes it as to the former receivers. A determination of that case involves an ascertainment of what rights were originally

acquired, and as to whether and how far these rights from year to year have been exceeded by those controlling and managing the railroad.

But, notwithstanding this strong view of the matter as presented by counsel for the receivers, I am not sufficiently satisfied that an injunction should be granted on this latter ground to authorize it for that reason alone. If the suit was proceeding against Jones for his own acts as receiver, I should be disposed to allow it to proceed to judgment. If the counsel for the plaintiffs in the city court are disposed to proceed against the receiver in that way, and only for his own acts, I will not grant an injunction against the further prosecution of the suit. I am quite clear, however, especially on the authority of and following the case of *Central Trust Co. v. East Tennessee, V. & G. Ry. Co.*, *supra*, that where a suit is proceeding in any other court, against a receiver of the circuit court, for acts other than his own as receiver, the suit should be enjoined. Unless it is made to appear here, therefore, that the suit in the city court will proceed only in the manner indicated, an injunction will issue as prayed for. In the event an injunction should issue, the plaintiffs in the city court, Schlapback and Harbin, by proper intervention in this receivership case, or, indeed, by proper pleadings in this separate case instituted by the receiver against them, can have their claim investigated here, and their rights ascertained and determined, as effectually as in any other court of competent jurisdiction.

CENTRAL TRUST CO. v. GEORGIA PAC. RY. CO. (POND-DECKER LUMBER CO., Intervener).

(Circuit Court, N. D. Georgia. May 12, 1897.)

MEASURE OF DAMAGES—BREACH OF CONTRACT BY CARRIER.

Where the agent of a connecting carrier by mistake has given to a shipper an unusually low rate on a special shipment, and the initial carrier, without knowledge of such rate, breaks its contract of carriage by sending the goods over a different road from that mentioned in the bills of lading, so that the shipper is compelled to pay the usual rate of freight, the initial carrier is liable, because of the breach, only for such damages as might reasonably have been within the contemplation of the parties on making the contract, and not for the whole difference between the regular rate and the special rate, of which it had no notice.

W. R. Hammond, for intervenor.

Glenn, Sloten & Phillips, for defendants.

NEWMAN, District Judge. This is an intervening petition in the above-stated case. It amounts, practically, to a suit by the intervenor, the Pond-Decker Lumber Company, against the receivers operating the Georgia Pacific Railway Company under order of this court. Intervenor proposed to purchase a sawmill located at Tallapoosa, Ga., on the line of the defendant company, for the purpose of removing the same to Gilmore, Ark., on the line of the Kansas City, Ft. Scott & Memphis Railroad. To this end it entered into corre-

spondence with J. J. Fletcher, the general freight agent of the last-named company, who was also the general freight agent of the Kansas City, Memphis & Birmingham Railroad Company, for a rate on this mill, to be taken down and transported from Tallapoosa, Ga., to Gilmore, Ark. It was estimated that there would be at least 6 car loads, whereas, in point of fact, it turned out to be 11 car loads. A rate of 36 cents per 100 pounds was given by Fletcher to the intervenor, and the mill was purchased, taken down, and shipped. Fletcher testifies, and the special master to whom this intervention was referred finds as a fact, that this rate of 36 cents per 100 pounds was given by mistake. It is also conceded that the regular and usual rate on this freight would have been 66 cents per 100 pounds. The rate given was over the Georgia Pacific Railroad Company, from Tallapoosa to Birmingham; thence, by way of the Kansas City, Memphis & Birmingham Railroad, to Memphis; and thence, by way of the Kansas City, Ft. Scott & Memphis Railroad, to Gilmore, Ark., the point of destination. Bills of lading were made out in this way when the freight was shipped at Tallapoosa. The agents of the receivers operating the Georgia Pacific Railroad, instead of delivering the freight at Birmingham to the Kansas City, Memphis & Birmingham Railroad, carried the goods to Winona, a point on the Georgia Pacific Railroad beyond Birmingham, and delivered the same to the Illinois Central Railroad, which intersects the Georgia Pacific Railroad at Winona, and the freight was transported from Winona over the Illinois Central to Memphis, and thence, by the Kansas City, Ft. Scott & Memphis Railroad, to Gilmore.

There is no complaint as to the delivery of the goods at the proper time and in the proper condition at Gilmore, and no fault is found on this score with the diversion or change of route. But, when the freight reached Gilmore, the regular rate of 66 cents per 100 pounds was demanded, which seems subsequently to have been reduced to 64 cents, allowing a reduction of 2 cents on the rate from Memphis to Gilmore over the Kansas City, Ft. Scott & Memphis Railroad. Fletcher, the general freight agent, testifies that, although the rate was given by mistake, he would have protected it if the goods had been shipped, as contemplated, over the Kansas City, Memphis & Birmingham Railroad, and not over the Illinois Central, and he would have called on the other roads to have helped him out and sustained him in protecting this reduced rate; but, as the goods were carried over the Illinois Central, he could not do so. This intervening suit seeks to recover the difference between the 36 cents per 100 pounds, and the 64 cents per 100 pounds actually paid. The evidence fails to show that the agents of the receivers had any notice of the special rate given by Fletcher to the intervenor. A witness did testify that there was such notice, but on cross-examination it developed that his only reason for so stating was that he had been told that such notice was given, showing it to be mere hearsay, which, of course, cannot be considered.

The contention of counsel representing the receivers is that there would be no liability on the part of the receivers to intervenor for damages on account of this reduced rate, especially as it was a

rate given by mistake, unless notice of such largely reduced rate had been given the receivers. Counsel cite, in support of this contention, the case of *Langdon v. Robertson*, 13 Ont. 497, 30 Am. & Eng. Ry. Cas. 23. The facts of that case are quite similar to the facts here. There was a special rate of freight over one route, that named in the bill of lading, and the goods were diverted by the initial carrier, and sent over a different route, and it was held that, while the plaintiffs were entitled to recover, they were only entitled to recover nominal damages. This decision, which reverses the trial court, was placed clearly and distinctly on the ground of want of notice by the initial carrier of the special rate to be allowed the shipper over the route from which the goods were diverted. It is only necessary to quote a paragraph from the opinion to show this, which is as follows:

"The evidence, to my mind, clearly establishes that the defendant, not negligently, but willfully, sent the goods by Duluth, instead of Milwaukee; but they reached their destination as quickly, or more quickly, than they would have done by Milwaukee, and also for less freight, were it not for the plaintiff's special agreement with the railways running from Milwaukee. By his willful disregard of his contract he should properly be held responsible for all damages that, under the law, may reasonably be awarded against him; and, if he had sufficiently specific notice of the plaintiff's contract, so that it might be fairly assumed that the contract he made to carry the goods was made in reference to the contract, the sum awarded by the learned chief justice would be the correct amount."

In the case cited, several authorities bearing on the question at issue were reviewed, and quotations from some of the opinions were given. The result apparently reached may be stated in a brief extract from one of the opinions quoted in this decision, which is as follows:

"A person can only be held to be responsible for such consequences as may reasonably be supposed to be in contemplation of the parties at the time of making the contract."

The rule unquestionably is that, for a breach of contract, such damages only may be recovered as would, in the contemplation of the parties at the time the contract was made, ordinarily and naturally follow the failure to perform the contract.

Booth v. Mill Co., 60 N. Y. 487, is cited and relied on by counsel for the intervenor. The rule laid down in that case may be gathered from that part of the syllabus covering this question, as follows:

"Where the parties to a contract of sale have such knowledge of special circumstances affecting the question of damages as that it may be fairly inferred they contemplated a particular rule for estimating them, and entered into a contract upon that basis, that rule will be adopted."

There is no departure in that case, however, from the general line of authorities on this subject, as to the extent of damages growing out of a breach of contract, as already discussed. The first sentence of the paragraph of the opinion as to the measure of damages in such case is in these words:

"The damages for which a party may recover for a breach of contract are such as ordinarily and naturally flow from the nonperformance."

The contention of counsel for the intervenor is, however, that the circumstances surrounding this shipment were such as to put the receivers on notice that a special rate had been given the shippers. What are these circumstances? First. The unusual character of the shipment. It was an entire sawmill, so far as it could be taken down, and it was all shipped at one time. There were 11 car loads embraced in one shipment. Secondly. It was billed to go a particular route. It is claimed that these circumstances are sufficient to put a railroad man, familiar with the practice of railroads and freight agents in such matters, on notice that a less rate than the regular rate would be given, and that an experienced railroad man would also know that the same could be given without violating the interstate commerce law, or any law, because it was an unusual shipment, and there would be no discrimination or undue preference against other shippers, as no shipment of similar character would ever probably be made.

Conceding that the agents of the receivers were put on notice that something less than the usual rate might be allowed for a shipment of this character, can it be held that they must take notice, and must contract in contemplation, of a mistake on the part of the general freight agent of connecting lines? It is a fact, established in the case, and the master so finds, that the rate given by Fletcher, the general freight agent of the connecting lines, being a remarkably low rate when compared with the regular rate, was made by mistake. It cannot be true that the initial carrier can be held to have had in contemplation, at the time goods are received for carriage, that a connecting line would make a mistake as to the rate on the goods given the shipper. It seems, from the facts in this case, that the general freight agent was under a misapprehension as to what the regular rate was. Now, if this general freight agent, with a knowledge of what the regular rate was, had made some reasonable deduction from it, and the proof showed that such reduction was usual, or even frequent, in a shipment of unusual character, and a recovery was based on such facts, there would be some ground for sustaining it under the rule contended for on the part of the intervenor. Such are not the facts here, however. In the extract which has been given from the opinion of the court in the case of *Langdon v. Robertson*, *supra*, the notice which must be brought home to the initial carrier is alluded to as "specific notice." And in another place in the opinion it is alluded to as "sufficiently specific or precise notice." There might be difficulty, therefore, if it were necessary to do so, in reconciling this Canada case with the New York case cited for the intervenor; but it is unnecessary to do so, for, conceding the doctrine of the New York case to be correct, and that circumstances may put the initial carrier on notice, and that "specific or precise notice" is not necessary, it cannot be held that the receivers in this case could have contracted in contemplation of the fact that the general freight agent of the connecting lines would make a mistake as to the rate, and that a breach of the contract would be followed by unusual damages growing out of such mistake. I am clear, therefore, that the initial carrier, having no knowl-

edge of the special rate—an unusually low rate—given the intervener, cannot, for a mere diversion of the goods, when they were delivered in good condition and in time, be held liable to the extent reported by the special master.

It was claimed on the part of the intervener that, because notice to the receivers was not alleged in the intervention, and the intervening petition was not demurred to, that it was unnecessary for such notice to be proven. The fact that the intervention fails specifically to allege notice did not relieve the intervener from the necessity of making out his case according to law. It seems that, when the intervener proposed to go into this question before the special master, the master ruled, either because he deemed such specific allegation unnecessary, or because there had been a failure to demur to the intervention on that ground, that the evidence should be admitted, and evidence was offered on this subject, as has been mentioned.

Counsel for the intervener has requested, in the course of the argument, that, if the judgment of the court should be against him on the subject of lack of notice to the receivers of the special rate given by the general freight agent of the other lines, he be allowed an order referring the case back to the special master to hear evidence on this subject. Counsel claims that he will be able to show by evidence that such notice was actually given to the receivers' agents. It would, in my opinion, be a violation of the correct practice to allow a case to be referred back to the master to take additional evidence, after it has reached the stage of the present case, except under most unusual circumstances, where there was a clear inadvertence, omission, or mistake of some sort to justify it. An effort was made before the special master to prove notice to the receivers, and the failure to do so was for the reason already stated,—the evidence relied upon was shown to be mere hearsay. The difficulty, confusion, and delay which would result from allowing reference back to the master in a case like this must be apparent. In the case of *Sanges*, intervener in the case of *Central Trust Co. v. Marietta & N. G. Ry. Co.*, a similar request was made and was denied at the last term. 75 Fed. 41.

Thus far I have no difficulty about a proper disposition of this case, but as to what the rights of the intervener are in view of the opinions above expressed is the real difficulty. While I am satisfied that the intervener is not entitled to recover on the basis allowed it by the special master,—that is, for the difference between what it actually paid for freight on the machinery and the rate given by mistake by the general freight agent,—still it seems that there should be a recovery for more than mere nominal damages. The measure of such damages can only be determined by intelligent jurors, or by a master to whom such a case is referred. I think it is true that there should have been in the contemplation of the parties, at the time this contract of carriage was made, the fact that the freight agent would make some reasonable deduction from the usual rate for a shipment of this character, so that this should be the basis, somewhat uncertain though it necessarily is, by which

the rights of the intervener must be determined. There is abundance of authority for damages found in this way. Now, unless the parties can agree as to what would be a proper measure of damages in view of the foregoing suggestion, this case will be referred back to the special master, not to take new evidence, but to find what would be a proper recovery in accordance with the views of the court as herein expressed.

CLARK et al. v. GREAT NORTHERN RY. CO. et al.

(Circuit Court, D. Washington, E. D. May 12, 1897.)

1. RAILROADS—CONTRACT TO GIVE CITY "TERMINAL RATES."

A contract by a railroad company to carry freight to a certain city at "terminal rates" if "the people" of the city would furnish a right of way through the city, alleged to have been accepted by "complainants and others," is unenforceable because of uncertainty as to parties, and as to the service promised, and also for want of mutuality.

2. CONTRACTS—UNCERTAINTY AS TO PARTIES.

A promise by an indefinite and unidentified number of persons to jointly do a particular thing cannot be enforced, as the promisee will not be permitted to proceed against selected persons to compel them to do by themselves what they have only promised to assist others in doing.

3. SAME—WANT OF MUTUALITY.

As a contract, to be enforceable, must be mutual, a contract dependent on a nonenforceable promise cannot itself be enforced.

4. SAME—PARTIES TO ACTION FOR RESCISSION.

Where a number of persons have jointly contributed to procure a right of way for a railroad through a city in consideration of the company's agreement to give certain rates, all must join in a suit to rescind the contract for failure of the company to comply.

Suit by F. Lewis Clark and others against the Great Northern Railway Company and others to enforce specific performance of a contract.

F. H. Graves, for complainants.

Will H. Thompson, for defendants.

HANFORD, District Judge. This is a suit to compel the defendants to specifically perform an alleged contract whereby they promised, in consideration of receiving, free of expense to them, a right of way for their line of railway through the city of Spokane, to give to the people of Spokane and vicinity the benefit of transportation of through freight from the east at terminal rates. The bill of complaint avers that after some preliminary and preparatory work on the part of Mr. James J. Hill, a high official of the defendant companies, by representations made to citizens of Spokane there was a meeting between Mr. Hill and a large number of representative citizens, at which meeting Mr. Hill formally offered to locate the line of the Great Northern Railway through Spokane, and to build said line, and, when completed, to carry freight by said line from its eastern terminal to Spokane at terminal rates, if the people of Spokane would furnish a right of way through the city free of expense to the railway companies; that the complainants and others accepted

said offer, and agreed to procure said right of way, and that they each made contributions of money or land, and solicited contributions from others, and in that way procured and paid for said right of way, and caused the same to be conveyed to the defendants, except a portion thereof not yet definitely located; and that the defendants, with full knowledge of the facts, have accepted said right of way, and have built upon part of it, and now occupy and use the same. The complainants aver that they are able, willing, and ready to fully perform their agreement in such manner as the court may decree, and that the defendants, having completed their line of railway to Seattle in 1893, have nevertheless refused, and still refuse, to deliver freight at Spokane from eastern points at terminal rates, but, on the contrary, in disregard of the promise so made by Mr. Hill, they persist in charging rates to Spokane much in excess of the rates on through shipments to Seattle and other places having the benefit of terminal rates. Therefore the complainants pray for a decree compelling the defendants to specifically perform said alleged contract, or, if that is impractical, then that the right of way conveyed as aforesaid be forfeited and conveyed back to the donors. The case has been argued and submitted upon a demurrer to the bill.

I will not volunteer an opinion upon questions which were argued, but which I find do not necessarily have to be considered in arriving at my conclusion. My opinion is adverse to complainants on two points, and on these grounds the demurrer must be sustained. In the first place, I find that the contract as pleaded is not enforceable, because it is too indefinite and uncertain as to parties, and as to the service promised on the part of the railway companies, and for want of mutuality. The fundamentals of a legal contract are parties, subject-matter, consideration, and assent. There can be no contract if any one of these elements is lacking, and, to enforce a contract by legal proceedings, it is necessary to set forth the contract with precision and certainty, so as to show a complete contract. Now as to parties. A promise made to everybody is not a promise to any person; and a promise by a multitude, or an indefinite and unidentified number of individuals, to jointly do a particular thing, cannot be enforced. In such a case the promisee will not be permitted to proceed against selected persons to compel them to do by themselves what they have only promised to assist others in doing. Then, to make a valid contract, it must be assented to; that is, there must be a meeting of minds, so that each party bound gives his assent to the same thing. It is necessary, therefore, that the extent and limitations and conditions of the offer made on one side and accepted on the other shall be defined, so that it may appear that something definite has been agreed to by all the parties. And a contract, to be enforceable, must have the quality of mutuality; for one or several persons who could not be compelled to perform a promise may not compel others to fulfill a promise dependent upon such nonenforceable promise. To whom did Mr. Hill promise that the railroad would carry freight at terminal rates, and who agreed to furnish the right of way? We must look to the bill of complaint to find the answer to these questions, and there we can only find that the sev-

eral complainants and others accepted Mr. Hill's offer, and agreed to furnish the right of way, and contributed to that object, and caused the right of way to be conveyed. But whether those who accepted the offer and agreed to furnish the right of way were to have the benefit of terminal rates for themselves, or whether all the people then living in Spokane and the surrounding country should share equally in the benefit, or whether the community as it was then constituted, together with all who have since cast in their lot and become members, and all who are yet to come, are to be favored with terminal rates, cannot be determined. But whether the broadest or the narrowest rule of construction be applied, or the middle ground be taken, it is equally impossible to find that the parties on the Spokane side of the agreement ever placed themselves in a situation to be compellable to do anything. For the same reason, they cannot maintain a suit to enforce the contract against the railroad party. In the second place, the complainants are not authorized to maintain a suit to recover the right of way. Others having equal rights with them in the subject may elect to retain whatever advantage there may be to them of having this transcontinental railway enter Spokane, even at the expense of waiving performance of the promise as to terminal rates. As such election by any one of the contributors must necessarily defeat a recovery, it is necessary to the maintenance of a suit with that object that every one of the contributors should be joined as a plaintiff. I consider that the bill, whether regarded as one for specific performance or for rescission of the contract, cannot be sustained, and therefore it must be dismissed.

DARST v. MATHIESON ALKALI WORKS.

(Circuit Court, W. D. Virginia. October 31, 1896.)

1. MASTER AND SERVANT—WRONGFUL DISCHARGE—MEASURE OF DAMAGES.

When suit is brought and trial is had before the expiration of the stipulated term of service to recover damages for a breach of contract by a wrongful discharge, the recovery cannot be for the whole amount of salary for the entire term, but only for the amount thereof to the date of trial, less such sum as plaintiff has earned, or might with reasonable diligence have earned, from the time of discharge to the time of trial.

2. SAME—GROUNDS FOR DISCHARGE.

The use by a salaried employé of a corporation of insulting, disrespectful, or abusive language, to any officer or superior employé thereof, in connection with the duties of the former, or his refusal to obey, or his advising other employes to disobey, the orders of any superior, is good ground for discharging him.

Daniel Trigg, for plaintiff.

White & Penn, for defendant.

PAUL, District Judge (charging jury). This is an action brought by the plaintiff against the defendant company to recover damages resulting from the wrongful discharge of the plaintiff from the service of the defendant company. The declaration is as follows:

"E. A. Darst, plaintiff in this cause, who is a citizen of the state of Ohio, complains of the Mathieson Alkali Works, a corporation under the laws of, and a citizen of, the state of Virginia, defendant, being summoned of a plea of trespass on the case, for that heretofore, to wit, on the 24th day of July, 1895, at Saltville, in the state of Virginia, the said defendant made and entered into an agreement and contract with the plaintiff, by which it agreed from and after the 17th day of July, 1895, and thenceforward for the period of three years, to pay to the plaintiff the sum of thirty-one hundred dollars annually, in equal monthly payments, and did provide in the said agreement that the first payment to be made in August, to wit, in August, 1895, was to be for the last fifteen days only of July, 1895; and, in consideration of the said agreement and undertaking on the part of the defendant, the said plaintiff did agree to give his entire time and attention and his best services to the defendant, in the supervision and direction of the boring and operation of its brine wells, and the general management of its brine supply, subject to the direction and approval of the defendant; and that the plaintiff's efforts should always be employed for the best interests of the company; and that any failure on his part to carry out the intent of the said agreement should constitute a breach of the same. And in order that the plaintiff might better do this, viz. better do and perform the said agreement on his part, the plaintiff agreed that he would bring his family to live in Saltville, as soon as the said defendant could furnish him quarters. And, as a condition of said agreement, it was provided that the outfit then owned by the plaintiff, and used by him for boring wells on the defendant's property, should be purchased within one month from the date of said agreement by the defendant, at a price to be mutually agreed, and that pending said settlement the said agreement should be deemed to be in effect in the same way as if no conditions were named. And the plaintiff avers that he on his part was and has been at all times ready and willing to give, and up to the time of the committing of the breach of the said named contract and agreement, as hereinafter set forth and complained of, on behalf of the defendant, did, pursuant to said agreement, give, his entire time and attention and his best services to the said defendant, in the supervision and direction of the boring and operation of its brine wells and the general management of its brine supply, subject to the direction and approval of the defendant, and did always employ his efforts for the best interests of the defendant, and did on his part carry out the intent of the said agreement, and did bring his family to live at Saltville as soon as the said defendant furnished him quarters, and did in all things do, keep, and perform the said agreement on his part. But, the plaintiff avers, the said defendant did not keep and perform the said agreement on its part, but did break and refuse to perform the same, although often requested so to do, and on the ——— day of August, 1896, willfully, and without any just or reasonable cause or excuse, dismiss the plaintiff from its service, and did refuse to allow him to continue longer in its employment, or to work or operate further under its said contract and agreement, or to fulfill the same on its part; whereby, and by reason of which said action of the said defendant, the said plaintiff hath been deprived of his employment, and hath been injured, and hath sustained damage to the amount of \$8,000. And therefore the plaintiff brings his suit," etc.

The action grows out of the following contract for hiring and service:

"This agreement, dated this 24th day of July, A. D. 1895, at Saltville, Va., between the Mathieson Alkali Works, hereafter called the company, of the first part, and E. A. Darst, of the second part, witnesseth: (1) That the company, from and after 17th day of July, 1895, and thenceforward, for the period of three years, will pay E. A. Darst the sum of thirty-one hundred dollars annually in equal monthly payments; the first payment, however, to be made in August, for the last fifteen days only of July. (2) E. A. Darst will give his entire time and attention and his best services to the company, in the supervision and direction of the boring and operation of its brine wells, and the general management of its brine supply, subject to the direction and approval of the company. His efforts shall always be employed for the best interests of the company, and any failure on his part to carry out the intent of this agreement

shall constitute a breach of the same. In order that he may the better do this, he will bring his family to live at Saltville, as soon as the company can furnish him quarters. It is a condition of this agreement that the outfit now owned by E. A. Darst, and used by him for boring wells on the company's property, shall be purchased within one month by the company, at a price to be mutually agreed. Pending such settlement, however, this contract shall be deemed to be in effect in the same way as if no condition were named. In testimony whereof, the parties hereto have set their signatures, the day and year first above mentioned, the Mathieson Alkali Works signing by its assistant treasurer, John Russell Gladding.

"[Signed]

Mathieson Alkali Works,

"By John Russell Gladding, Asst. Treas.
E. A. Darst.

"[Signed]

"Witness as to both signatures:

"[Signed] Chas. M. Perry."

All of the evidence for the plaintiff and for the defendant being given to the jury, counsel for the plaintiff requested the court to instruct the jury as follows:

"The court instructs the jury that if they believe from the evidence that the plaintiff, E. A. Darst, was employed by the defendant, the Mathieson Alkali Works, under a contract for the term of three years, at a salary of \$3,100 per year, payable monthly; and if they further believe that the plaintiff did keep and perform the stipulations of said contract on his part, and that he was wrongfully, and without sufficient cause, discharged from the service of said defendant on the 4th day of August, 1896, and that he was paid his salary up to the date of his said discharge,—they shall find for the plaintiff. And the jury is further instructed that the plaintiff's damages is prima facie the full amount called for by the contract which remains unpaid, subject to such reduction as the jury may believe from the evidence that the defendant is entitled to by reason of any probability of the plaintiff obtaining other employment in the same line called for by the contract, if they have proof upon which to estimate such probability, which is incumbent upon the defendant to prove. If the jury cannot, from the proof, ascertain so as to estimate such probability, they may then render a verdict for the full amount of the unpaid balance called for by the contract. But the measure of damages is a question for the jury, under all the circumstances of the case."

Counsel for the defendant object to this instruction, on the ground that it does not correctly state the law as to the measure of recovery, where, as in this case, the action to recover damages for a wrongful discharge from service is brought before the expiration of the term of hiring.

The defendant requests the court to give the jury the following instruction, which, it claims, correctly states the law:

"If the jury believe from the evidence in this cause, in the light of the instructions given below, that the plaintiff is entitled to recover, then the court instructs the jury that the measure of recovery will be the amount which would have been due the plaintiff under the contract down to this date, if he had continued in the service of the defendant company."

These conflicting views as to the measure of recovery present the question for the court's decision. The confusion of the decisions and of the text writers on this subject is much greater than we would expect to find in a question that has necessarily been many times before the courts. Much of this confusion, it seems to the court, is to be found in the text-books from the failure of the writers to clearly present the distinction between an action brought after the expiration of the term of service and one brought during its continuance. The principle on which an employé who has been wrongfully discharged

is allowed to recover is thus stated by Justice Story in *Emerson v. Howland*, 1 Mason, 45-53, Fed. Cas. No. 4,441:

"In actions for wages brought against the employer by the servant or employé discharged without cause before the end of the contract of service, a compensation is intended to be allowed, which shall be a complete indemnity for the illegal discharge; and this is ordinarily measured by the loss of time and the expense incurred by the party."

Sedg. Dam. (4th Ed.) p. 396, note 1. In this note it is said:

"It is the actual loss, and not prospective damages, which is recoverable in these actions." "This doctrine of compensation for actual loss runs through all the authorities on this subject, and it is the fixed principle in this class of cases."

In 1 Lawson, Rights, Rem. & Prac. pp. 483, 484, § 276, after referring to the former doctrine, the measure of the servant's recovery is thus stated:

"And it is now universally held that the measure of the servant's recovery is the sum he was to receive during the term, less such sums as he may have earned or could have earned by reasonable diligence in obtaining other employment. Where the servant is employed for a term, and wrongfully discharged before the end of it, the presumption is that he is entitled to recover for the whole term, and the burden is on the defendant to show a legal excuse for not paying him the full amount for the whole term. The defendant must prove 'either that the plaintiff was actually engaged in other profitable service during the term, or that employment was offered to him and he rejected it.' If the servant finds employment at the same or higher wages, he is entitled to recover for the time actually lost; and, if he finds employment at lower wages, he is entitled to recover the difference between the amount earned and what his master had agreed to pay him. The servant may recover wages during the time he is idle, even though in his second employment he gets higher wages than under his first contract, and therefore in all he is better off than though he had not been discharged."

This doctrine manifestly applies to a case where the action is brought after the expiration of the term of service, for in the same section it is said:

"If the servant sue for the breach before the term expires, he can only recover damages up to the time when he sues; but, if he waits until the end of the term, he can recover full damages for the whole time."

In Wood, Mast. & S. p. 260, the text writer, after stating the rule in England, says:

"But I am aware of no case in this country in which a similar rule has been adopted, but, upon the contrary, the drift of American decisions is opposed to any such rule of recovery, and limits the judgment to the servant's actual loss up to the day of trial; and it would be an unsafe experiment in a case where there is a prospect of any considerable loss of time to bring an action before the period of service has expired, as there can be only one action for damages under any circumstances."

Gordon v. Brewster, 7 Wis. 355, is a leading case on this question, and is cited with approval in 1 Lawson, Rights, Rem. & Prac. p. 485, note, and by Sedg. Dam. p. 396, note. In this case the supreme court of Wisconsin says:

"Had the respondent (the plaintiff in the court below) seen fit to wait before bringing his action until the period had elapsed for the complete performance of the agreement, the measure of compensation could then have been easily arrived at. * * * But, as the case now stands, we think he was only entitled to recover his salary on the contract down to the day of trial, deducting there-

from any wages which he might have received or might have reasonably earned in the meantime. This rule appears to us to be the most equitable and safe that occurs to our minds, and the one most likely to effect substantial justice between the parties."

This is the rule the court will adopt in the case at bar. It does not see how it can adopt any other so as to guide the jury to a correct conclusion. There is no difficulty in applying the rule as to the measure of recovery where the term of service has expired. In such case the presumption is that the plaintiff is entitled to recover what he was to receive for the whole term, less such sums as he may have earned, or could have earned by reasonable diligence in obtaining other employment. In such case the whole facts are before the jury, the period of employment, the price to be paid for the service, the breach of the contract, the wages earned, or that could with diligence have been earned, by the plaintiff between the time of the breach and the expiration of the term of service. The jury has before it these substantial facts, from which they can safely compute the plaintiff's actual loss, and upon which they can safely base their verdict. But in the case at bar there are no such definite, tangible facts to be submitted to the jury. In this case there remain about 21 months of the unexpired term of service. There is no evidence before the jury on which they can make any estimate of what the plaintiff will probably be able to earn, or could, with reasonable diligence, earn, during these ensuing 21 months. He may find ready and profitable employment, or he may not find it. How can the jury enter this unexplored field of the future without facts or principles to guide them, but left to the vaguest speculation, and arrive at a just conclusion as to the plaintiff's actual loss from the breach of the contract of service? A verdict rendered under such circumstances would carry with it none of the sanctity that attaches to the verdict of a jury when it is based upon the substantial facts that are required to sustain it. If the plaintiff wished to recover as damages the whole amount remaining unpaid of the salary, and for the full term provided in the contract of service, he should have waited, before bringing his suit, until the expiration of the term of service, when he could present his case to the jury, with the evidence of accomplished facts to show the measure of his actual loss by reason of the breach of the contract of service with the defendant company.

The instruction asked for by the plaintiff is refused, and in lieu thereof the following instruction will be given to the jury by the court:

"The court instructs the jury that if they believe from the evidence that the plaintiff, E. A. Darst, was employed by the defendant, the Mathieson Alkali Works, under a contract for the term of three years, at a salary of \$3,100 per year; payable monthly; and if they further believe that the plaintiff did keep and perform the stipulations of said contract on his part, and that he was wrongfully, and without sufficient cause, discharged from the service of said defendant, on the 4th day of August, 1896, and that he was paid his salary up to the date of his said discharge,—they shall find for the plaintiff. And the jury are further instructed that the measure of recovery in this case, if any, will be the amount which would have been due the plaintiff under the contract down to this date if he had continued in the service of the defendant company, less such sum as he has earned, or with reasonable diligence might have earned, from the time of the breach of the contract to the present."

The first instruction asked for by the defendant it is unnecessary to give, because the doctrine it lays down is contained in the instruction just given by the court. The second and third instructions asked for by the defendant will be given, and are as follows:

"If the jury believe from the evidence that on or about the 29th of July, 1896, the plaintiff, E. A. Darst, was guilty of the use of insulting, disrespectful, or abusive language to any officer or superior employé of the defendant company, or about them, or either of them, and in their presence and hearing, and connected with the duties of the said plaintiff as an employé of the defendant company; or if they believe from the evidence that, a few days before the plaintiff's discharge, he refused to obey the orders of any superior in position in the employment of defendant company, in matters connected with his duties as an employé of the defendant company; or if they believe from the evidence that on or about the 29th of July, 1896, the plaintiff advised any employé of the defendant company not to obey an order of a superior in employment of the said defendant company, given by said superior in a matter connected with the duties of the said employé,—then, and in either event, the court instructs the jury that such conduct on the part of the plaintiff was a sufficient cause for his discharge, and they must find for the defendant, even though they may further believe that the plaintiff was not, in fact, discharged by the defendant company for these causes, or either of them.

"If the jury believe from the evidence that Charles M. Perry was the assistant general manager of the defendant company; and that F. J. Lucas had general supervision of all departments of the defendant's works at Saltville, Virginia, outside of the alkali works proper, including the department of which the plaintiff, E. A. Darst, was foreman; and that on or about the 29th day of July, 1896, in a conversation between the said Charles M. Perry, F. J. Lucas, and the plaintiff, concerning matters immediately connected with the duties of the said plaintiff, as an employé of the defendant company, the said plaintiff was insulting, disrespectful, or abusive to the said Charles M. Perry, or the said F. J. Lucas, or either of them; and that on the following day the said F. J. Lucas, in the discharge of his duties, went to one of the wells operated by the plaintiff, and whilst there, giving the plaintiff instructions in reference to the matters embraced in the conversation of the day before, or in reference to certain other duties of the plaintiff, one Howard Darst, a brother of the plaintiff, and working under him, came up, pulled the said F. J. Lucas from his horse, threw him upon the ground, and beat him, in the presence of the said plaintiff and other employés of the defendant company under said plaintiff; that the plaintiff stood by, and, seeing the fight, failed to interfere, or refused to interfere, or said to the said F. J. Lucas, who appealed for help, 'Help yourself,' or words to that effect,—then the court instructs the jury that this was such conduct on the part of the plaintiff as justifies his discharge, and they must find for the defendant, even though they further believe from the evidence that the plaintiff was not, in fact, discharged for this cause."

Verdict for the defendant.

N. K. FAIRBANK & CO. v. CINCINNATI, N. O. & T. P. RY.

(Circuit Court of Appeals, Sixth Circuit. May 17, 1897.)

CARRIERS—LOSS OF GOODS—EXCEPTIONS IN BILL OF LADING.

In a clause in a bill of lading exempting the carrier from liability for "loss or damage arising from * * * collisions, explosions, accidents to boilers or machinery, * * *" the word "machinery" applies only to the group of mechanical parts connected with the boiler and steam supply, by which power is generated and applied, and the vessel or train of cars is propelled, and it does not include an axle of one of the cars in a train. Accordingly *held* that under such a bill of lading the carrier was not exempted from liability for damage caused by the breaking of an axle of a car.

In Error to the Circuit Court of the United States for the Western Division of the Southern District of Ohio.

The action below was brought by N. K. Fairbank & Co. against the Cincinnati, New Orleans & Texas Pacific Railway Company to recover damages for the loss of four tanks of oil alleged to have been destroyed while in transportation over the defendant's railroad. On May 4, 1888, the Southern Cotton-Oil Company shipped from Atlanta, Ga., consigned to N. K. Fairbank & Co., at Chicago, Ill., five tank cars loaded with cotton-seed oil. All of them were shipped under bills of lading of the same form issued by the East Tennessee, Virginia & Georgia Railway Company, providing that they should be carried over the East Tennessee, Virginia & Georgia Railway, the Cincinnati, New Orleans & Texas Pacific Railway, and other roads. The bills of lading provided that the oil should be carried by "the E. T., V. & G. Railway to * * *, thence by connecting rail or other carrier via * * *, until they reach the station or wharf near their destination." The bill of lading contained the following provisions which have a bearing in this case: "It is mutually agreed, in consideration of the rates herein guaranteed, that the liability of each carrier, as to goods destined beyond its own route, shall be terminated by proper delivery of them to the next succeeding carrier. No carrier, or the property of any, shall be liable for * * *, nor for any loss or damage arising from any of the following causes, viz.: Fire, from any cause, on land or water, or while awaiting shipment, transshipment or delivery, or during transportation; jettison; ice; freshets; floods; weather; pirates, robbers, or thieves; acts of God or of the country's enemies; riots, strikes, mobs, or combinations; collisions; explosions; accidents to boilers or machinery; stranding; straining; any accident on or perils of the seas or other waters, or of steam or inland navigation; restraints of government; legal process; claims of ownership by third parties; detention or accidental delay; want of proper cooperation or mending; insufficiency of package in strength or otherwise; rust; dampness; loss in weight; leakage; breakage; sweat; blowing; bursting of casks or packages from weakness or natural causes; evaporation; vermin; frost; heat; smell; contact with or proximity to other goods; natural decay or exposure to weather; nor for the condition of baling of hay, hemp, or cotton, or for loss or damage of any kind on goods whose bulk or nature requires them to be carried on open cars or on deck, or for the condition of packages or any deficiency in the contents thereof if receipted for by consignees as in good order." The bill of lading contained this further provision: "This bill of lading is signed for the different carriers who may be engaged in the transportation, severally, not jointly, and each of them is to be bound by, and have the benefit of, all the provisions thereof as if signed by it, the shipper, owner, and assignee." The cars, after being loaded, proceeded to Chattanooga, and were delivered to the defendant company on May 5th. At about 2 o'clock on the morning of May 7th the train containing these cars was wrecked on defendant's line, and four of the tank cars were so damaged that the oil contained therein was spilled, and totally lost. The market value of the oil at the time, for the purposes of this suit, was agreed to be \$5,270.53. This suit was brought to recover for the loss of the four tanks of oil. The third defense of the answer set up the conditions in the bill of lading heretofore stated, and averred that the loss of the oil was solely due to an accident to certain machinery, to wit, the axle of a car in defendant's train in which said four tanks of oil were being transported, which axle, without any fault or negligence on the part of this defendant, failed, and broke down, under said car, whereby said four cars, being in the rear thereof, were derailed, and the contents thereof were lost. The case was twice tried. In the first trial the court directed a verdict for the plaintiff. The trial court was of opinion that it had erred in directing a verdict for plaintiff, and on motion granted a new trial. In the second trial the court directed a verdict for the defendant, and entered judgment upon the verdict. This writ of error is prosecuted to reverse the judgment. At the trial, there was no evidence tending to show that defendant was guilty of a want of care in the matter of the axle. It broke because of an internal defect in the material which external examination could not have discovered.

Ramsey, Maxwell & Ramsey, for plaintiff in error.
 Judson Harmon, Edward Colston, A. W. Goldsmith, and Geo.
 Hoadly, for defendant in error.

Before TAFT and LURTON, Circuit Judges, and HAMMOND, J.

TAFT, Circuit Judge (after stating the facts as above). The learned judge at the circuit, finding from the undisputed evidence that the loss of the oil had been occasioned by the breaking of an axle, held that such a cause was an accident to machinery, within the exemption of the bill of lading, and so directed a verdict for the defendant. The construction thus put upon the exemption in the bill of lading presents the only question which we deem it necessary to consider. It is well settled that exemptions in favor of a common carrier in bills of lading are to be strictly construed against the carrier, and that any doubt or ambiguity therein is to be resolved in favor of the shipper. *Black v. Transportation Co.*, 55 Wis. 319, 13 N. W. 244; *Railway Co. v. Talbot*, 39 Ark. 524; *Norman v. Binnington*, 25 Q. B. Div. 475, 477; *Taylor v. Steam Co.*, L. R. 9 Q. B. 546, 549; *Burton v. English*, 12 Q. B. Div. 218, 224; *Cream City R. Co. v. Chicago, M. & St. P. Ry. Co.*, 63 Wis. 93, 23 N. W. 425. "And when the particular dangers or risks against which the carrier has specifically guarded himself in his receipt are followed by more general and comprehensive words of exemption, the latter are to be construed to embrace only occurrences ejusdem generis with those previously enumerated, unless there be a clear intent to the contrary." *Hutch. Carr.* §§ 275, 276; *Hawkins v. Railway Co.*, 17 Mich. 57; *The Caledonia*, 157 U. S. 124, 15 Sup. Ct. 537. It is perfectly manifest from a reading of the bill of lading and the exemption thereof that the bill was designed as a contract for both land and water transportation, for the clause runs:

"Fire from any cause, on land or water, or while awaiting shipment, transshipment, or delivery, or during transportation; jettison; ice; freshets; floods; weather; pirates, robbers, or thieves; acts of God or the country's enemies; riots, strikes, mobs, or combinations; collisions; explosions; accidents to boilers or machinery; straining; any accident on or perils of the seas or other waters, or of steam or inland navigation," etc.

Light is thrown upon the meaning of the phrase "accidents to boiler and machinery" if we consider it as applied to a ship as well as to a freight train. The juxtaposition of the words "boiler" and "machinery" certainly suggests that machinery refers to the group of mechanical parts connected with the boiler and steam supply by which power is generated and applied, and the vessel is propelled through the water. And the term must have the same limitations when applied to a train of cars. In this light, "machinery" only includes the mechanical instrumentalities present in the engine room of the steamer or the locomotive of the train. The cars and their appurtenances are the things which are being moved or drawn by the machinery. Parts of the car are not, in our opinion, in the common acceptation of the term, embraced within the term "machinery," especially when that is associated with the term "boilers." It is true, it may be difficult to draw the line as to certain

devices used upon the cars which are directly connected with the engine, as, for instance, the appliances necessary to the operation of the Westinghouse air brake. These are directly connected with the engine, and yet are a permanent part of the car. But, while doubtful cases may be suggested, we are very clear in our opinion that those devices and parts of a car which have no physical operation and connection with the locomotive except by means of the cars of the train and the couplers between them are not within the meaning of the term "machinery" in the phrase "accidents to boilers and machinery," any more than the plates on the hull of a steamship can be said to be part of its machinery. The wheels and axle are necessary to the movement of the car, just as the hull and plates on the ship are necessary to its progress through the water; and in a wide sense they are a part of the machinery necessary to render the transportation of the train or ship possible. But they certainly would not be so construed except in cases where the most liberal rule of construction is to prevail. There is very little authority upon this question, although the form of the bill of lading herein seems to have been a very old one.

In Porter on the Law of Bills of Lading (section 203) it is said that "the phrase 'damage from machinery' will not cover a loss caused by the breaking of tackle used to discharge cargo. The word 'machinery,' it has been said, includes only the machinery by which the vessel is propelled." In support of this the author cites the Case of Galley of Lorne, Mitch. Mar. Reg., Feb. 11, 1876, and Legg. Bills Lading, p. 179.

We do not think that the cases cited by the counsel for the appellee, and which were relied on by the learned judge at the circuit, support the conclusion reached, because in them the term was used with reference to a subject-matter quite different from that in the case at bar. In *Railway Co. v. Brooks*, 84 Ala. 138, 4 South. 289, the question was whether an injury in the eye, received by a railroad employé, caused by a scale flying from the iron rail of the track when struck with a defective hammer, was not an injury caused by reason of a defect in the condition of the ways, works, machinery, or plant connected with or used in the business of the master or employer, and so within the statute to define the liabilities of employers or workmen for injuries received by the workmen while in the service of the employer. The court held that the hammer was not a part of the machinery within the statute, but in the course of the discussion it gave a wide definition to the term "machinery,"—a definition certainly wide enough to include the axles of cars in a train. The judge said:

"In construing words used in a statute, reference should be made to the subject of legislation, and if they have acquired a defined, popular signification when referable to such subject the presumption is that they were used in such sense by the legislature. A machine is a piece of mechanism, which, whether simple or compound, acts by a combination of mechanical parts, which serve to create or apply power to produce motion, or to increase or regulate the effect. As used in the patent act, it has been defined to be 'a concrete thing, consisting of parts, or of certain devices or combination of devices.' *Burr v. Duryee*, 1 Wall. 531. Primarily, machinery means the works of a machine,—the combination of the several parts to put it in motion. But we do not understand that the term was used in the statute in its primary sense, but, having a

more enlarged signification, should be construed as so used, nothing appearing to show that it was intended to be used in its primary or restricted sense. Thus understood, the term 'machinery' embraces all the parts and instruments intended to be and actually operated from time to time exclusively by force created and applied by mechanical apparatus or contrivance, though the initial force may be produced by the muscular strength of men or animals, or by water or steam, or other inanimate agency. *Seavey v. Insurance Co.*, 111 Mass. 540. The carding, spinning, and weaving machines, together with the instrumentality by which the prime motive power is created or applied, constitute the machinery of a cotton mill. When cars, though used at times, and at other times detached, are formed into a train, to which the propelling force is imparted by means of a locomotive, the entire train constitutes machinery connected with or used in the business."

The association of the word "machinery" with the words "ways and plants" was quite enough to justify the court in giving the term an enlarged signification in the case cited, but the reasoning of the court shows that in a case where the rule of construction is a narrow one the term would not embrace either the car body, car-wheels, or the car axles, but only that combination of mechanical parts connected with the locomotive and boiler for the propelling of the train.

In the case of *Seavey v. Insurance Co.*, 111 Mass. 540, the question was of the construction of a contract of insurance in which the property insured was described as "the engine and machinery contained in a two-story frame building for the manufacture of tinware," etc. The issue was whether this language included 642 forming and cutting machines, which were dies made of iron or steel, and used to give form to the various utensils made in the business. These dies were capable of being removed from the press, and others were substituted in their place as often as the product of manufacture was to be varied. It was decided that in such a policy the word "machinery" might fairly be held to cover all the implements intended to be operated by the machinery in the business of the insured, and which were usually operated in the regular and ordinary prosecution of the business described in the policy. It will be observed that in this case the rule of construction was favorable to the assured, and that the words "for the manufacture of tinware" justified a broad interpretation of the word machinery.

In *Com. v. Lowell Gaslight Co.*, 12 Allen, 75, the question was whether, under a tax law which imposed taxation upon the market value of the capital stock of the gas company, but permitted this amount to be reduced by deducting the value of the real estate and machinery for which the corporation was assessed in the town or city in which it was established and carried on its business, the mains or pipes laid down in the streets to distribute the gas, and the gas meters were to be regarded as machinery of the corporation; and it was held that they were, the court saying:

"Indeed, in a broad, comprehensive, and legitimate sense, the entire apparatus by which gas is manufactured and distributed for consumption throughout a city or town constitutes one great integral machine, consisting of retorts, station meters, gas holders, street mains, service pipes, and consumers' meters, all connected and operating together, by means of which the initial, intermediate, and final processes are carried on from its generation in the retort to its delivery for the use of the consumers."

It is hardly necessary to point out that the almost figurative sense in which the term "machinery" is here used in favor of the taxpayer, and to support a reasonable construction of the statute, can have no application to the case at bar in which the word "machinery" is to be given a specific and restricted meaning.

Our conclusion upon this point renders it unnecessary for us to consider the remaining argument pressed upon us by counsel for the plaintiff, to wit, that a common carrier by train is held to an implied warranty of the sound condition of the cars in which the merchandise transported is carried, analogous to the implied warranty of seaworthiness to which the common carrier by sea is held, and that in such cases the exception as to accidents from machinery in the bill of lading applies only to accidents after the transportation has begun, and does not include those which arise from defects, though hidden, if in existence before shipment commences. The judgment of the court below is reversed, with directions to order a new trial.

EVEY v. MEXICAN CENT. RY. CO., Limited.

(Circuit Court of Appeals, Fifth Circuit. April 12, 1897.)

No. 544.

1. CONFLICT OF LAWS—ACTION IN FEDERAL COURT FOR INJURIES IN ANOTHER COUNTRY—MASTER AND SERVANT.

The right of an employé of a railroad company, injured in the republic of Mexico by the negligence of the company, to recover in a civil action damages for such injury under the law of that republic, may be enforced in a federal court of the state of Texas having jurisdiction of the parties and of the subject-matter; that law being neither so vague and uncertain, nor so dissimilar to the law of the state of Texas, as to prevent it from being so enforced, and both parties being citizens of the United States.

2. SAME—DISSIMILARITY IN LAW.

A dissimilarity between the law of another country and the law of a state, in the federal court of which it is sought to be enforced, will not prevent such enforcement, unless the dissimilarity is so great as to conflict with the settled public policy of that state.

3. SAME—RIGHT TO SUE WHERE INJURY OCCURRED.

The fact that a person injured by the negligence of a railroad company in another country might sue in that country is not sufficient to prevent him from suing in a United States court, particularly where the company owns and operates part of the same line of railroad in the state in which the suit is brought.

4. SAME—RES JUDICATA—SECOND SUIT FOR ADDITIONAL DAMAGES.

The provision of the Penal Code of Mexico (article 306) that the required condition that the damages and injuries shall be actual "shall not prevent that the indemnization of subsequent damages and injuries be exacted by a new suit when they shall have accrued," has reference only to damages for injuries that develop after the first suit.

5. SAME—MATTERS PERTAINING TO REMEDY.

The fact that the law of another country provides for the recovery in a second suit of damages for injuries which develop after the first suit does not prevent the person injured from suing in a court of this country, in which all damages must be recovered in one suit, as that provision of the foreign law relates merely to the remedy, and cannot govern here.

6. SAME—MATTERS OF PROCEDURE

The provision of the Penal Code of Mexico (article 313) that the judges "shall endeavor that the amount and terms of payment be fixed by agree-

ment of the parties" relates merely to procedure, and not even to the remedy, and therefore does not control in an action in a United States court arising under the law of Mexico.

7. SAME—CRIMINAL LIABILITY.

The fact that acts of negligence for which the laws of Mexico give a civil remedy constitute also a crime under the laws of that country does not prevent the person injured from maintaining a civil suit therefor in a United States court, the liability not depending on the criminal prosecution or conviction of the defendant.

8. SAME—PROVISIONS CONTRARY TO POLICY OF OUR LAW.

The fact that the provision of the Penal Code of Mexico (article 323) that the judge may award, as "extraordinary indemnity," any sum that he may determine, considering the "social position" of the person injured, is against the policy of our law, is no obstacle to a suit in a United States court to enforce a right given by the law of Mexico, there being no prayer for such extraordinary indemnity.

9. SAME—WANT OF PRECEDENTS IN FOREIGN COUNTRY.

The fact that the Mexican courts are not governed by precedent, and have no reports of adjudicated cases, is not an obstacle to an action in a United States court to enforce a right given by the laws of Mexico.

10. FEDERAL COURTS—DECISIONS OF STATE COURT.

The decisions of a state court that a law of another country is opposed to the policy of the state, and cannot be enforced there, are not controlling in the federal courts, the question of international comity being controlled by international law and custom.

In Error to the Circuit Court of the United States for the Western District of Texas.

Action by Edward Evey against the Mexican Central Railway Company, Limited, to recover damages for personal injuries. Petition dismissed on special exceptions, and plaintiff brings this writ of error.

To make an intelligent statement of this case, it is necessary to give the plaintiff's first amended original petition and the defendant's special exceptions thereto in full, as follows:

Now comes the plaintiff, Edward Evey, and, by leave of court first obtained, files this, his first amended original petition, in lieu of his original petition heretofore filed, and alleges that the plaintiff, Edward Evey, is a citizen of, and resides in, El Paso county, Texas, and that the defendant is a railway corporation duly incorporated under the laws of, and a citizen of, the state of Massachusetts, doing business in El Paso county, Texas, and has, and at all times hereinafter mentioned has had and maintained, an office and agent in El Paso county, Texas; that the said defendant, the Mexican Central Railway Company, Limited, owns and operates, and at all times hereinafter mentioned has owned and operated, a line of railway from the City of Mexico, in the republic of Mexico, to and into El Paso county, Texas, carrying on and conducting the ordinary business of a railway company, as a common carrier of goods and passengers for hire; that on the 12th day of July, 1895, and for a long time next prior thereto, plaintiff was an employé of said defendant, engaged in the employment of said defendant company as a locomotive engineer, and was engaged in the running of an engine to and fro over its railway for defendant upon the division known and commonly called the "Mexico Division," and which comprises that portion or section of defendant's railroad from the City of Mexico north to Danue station, in the republic of Mexico. And plaintiff says that on said 12th day of July, 1895, and while so engaged in the service of said defendant, and in the discharge of his duties incident to said employment, and while running said engine under the direction of said defendant company, he was, by and through the negligence of said defendant company, its section boss, agents, and servants, seriously and permanently injured, without any fault or contributory negligence on his part. And he says that on the said 12th day of July, 1895, he was engaged, as an engineer, in running for defendant, and under its orders and directions, an engine known

in railroad parlance as a "helper engine," which said engine was then and there under the direction and in the charge of one Phil J. Martin, as conductor thereof; that on said 12th day of July, 1895, plaintiff, under the direction of said defendant and its said conductor aforesaid, had assisted a freight train, with said helper engine, from Tula station to Danue station, on said defendant's railroad; that plaintiff arrived at said last-named station, on the said helper engine, at about 7 o'clock p. m. on said 12th day of July, 1895; that, upon his arrival at said Danue station, plaintiff was ordered to return to said Tula station by defendant and its agents and its said conductor, Phil J. Martin; that in obedience to the orders of defendant and its agents and said conductor, who was then and there present, and in charge of, and controlling the operation of, said engine, plaintiff started to return from said Danue station to said station of Tula, and that while he was so returning the engine upon which plaintiff was as aforesaid was derailed and wrecked by and through the negligence of said defendant company, its section master, agents, and servants, in this: that said railway track was obstructed by a push car, said push car being then and there on said railway track, and being then and there in such a position as to obstruct said railway track, by and through the negligence of defendant, its section master, agents, servants, and employés; that plaintiff did not know, and had no means of knowing, that the railroad of defendant was unsafe or so obstructed, and was not informed thereof by defendant, or defendant's said section master, agents, or employés, and said push car was not seen by the plaintiff in time for him to stop said engine and protect himself against injury, for the reason that said defendant, its officers, section boss, and agents, negligently failed to provide the said push car with a light, and negligently failed to have a man or some person in front of said push car with a signal light to give warning to the plaintiff and others who might be upon said helper engine. And the said defendant, its officers, section boss, agents, and employés, negligently allowed said push car to be out upon said railroad track after dark (it being already dark when the accident aforesaid happened), and the said defendant, its section boss, agents, and employés, negligently failed to inform plaintiff that said track was so obstructed, or that said push car was upon that section of said railroad where plaintiff was operating said engine as aforesaid, although said defendant then and there owed plaintiff the duty to keep said railroad track clear and free of all obstructions. And through such negligence upon the part of said defendant, its section boss, agents, and employés, plaintiff was injured as hereinbefore and hereinafter stated. Plaintiff alleges that, when said push car was struck by said engine, said engine was derailed and wrecked, and plaintiff was thrown from said engine and sustained serious and permanent injuries, to wit, his left foot was badly crushed and broken, three of plaintiff's ribs were crushed and broken, and plaintiff was greatly bruised, wounded, and permanently injured in his back, shoulders, heart, and spine, and by reason of such injuries plaintiff became insensible, and remained insensible for a long space of time, to wit, for the space of two hours, and after he regained consciousness he suffered intense pain and agony for the space of twenty-four hours; that after so receiving said injuries he was, by reason of the negligence of said defendant and its agents, forced to lie in the rain, upon the ground, and without shelter, for the space of nearly five hours, without any effort or attempt upon the part of defendant, its agents or servants, or any or either of them, to administer to him, or to in any way or manner alleviate plaintiff's great suffering. Plaintiff states that the injuries so received by him were occasioned solely by the negligence of the defendant, its section boss, agents, and employés, in not maintaining its roadway in a safe and secure condition for the passage of said engine over the same, and in negligently allowing said push car to be on said track at the time of said accident, and in negligently allowing the same to be on said track without supplying same with a proper and sufficient light, and in negligently allowing said push car to be operated upon the same without having a man with a signal light at a safe distance in advance of the same, or on plaintiff's side of the same, to warn plaintiff of danger, and to notify plaintiff that there was danger, and that the push car was upon that section of track, and in front of him. And plaintiff says that had not defendant, its section boss, agents, and employés, been so negligent in those respects, he would not have

been injured. Plaintiff states that said injuries so received by him through the negligence of defendant as aforesaid are serious and permanent as aforesaid, and have rendered plaintiff a cripple and invalid for life, and by reason of said injuries plaintiff has ever since said 12th day of July, 1895, suffered great mental and physical pain, and now suffers, and will throughout the remainder of his life continue to suffer, such pain, and that by reason of said injuries plaintiff was forced to lie in a hospital in the republic of Mexico for the space of two months, and for seven months afterwards plaintiff was unable to do any work or follow any employment. Plaintiff says that before said injury he was a sound, able-bodied, and vigorous man, but by reason of said injuries plaintiff's heart is permanently and dangerously affected, his nervous system shattered and permanently injured, and plaintiff's capacity to earn a living as a locomotive engineer has been destroyed, and his capacity to earn a living by any sort of means or employment has been seriously and permanently impaired; that at the time of and before said injuries the plaintiff was earning the sum of one hundred and twenty dollars per month in money of the United States of America, or its equivalent in money of the republic of Mexico, and that, by reason of his experience as a railroad engineer, he would have been able to earn at least that amount afterwards; that in consequence of said injuries it will be impossible for said plaintiff in the future to secure any kind of permanent employment, and that, even if he succeeds in securing any kind of employment, he will not be able to make and earn more than thirty dollars per month; that, at the time of said accident, plaintiff was 34 years of age.

Plaintiff further alleges that by the laws of Mexico, which now exist, and which existed and were in force at the time and place of the happening of said injuries, through defendant's negligence as aforesaid he (plaintiff) has and had a right of action against defendant for his damages, and he says that the following were the laws of Mexico, and are now the laws of Mexico, applicable in this case, out of which his said right of action grew, and by virtue of which the same now exists in said republic of Mexico, viz.:

From the federal constitution of the Mexican United States:

"Art. 72. Congress has power: * * * (22) To enact laws governing the general lines of communication, and governing post-offices and mails."

"Art. 97. The federal courts have jurisdiction: (1) Of all questions growing out of the execution and application of the federal laws, except when the application of the law only affects interests of individuals, in which case the local judges and tribunals of the state shall entertain jurisdiction."

From the Federal Penal Code of Mexico:

"Art. 4. A crime is the voluntary infraction of a penal law, doing that which it prohibits, or neglecting to do that which it commands.

"Art. 5. A misdemeanor is the infraction of police regulations or proclamations and good government.

"Art. 6. There are intentional crimes, and crimes resulting from neglect."

"Art. 11. Negligent crimes exist: (1) Where an act is done, or a duty omitted, which, although lawful in itself, is not so by reason of its consequences, if the accused fails to provide against such consequences, through negligence, want of reflection or care, by not making proper investigations, by not taking necessary precautions, or through unskillfulness in any art or science, the knowledge of which is necessary in order that the act done may not result in injury. Unskillfulness is not punishable when he who does the act does not profess the art or science necessary to be known, and acts when impelled by the gravity and urgency of the case. * * * (3) Where the question relates to an act which is punishable solely by reason of the circumstances under which it is done, or by reason of a circumstance personal to the party aggrieved: If the accused is ignorant of such circumstances, through not having previously made the investigation which the duty of his profession or the importance of his case demands."

Pen. Code, bk. 2, "Civil Liability in Criminal Matters":

"Art. 301. The civil liability arising from an act or omission contrary to a penal law consists in the obligation imposed on the party liable, to make (1) restitution, (2) reparation, (3) indemnization, and (4) payment of judicial expenses."

"Art. 304. Reparation comprehends: The payment of all the damages caused to the injured party, to his family or to a third person, for the violation of a right which is formal, existing and not simply possible, if such damages are actual, and arise directly and immediately from the act or omission complained of, or there be a certainty that such act or omission must necessarily cause, as a proximate and inevitable consequence.

"Art. 305. Indemnization imports: The payment of damages, that is, of that which the injured party fails to enjoy as a direct and immediate consequence of an act of omission by which a formal, existing and not merely possible right is attacked, and of the value of the fruits of the thing usurped and already consumed, in the cases in which the same should be done conformably with civil right.

"Art. 306. The condition required by the two preceding articles, that the damages and injuries should be actual, shall not prevent that the indemnization of subsequent damages and injuries be exacted by a new suit, when they shall have accrued: If they proceed directly from, and as a necessary consequence of, the same act or omission from which resulted the previous damages or injuries.

"Art. 307. The payment of judicial expenses solely embraces those absolutely necessary, which the injured party incurs for the purpose of investigating the act or omission which causes the criminal proceeding and to avail himself of his rights in such proceeding or in the civil suit.

"Art. 308. The civil responsibility cannot be declared except at the instance of the party entitled to recover.

"Art. 309. The judges who adjudicated upon the civil responsibility shall be controlled by the provisions of this title, in so far as its provisions extend; on other questions, they shall follow, according to the nature of the suit, the provisions of the civil or of the commercial laws which may be in effect at the time of the happening of the act or omission causing the civil responsibility.

"Art. 310. The right to civil responsibility forms part of the estate of a decedent and descends to his heirs and successors; provided, it be not the case of the following article, or that it arise from injury or defamation, and that, the offended person having been able in his lifetime to bring his suit, he neither did so nor directed his heirs to sue; in such case the offense shall be understood as remitted.

"Art. 311. The action to enforce civil responsibility demanding support of a person guilty of homicide is personal, and belongs exclusively to the persons named in the end of article 315, as directly damaged. Consequently such action forms no part of the estate of the deceased, nor is it extinguished, although the latter pardon the offense in life."

"Art. 313. The judges who take cognizance of suits based upon civil responsibility shall endeavor that the amount and terms of payment be fixed by agreement of the parties. Failing in this, the provisions of the following articles shall be observed: * * *

"Art. 321. In case of blows or wounds, from which the injured party does not remain crippled, lamed or deformed, he shall have the right that the responsible party pay all his expenses of cure, the damages he may have suffered, and that which he may fail to gain during the time which, in the opinion of competent persons, he may not be able to do the work by which he subsisted. But it is essential that the inability to work should be the direct result of the wounds or blows, or be a cause which is the immediate effect of such blows or wounds.

"Art. 322. If the inability of the injured party to devote himself to his accustomed work be permanent, from the moment in which he shall recover and can properly devote himself to other and different work, which may be lucrative and appropriate to his education, habits, social position and physical constitution, the civil responsibility shall be reduced to paying him the sum which his ability to earn in his new employment falls short of his daily earnings in his former occupation.

"Art. 323. If the blows or wounds cause the loss of any member not indispensable for work, or the person wounded or struck remain otherwise, crippled, lamed or deformed, by that circumstance, he shall have the right not only to the damages and injuries, but also to the sum which the judge may determine

as extraordinary indemnity, considering the social position and sex of the person and the part of the body remaining crippled, lamed or deformed.

"Art. 324. The gain which the injured party fails to earn during his inability to work shall be computed by multiplying the sum which he formerly earned per day by the number of days of his disability.

"Art. 325. The provisions of the foregoing articles for computing the civil responsibility for wounds or blows shall be applied to all other cases where, in the violation of a penal law, a person may cause the illness of another, or may have placed him under disability to work.

"Art. 326. No person can be charged with civil liability upon an act or omission contrary to a penal law unless it be proven: That the party sought to be charged usurped the property of another; that without right he caused, by himself or by means of another, damages or injuries to the plaintiff; or that, the party sought to be charged being able to avoid the damages, they were caused by a person under his authority.

"Art. 327. Whenever any of the conditions of the preceding articles are established, the defendant shall be civilly liable, without regard to whether he be absolved or condemned to criminal liability."

"Art. 330. In order that masters may be held civilly liable through their clerks and servants, according to the provisions of articles 326 and 327, it is an indispensable condition that the act or omissions of the clerks or servants causing the liability shall occur in the service for which they were employed.

"Art. 331. Under the condition of the preceding article, those liable are.
* * * railroad companies."

"Art. 363. Limitation: The various actions by which the civil responsibility may be demanded, or the execution of a final judgment declaring that such responsibility has been incurred by the accused may be asked, shall be extinguished according to the terms and in the manner provided by the Civil Code or the Commercial Code, according to the nature of the demand and the subject-matter treated of.

"Art. 364. Amnesty shall not extinguish the civil responsibility, nor the actions to exact it, nor the legal rights which third persons may have acquired. Nevertheless, when the responsibility may not yet have been made effective, and the demand is not for restitution, but for reparation of damages, of indemnity for injuries, or for payment of judicial expenses, the guilty person shall remain free from such obligations only when it is so declared in the amnesty and they are expressly left to the charge of the public treasury.

"Art. 365. A pardon shall in no case extinguish the civil responsibility, nor the actions to enforce it, nor the legal rights which third persons may have acquired.

"Art. 366. Limitation is interrupted by the criminal proceeding until final judgment is pronounced. This done, the term of limitation commences to run anew."

Transitory Law, Pen. Code:

"Art. 26. Until it is determined in the new Code of Procedure what judges shall have jurisdiction and the mode of proceeding, in suits to enforce civil liability, the following rules shall be observed: * * * (5) Actions to enforce the civil liability may be brought before a court of civil jurisdiction, whether or not the criminal proceeding has been commenced; but while the latter is pending the proceedings in the former shall be stayed."

From the Federal Civil Code:

"Art. 9. Against the observance of the law, disuse, custom or practice to the contrary cannot be alleged."

"Art. 20. When a judicial controversy can be decided neither by the text nor by the natural meaning or spirit of the law, it must be decided according to the general principles of right, taking into consideration all the circumstances of the case.

"Art. 21. In case of conflict of rights and the absence of express law for the especial case, the controversy shall be decided in favor of him who seeks to avoid damages, and not in favor of him who seeks to obtain profit. If the conflict should be between equal rights, or rights of the same species, it shall be decided observing the greatest equality possible between the parties."

"Art. 1095. Limitation bars in three years: * * * (8) Civil responsibility

for injuries, whether done by word or by writing, and that which arises from damage caused by persons or animals, and which the law imposes upon the representatives of such persons or the owners of the animals."

Act of congress of December 15, 1881:

"Article 1. The executive shall regulate the service of railroads, telegraphs and telephones constructed, or which in the future may be constructed, upon Mexican territory, according to the following bases: (1) Railroads, telegraphs and telephones which in the federal district and territory of Lower California unite together two or more municipalities, or the federal district and territory of Lower California with one or more states; those which communicate two or more states with each other; those which touch at any point in the territorial boundary line of the republic and foreign countries, or run parallel therewith within a region of twenty leagues, are known as general lines of communication within the meaning of fraction 22 of article 72 of the constitution. (2) These general lines of communication and their branches shall be subject exclusively to the federal legislature, executive and judicial powers, in their respective spheres, in all cases where any of the following matters are involved: * * * (g) Construction and repair of the works. Crimes committed against the security or integrity of the works or against the operations of the lines. (h) Security of the same works for which the companies are obligated, and crimes or misdemeanors of the companies through delays or obstruction, carelessness or fault in the service, and for accidents or mishaps in the operation."

From the regulations for the construction, maintenance, and operation of railroads:

"Art. 52. The coaches and cars which enter into the make-up of a train shall have the drawheads of the same height, so that their centers will be opposite to each other.

"Art. 53. The conductor of a train en route is the person in command of all the train crew, including the engineer and fireman."

"Art. 121. Engineers shall communicate by means of a steam whistle with the agents charged with the duty of watching, and with the conductors of trains, using the following signal: * * * Three blasts or sounds of the whistle shall be the signal that the entire train is going to move backward."

"Art. 124. Companies [railroad] are liable for accidents which occur through the failure to observe the provisions of this chapter [chapter 7] respecting signals, and for employing people who do not have certificates showing that their sight and hearing are free from infirmity which does not permit them to recognize the signals."

"Art. 194. Companies [railway] are liable for all faults or accidents which occur through tardiness, negligence, imprudence or want of capacity of their employes."

"Art. 298. All violations of this law, which companies [railway] commit shall be subject to punishment by the administration by fine up to five hundred dollars, which the department of public works shall assess reserving always the right of individuals, through indemnity, and the liability which the companies may have incurred through criminal acts or omissions committed by them."

Plaintiff further alleges that by virtue of the general principles of right and justice, and by virtue of the laws of Mexico hereinbefore set forth, he had at the time of the occurrence of the accident hereinbefore mentioned, and now has, a right of action for his damages against the defendant in the republic of Mexico, and the same now exists in said country as well as in the United States of America. And he says that the acts of negligence upon the part of the defendant, its section master, agents, and employes, complained of, were wrongful and actionable, as has been hereinbefore shown by the plaintiff, in the republic of Mexico, at the time of the accident complained of, and are now so, and he says the same were then and are now wrongful and actionable in the United States of America and in the state of Texas. And plaintiff says that by reason of said injuries received by him he has suffered and sustained damages in the sum of fifteen thousand dollars, for which he sues. And, the defendant being in court, plaintiff prays that he have judgment for his damages aforesaid, costs of suit, and he prays for general relief.

The special exceptions are:

(1) And, for further special exception to said petition, defendant, by its attorneys, comes and says: That it excepts to said petition because the laws of the republic of Mexico, as pleaded by the plaintiff, are so vague, uncertain, and dissimilar to the laws of this country that this court should not entertain jurisdiction herein and attempt to enforce said laws. That said laws have been passed upon by a decision of the supreme court of the state of Texas, to wit, in the case of *Railway Co. v. Jackson*, 33 S. W. 857; it being therein held that the courts of this state would not sit to adjudicate controversies like the one at bar, under the laws of the said republic of Mexico, on account of their dissimilarity to our laws, and that the policy of this state and courts of this country would be not to interfere with the traffic of railroads having their lines in Mexico by adjudicating causes arising in Mexico. (2) That said petition shows that the injury sustained by plaintiff occurred in the republic of Mexico, and any right of action he may have would be controlled by the laws of said republic, and it appears that said defendant has ever since said injury maintained its line of railroad in said republic, and continued to possess its property in said republic, and there is no reason shown in said petition why plaintiff did not sue for damages for said injuries in said republic, where the injury occurred, instead of bringing his suit in this court. (3) That it appears from the laws of Mexico, as set out in plaintiff's petition, that, if plaintiff has any cause of action, it would be controlled by the laws of the republic of Mexico. That according to said laws, as set out in plaintiff's petition, that suit and adjudication of the rights of plaintiff and the awarding of damages to the plaintiff for the injuries sustained would not be a final determination of the rights between the parties, but that plaintiff, according to said law, would have the right to bring suits from time to time, and recover in said suits, if said injury is continuing or permanent. That said law is contrary to public policy. (4) That, according to article 313 of the laws of said republic, the judge who takes cognizance of suits based upon civil responsibility shall endeavor to effect compromise, so that the amounts and terms of payment be fixed by agreement of the parties. That said petition fails to show that the judge of this court, or any judge having cognizance of said matter, had endeavored to have the amount and terms of the payment for such injuries agreed upon between the parties. (5) That according to the laws of said republic, as set out in said petition, said plaintiff would have no right in a civil suit to recover damages for his said injuries unless he shows that the acts of defendant which caused the injury constituted a crime under said laws of Mexico. That the recovery in such civil suit is penal in its nature. That this court cannot enforce the penal laws of the republic of Mexico. That said laws so pleaded do not sufficiently define what acts are made penal under said laws to enable this court to judge whether or not said acts by which such injury was caused are penal, within the meaning of said law, to entitle plaintiff to any recovery in a civil action therefor. (6) That, according to article 323 of the laws of said republic of Mexico, a recovery may be had not only for the damages sustained by the injury complained of, but the judge trying the case may award, as extraordinary indemnity, any sum that he may determine, considering the social position, etc., of the party injured. That said law is against natural justice and the policy of our law, to discriminate in favor or against a litigant according to his social position. (7) That the laws of the republic of Mexico, by which plaintiff's cause of action will have to be tried, are so vague and indefinite that this court cannot properly and intelligently determine and administer the same. Wherefore defendant prays judgment of the court, etc.

The circuit court, on argument, sustained the said special exceptions, and, the plaintiff declining to amend, dismissed the action, to which the plaintiff excepted, and now prosecutes this writ of error.

Millard Patterson and W. B. Brack, for plaintiff in error.

T. A. Falvey, for defendant in error.

Before PARDEE and McCORMICK, Circuit Judges.

PARDEE, Circuit Judge (after stating the facts as above), delivered the opinion of the court.

As the plaintiff is a citizen of the state of Texas, residing in the Western district of said state, and the defendant a citizen of the state of Massachusetts, the circuit court has jurisdiction *ratione personarum*. As the cause of action shown by the petition is one for a personal tort (i. e. for injury to the person through negligence), it is transitory, and the circuit court has jurisdiction *ratione materiarum*.

While the negligence complained of was committed in the republic of Mexico, neither of the parties is a citizen of Mexico, but both are citizens of the United States; and therefore there ought to be no question of international comity in the case, further than to inquire whether the laws of Mexico give a right to the plaintiff to recover damages for such negligence, and the extent of such right. The laws of the republic of Mexico create a civil liability in favor of a person injured by negligence, and give a distinct civil remedy therefor, in the nature of pecuniary damages. To the same effect is the law of the state of Texas. This action is not barred by any statute of the United States, of the state of Texas, or of the republic of Mexico. "A right arising under, or a liability imposed by, either the common law or the statute of a state may, where the action is transitory, be asserted and enforced in any circuit court of the United States having jurisdiction of the subject-matter and the parties." *Dennick v. Railroad Co.*, 103 U. S. 11. Whether a law is a penal law, in the international sense, so that it cannot be enforced in the courts of another state, depends upon whether its purpose is to punish offenses against the public justice of the state, or to afford a private remedy to a person injured by the wrongful act. *Huntington v. Attrill*, 146 U. S. 657, 673. 13 Sup. Ct. 224. "The test is not by what name the statute is called by the legislature or the courts of the state in which it was passed, but whether it appears to the tribunal which is called upon to enforce it to be, in its essential character and effect, a punishment of an offense against the public, or a grant of a civil right to a private person. In this country the question of international law must be determined in the first instance by the court, state or national, in which the suit is brought. If the suit is brought in a circuit court of the United States, it is one of those questions of general jurisprudence which that court must decide for itself, uncontrolled by local decisions. *Burgess v. Seligman*, 107 U. S. 20, 33, 2 Sup. Ct. 10; *Railway Co. v. Cox*, 145 U. S. 593, 605, 12 Sup. Ct. 905." *Huntington v. Attrill*, 146 U. S. 683, 13 Sup. Ct. 233. "The statute of another state has, of course, no extraterritorial force; but rights acquired under it will always, in comity, be enforced, if not against the public policy of the laws of the former. In such cases the law of the place where the right was acquired or the liability was incurred will govern as to the right of action, while all that pertains merely to the remedy will be controlled by the law of the state where the action is brought; and we think the principle is the same whether the right of action be *ex contractu* or *ex delicto*." *Herrick v. Railway Co.*, 31 Minn. 11, 16

N. W. 413, approved by the supreme court of the United States in *Railroad Co. v. Babcock*, 154 U. S. 190, 14 Sup. Ct. 978. The foregoing propositions are not exactly disputed by the learned counsel for the defendant in error, but we have thought best to state them, in order to relieve this case of some of the judicial fog which has settled on it.

The first special exception to the plaintiff's right of action is, in substance, that the laws of the republic of Mexico, as pleaded by the plaintiff, are so vague, uncertain, and dissimilar to the laws of this country, that this court should not entertain jurisdiction thereon and attempt to enforce said laws. To pass upon this exception, it is pertinent to inquire to what extent the proper understanding and construction of the laws of the republic of Mexico are material to the case made in the petition. According to the rule declared in *Herrick v. Railway Co.*, *supra*, which rule, as we have seen, was approved by the supreme court of the United States in *Railroad Co. v. Babcock*, *supra*, the law of Mexico is to be looked to, to determine whether thereunder an employé of a railroad company, injured by and through the negligence of the company, has a right to recover in a civil action damages for such injury, and, if he has, what is the extent of such right. On this inquiry, we are of opinion that the law of Mexico, instead of being vague and uncertain, is clear and specific. Article 11 of the Mexican Federal Penal Code, and articles 301, 304, 305, 306, 307, 308, and 326 of book 2 of the same Code, as pleaded, confer on any person injured by and through the negligence of another a right to recover in a civil proceeding all the actual damages sustained. Article 330 of the same Code provides that masters may be held civilly liable, through their clerks and servants, according to the provisions of articles 326 and 327, for the negligence of said clerks and servants within the scope of their employment. Article 194 of the act of congress of December 15, 1881, declares that railway companies are liable for all faults or accidents which occur through tardiness, negligence, imprudence, or want of capacity of their employés. Certainly these laws, so clearly defining negligence and the civil rights resulting therefrom, ought not to be rejected as too vague and indefinite to be administered by intelligent courts and judges.

But it is excepted that these laws are dissimilar to the laws of this country (i. e. Texas), and too dissimilar to be administered by the court. The alleged dissimilarity having such grave results is not pointed out in the exception. The brief of the learned counsel for the defendant in error is but little more specific, and that little by way of argument that the law of Mexico, as pleaded, requires a judicial determination of the infraction of the penal law of Mexico as a condition precedent to a suit for civil damages, and that such criminal proceedings have not been commenced, whereby all pending civil proceedings would be stayed, under article 26 of the transitory law of the Penal Code of Mexico; and, further, that the petition should show, but does not, that the judge who took cognizance of this suit endeavored to procure an agreement of the parties to a compro-

mise of the controversy as required by article 313 of the Mexican Code before proceeding to adjudication hereof. Article 26 of the transitory law (Penal Code) and article 313 of the Penal Code, as pleaded, relate wholly to matters of procedure, and do not affect the right, nor even the remedy. Article 327 of the Penal Code provides that the civil liability shall exist without regard to whether the defendant be absolved or condemned to criminal liability; and article 298 of the act of congress of December 15, 1881, expressly reserves the right of individuals through indemnity and the liability which the companies may have incurred through criminal acts or omissions committed by them. If, however, it should be conceded that there is dissimilarity between the law of Mexico giving the right of action and the law of Texas, in which state it is sought to enforce the right, it does not appear that such dissimilarity extends so far as to conflict with the settled public policy of the state of Texas.

"But it by no means follows that, because the statute of one state differs from the law of another state, therefore it would be held contrary to the policy of the laws of the latter state. Every day our courts are enforcing rights under foreign contracts where the *lex loci contractus* and the *lex fori* are altogether different, and yet we construe these contracts and enforce rights under them according to their force and effect under the laws of the state where made. To justify a court in refusing to enforce a right of action which accrued under the law of another state, because against the policy of our laws, it must appear that it is against good morals or natural justice, or that for some other such reason the enforcement of it would be prejudicial to the general interests of our own citizens. If the state of Iowa sees fit to impose this obligation upon those operating railroads within her bounds, and to make it a condition of the employment of those who enter their service, we see nothing in such a law repugnant either to good morals or natural justice, or prejudicial to the interests of our own citizens." *Herrick v. Railway Co.*, 31 Minn. 11, 16 N. W. 413.

See, also, *Higgins v. Railway Co.*, 155 Mass. 176, 29 N. E. 534.

In *Huntington v. Attrill*, *supra*, the supreme court says:

"In order to maintain an action for an injury to the person or to movable property, some courts have held that the wrong must be one which would be actionable by the law of the place where the redress is sought, as well as by the law of the place where the wrong was done. See, for example, *The Halley*, L. R. 2 P. C. 193, 204; *Phillips v. Eyre*, L. R. 6 Q. B. 28, 29; *The M. Moxham*, 1 Prob. Div. 107, 111; *Wooden v. Railroad Co.*, 126 N. Y. 10, 26 N. E. 1050; *Ash v. Railroad Co.*, 72 Md. 144, 19 Atl. 643. But such is not the law of this court. By our law a private action may be maintained in one state, if not contrary to its own policy, for such a wrong done in another and actionable there, although a like wrong would not be actionable in the state where the suit is brought. *Smith v. Condry*, 1 How. 28; *The China*, 7 Wall. 53, 64; *The Scotland*, 105 U. S. 24, 29; *Dennick v. Railroad Co.*, 103 U. S. 11; *Railway Co. v. Cox*, 145 U. S. 593, 12 Sup. Ct. 905."

The second special exception is that the petition does not show any reason why plaintiff did not sue for damages for said injuries in the republic of Mexico, and this on the ground that the injury sustained by the plaintiff occurred in the republic of Mexico, and any right of action which he may have is controlled by the laws of said republic; and it appears that the defendant has, ever since the injury, maintained its line of railroad in said republic, and continued to possess its property in said republic. We are familiar with the exception of the pendency of another suit between the same parties

on the same cause of action in another court of the same jurisdiction, but this is our first introduction to an exception that the plaintiff cannot maintain a cause of action in a court having jurisdiction *ratione personæ* and *ratione materiæ*, because the plaintiff could have instituted his action in some other court that would have had like jurisdiction. It has been conclusively shown that although the injury for which plaintiff sues occurred in the republic of Mexico, and that his right to recover damages is controlled by the laws of said republic, yet the plaintiff has a right to sue in the circuit court. That the petition shows that the defendant owns and operates a railroad in the republic of Mexico does not appear to be a very good reason for the courts of Texas to decline jurisdiction, particularly where the same petition shows that the defendant owns and operates part of the same line of railroad in the state of Texas.

The third special exception is, in substance and effect, that a judgment in favor of plaintiff, awarding him damages for the injury sustained, would not be a final determination of the rights between the parties, but that thereafter the plaintiff, under the law of Mexico, would have the right to bring suits from time to time, and recover in said suits, if his said injury is continuing or permanent. This exception appears to be based upon article 306 of the Penal Code of Mexico, as follows:

"The condition required by the two preceding articles, that the damages and injuries should be actual, shall not prevent that the indemnization of subsequent damages and injuries be exacted by a new suit, when they shall have accrued: If they proceed directly from, and as a necessary consequence of, the same act or omission from which resulted the previous damages or injuries."

The purport of this article is that if damages accrue after the first suit, which damages proceed directly from, and as a necessary consequence of, the same negligence, such damages may be made the subject of a second suit; and the article clearly has reference only to damages which accrue after the first suit, and which were not known to exist at the time such suit was brought and determined. It was evidently intended to give a party injured through negligence full actual damages, although not known or contemplated at the time of the first suit. The adjudication under the Mexican law in the first suit is as final as to all injuries known to exist or existing at the time of the suit as is an adjudication in our courts. In this connection the following from the opinion of Chief Justice James in *Railway Co. v. Jackson* (Tex. Civ. App.) 32 S. W. 234, 235:

"The well-established rule of law is that we are to look to the laws of Mexico for what pertains to the rights of the parties, and to our laws and practice for what applies to the remedy. *Railroad Co. v. Babcock*, 154 U. S. 190, 14 Sup. Ct. 978; *Herriek v. Railway Co.*, 31 Minn. 11, 16 N. W. 413; *Knight v. Railroad Co.*, 108 Pa. St. 250. There is no fundamental difference as to the measure of damages. The actual damage the injured party has sustained and will afterwards sustain is sought to be arrived at and redressed in both jurisdictions. The end sought in both countries is compensation. The allowance of a new suit for injuries that develop later demonstrates the purpose of the Mexican law to secure to the injured party his right to complete actual damages. The case is not like those in which it appears that the foreign law limits the amount of damages recoverable to a certain sum, where it is held that the domestic court will not render judgment in excess of such sum. The

limit and standard in both countries is compensation, and the power to reduce the allowance in favor of the defendant, and the right to a new suit in favor of plaintiff, for unconsidered damages, are all merely the means of attaining and enforcing actual damages. It is observed that exemplary damages were not asked or allowed in this case. Our opinion on this branch of the case is that the difference in the mode of arriving at and administering the damages is a matter that affects the remedy only, and therefore offers no obstacle to the exercise of jurisdiction by our courts. Story, *Conf. Laws*, § 307d. It was proper to proceed according to our law and practice, as the court did in this instance, in ascertaining the entire damages and awarding execution."

—Is directly in point, and we agree with the reasoning and conclusion.

The fourth special exception sustained by the court below is that the petition fails to show that the judge of the circuit court, or any judge having cognizance of the matter, had endeavored to have the amount and terms of the payments for plaintiff's injuries agreed upon between the parties as required of the judges in Mexico under article 313 of the laws of said republic. We have already held that this article relates merely to procedure, and does not affect the right, nor even the remedy. The procedure provided for in said article 313 is, as we are informed, a practice enjoined in suits on contracts as well as torts, and is derived from the civil law.

The fifth special exception is that according to the laws of Mexico, as pleaded, the plaintiff has no right to recover damages in a civil suit unless he shows that the acts of the defendant which caused the injury constituted a crime under said laws of Mexico; that the recovery in said civil suit is penal in its nature; that the circuit court cannot enforce the penal laws of the republic of Mexico, and that the laws of said republic do not sufficiently define what acts are made penal under said laws to enable the court to judge whether or not said acts by which said injury was caused are penal, within the meaning of the law, to entitle the plaintiff to any recovery in a civil action therefor. It appears from the laws pleaded that a civil action lies in the courts of Mexico for the negligent wrongs complained of, and although by the laws of Mexico the wrongful acts of the defendant, as alleged in the petition, may constitute a negligent crime, it does not appear that the liability of defendant to the plaintiff for the injuries complained of depends in any way upon the criminal prosecution or conviction of the defendant. Article 327, Mexican Code; articles 194, 298, *Act. Cong. Dec. 15, 1881*. And see *Huntington v. Attrill*, *supra*. The recovery sought in this case is not penal, but is for the individual benefit of the plaintiff, and inures in no way to the benefit of the public. The court is not asked in this action to enforce any penal law of the republic of Mexico, but merely to enforce the civil right of the defendant granted by the laws of Mexico, occasioned by an act of negligence such as gives a right of action under the law in any civilized country.

The sixth special exception is that, according to article 323 of the laws of the republic of Mexico, a recovery may be had not only for the damages sustained by the injuries complained of, but the judge trying the case may award as extraordinary indemnity any sum that he may determine, considering the social position, etc., of the party

injured; and the argument is that the said law is against natural justice, and that to discriminate in favor of or against a litigant according to his social position is against the policy of our law. Counsel for the plaintiff answers this exception as follows:

"There is no law requiring us to sue for extraordinary indemnity, and we have not done so; and the fact that we might have done so in the republic of Mexico is no reason why we should not sue for, in this country, such damages as are otherwise permissible. The fact that the defendant is sued in a forum where extraordinary damages cannot be recovered is a matter for which he ought to thank heaven, take courage, and say no more about it. He certainly cannot complain. Suppose the law of one country should give exemplary damages under circumstances such as that the laws of our country would not give? Could it be supposed that that was a reason for this court refusing to give such damages as are permissible under our laws? If the law of Mexico giving extraordinary indemnity considering the social position is against natural justice and the policy of our laws, that would be a good reason why the courts of this country should not give extraordinary indemnity. But certainly it is no reason why they should not give ordinary indemnity such as is consistent with natural justice and our policy."

This answer seems to dispose of the sixth exception conclusively.

The seventh special exception reiterates the charge of vagueness and indefiniteness of the Mexican law involved, and is disposed of by what has been said with regard to the first special exception.

To support the ruling of the circuit court sustaining the foregoing special exceptions, the learned counsel for the defendant in error relies solely upon a decision of the supreme court of the state of Texas in *Railroad Co. v. Jackson* (Tex. Sup.) 33 S. W. 857. That was a case in most respects similar to the one under present consideration; differing, however, in one or two important points, which will be hereafter noticed. The first propositions in *Railroad Co. v. Jackson*, supra, affecting the ruling here, are as follows:

"This is a transitory action, and may be maintained in any place where the defendant is found, if there be no reason why the court whose jurisdiction is invoked should not entertain the action. The plaintiff, however, has no legal right to have his redress in our courts; nor is it specially a question of comity between this state and the government of Mexico, but one for the courts of this state to decide, as to whether or not the law by which the right claimed must be determined is such that we can properly and intelligently administer it with due regard to the rights of the parties. *Gardner v. Thomas*, 14 Johns. 134; *Johnson v. Dalton*, 1 Cow. 543. The decisions of this court (well sustained by high authority) establish the doctrine that the courts of this state will not undertake to adjudicate rights which originated in another state or country, under statutes materially different from the law of this state, in relation to the same subject. *Railway Co. v. McCormick*, 71 Tex. 660, 9 S. W. 540; *Railway Co. v. Richards*, 68 Tex. 375, 4 S. W. 627. Many difficulties would present themselves, in an attempt to determine the meaning of the Mexican law, and to apply it in giving redress to the parties claiming rights under it. We understand the Mexican courts are not governed by precedent, and we have no access to reports of adjudicated cases of those courts, from which we could ascertain their interpretation of these laws."

It is to be noticed that the action was one in a court of the state of Texas brought by a citizen of that state against a foreign corporation, and that the suit before us is one brought in a court of the United States by a citizen of the United States against another citizen of the United States. In the Texas case the right to sue may be affected by comity. In our case the right to sue is specifically grant-

ed by the statute, and appears to be absolute. *Gardner v. Thomas* and *Johnson v. Dalton*, cited above, were cases in which one British subject sued another British subject (both sailors) in the state of New York to recover damages for assault and battery committed on board a British ship on the high seas. In *Gardner v. Thomas* the court admitted jurisdiction, but refused to hear the case on motives of policy. In *Johnson v. Dalton* the court approved *Gardner v. Thomas*, but concluded that, as the plaintiff left or abandoned the vessel in the port of New York, the court ought to entertain jurisdiction. These two cases are not very persuasive in determining as to the right of a citizen of Texas to sue in his own court and before his own judge. The Texas cases cited were actions for damages caused by the death of the injured party, where it was held that the courts of Texas will not entertain such actions if founded upon a law which is materially different from the law of that state. The rule declared may be correct and binding on the courts of the state of Texas, but the rule in this regard binding on the courts of the United States is to the contrary, and is found peremptorily declared in *Dennick v. Railroad Co.*, *supra*. The difficulties which present themselves in determining the meaning of the Mexican law, and in applying it to give redress to the parties claiming rights under it, we have already sufficiently considered. As to the Mexican courts not being governed by precedent, and having no reports of adjudicated cases, we concur with what Chief Justice Fly so well says in *Railway Co. v. Mitten* (Tex. Civ. App.) 36 S. W. 282:

"Dissimilarity of the laws, however, was not the sole ground upon which the aid of our courts was denied to Jackson, but other and (to us) novel reasons were given why the right should be denied; among the number being the difficulties that would beset Texas courts in determining the meaning of Mexican laws. On this point it is said, 'We understand the Mexican courts are not governed by precedent, and we have no access to reports of adjudicated cases of those courts, from which we could ascertain their interpretation of these laws.' If it be true that the Mexicans have no precedents, and keep no record of adjudicated cases, it would seem that a Mexican court would be in no better position to follow in the track of the decisions than would an American; and while 'it is well settled that, if one state undertakes to enforce a law of another state, the interpretation of that law as fixed by the courts of the other state is to be followed,' still it does not follow that where the other state has not interpreted its laws, or has failed to record its interpretations, this state should therefore refuse to extend a remedy for a wrong inflicted on a citizen within the borders of such foreign state. In many of the cases in which jurisdiction has been assumed or held to attach in the courts of one state when the wrong was perpetrated in another, the offending party had removed from the latter state, but we have found no case where the fact of removal was made the ground for assuming jurisdiction. Our courts either have jurisdiction of the class of cases we are discussing, or they have not; and the question of whether a man has voluntarily resorted to our courts, or been forced into them, or whether commerce between Mexico and Texas will be injured or protected by compelling the payment by a corporation of damages for the wrongs it has inflicted, or the condition of our dockets, can have no weight or force in determining jurisdiction. These are considerations that might possibly address themselves to the notice of legislatures, but not to the determinations of courts. Courts are not at liberty to assume or decline jurisdiction upon speculative grounds, or for reasons of public policy. *Percival v. Hickey*, 18 Johns. 257. We are not willing to subscribe to the doctrine that a citizen of Texas who has suffered wrongs, transitory in their nature, in a foreign country, at the hands of one who has his legal domicile in this state, before he can obtain

redress at the hands of our courts must show that he has been refused aid in the foreign courts, and make it appear that he comes to the courts of his own country unwillingly, and as a last resort. Jurisdiction of a cause should not be made to depend upon any such state of circumstances. If the construction placed upon the decision in the Jackson Case be the true one,—and some of its expressions would seem to justify the construction,—it is a practical denial of remedies for wrongs that may be inflicted by one of our citizens upon another in Mexico by relegating him to a trial in the courts of a country where the laws are said to be enforced without precedent or authority, and which laws are claimed to be so uncertain and obscure that our courts cannot undertake to construe them. We are not willing to subscribe to such doctrine, and will not extend the scope of the decision referred to beyond the purview of the facts of that case. We hold that the petition showed a cause of action, and that the district court of El Paso county had jurisdiction of the case."

Following the above-quoted propositions, the supreme court in the case cited elaborates in regard to the dissimilarity between Mexican law and the law of Texas, and holds that this dissimilarity is sufficient to warrant the courts of Texas in refusing to entertain jurisdiction. The court next finds that another reason for refusing to entertain jurisdiction exists in the fact that the Mexican National Railroad owns and operates a railroad in Mexico; and as a matter of comity to the people of Mexico, and as a matter of policy towards the growing commerce between Texas and Mexico, and out of consideration for the overburdened condition of the dockets of the Texas courts, the court holds the Texas courts ought not to entertain suits for negligence brought against railroad companies operating lines in Mexico, where the plaintiff chooses the Texas jurisdiction from convenience, and not from necessity. The petition in the case at bar shows a fact not appearing in the Jackson Case, i. e. that the Mexican National Railroad extends into and is operated in the state of Texas; and that being the case, and as the plaintiff has a right to sue in the circuit court, we doubt if the locality of the defendant's railroad, given as sufficient for nonsuiting Jackson in the courts of the state of Texas, is sufficient to nonsuit the present plaintiff in the circuit courts of the United States sitting in Texas. The question of international comity is controlled and decided by international law and custom, and the decisions of local courts are not controlling in the courts of the United States. *Huntington v. Attrill*, *supra*; *Greaves v. Neal*, 57 Fed. 816. Clearly the opinion and decision of the supreme court of the state of Texas ought not to, and does not, control in the proper decision of the questions here involved. Our lengthy discussion of the case comes from our high appreciation of the acknowledged ability of the judges of that court, and in deference to our learned brother of the circuit court, who appears to have followed the same.

Having considered the important questions presented in this case in the light of the numerous authorities cited by counsel, and many others within our reach, we conclude that neither in reason nor on authority are the special exceptions to the amended original petition well founded. The judgment of the circuit court is reversed and the case remanded, with instructions to overrule the special exceptions, and thereafter proceed in the trial and determination of the case according to law.

CLARK et al. v. SIGUA IRON CO.

(Circuit Court of Appeals, Third Circuit. June 1, 1897.)

EQUITABLE ASSIGNMENT—CORPORATIONS—UNPAID SUBSCRIPTIONS.

Defendants entered into a contract with the S. Co., by which they agreed to surrender certain bonds of the S. Co. held by them as collateral to its demand note in consideration of an agreement by the S. Co. to pursue certain stockholders indebted to it on subscriptions, and use every effort to collect from them, by litigation if necessary, which should be conducted by attorneys selected by defendants, any sums collected to be received by the S. Co. for defendants, and paid to them, and any judgment to be assigned to defendants on request; all sums received by defendants to be applied on the S. Co.'s note. *Held*, that this contract constituted an equitable assignment of the claims against the stockholders to defendants, and in an action by the S. Co. against defendants to recover a sum paid to them by one of the stockholders against whom judgment was obtained as money had and received to the use of the S. Co., a statement of such contract constituted a sufficient affidavit of defense.

In Error to the Circuit Court of the United States for the Eastern District of Pennsylvania.

Joseph S. Clark and Richard C. Dale, for plaintiffs in error.

George Tucker Bispham, for defendant in error.

Before ACHESON, Circuit Judge, and BUTLER and BUFFINGTON, District Judges.

BUFFINGTON, District Judge. This case arises on a writ of error to the circuit court of the United States for the Eastern district of Pennsylvania, sued out by Edward W. Clark and others, defendants in a suit brought against them by the Sigua Iron Company. That court made absolute a rule to enter judgment for want of a sufficient affidavit of defense, and its action in so doing is here assigned for error. The statement of claim averred the plaintiff company on January 6, 1894, recovered judgment against F. F. Vandervort in the court of common pleas No. 3 of Allegheny county for \$3,855.21, which judgment was subsequently affirmed by the supreme court of Pennsylvania (164 Pa. St. 572, 30 Atl. 491); that on February 4, 1894, the plaintiff company was placed in the hands of a receiver by the United States circuit court for the Eastern district of Pennsylvania; that on January 5, 1895, the defendants in the present suit received from Vandervort, for the use of the plaintiff, the amount of said judgment and interest; that "having so had and received the said moneys for the use of the plaintiff, the defendants became and are liable to pay the said moneys to the said plaintiff, with interest"; that demand for such payment was made before suit brought, and refused. It will be noted that by the plaintiff's statement its right to recover is based upon the receipt by the defendants "for the use of the plaintiff" of the amount of its judgment against Vandervort, and that, having so received it, and refused to pay it over, a right of action accrued to the plaintiff. It would, therefore, appear that the liability of defendant to pay arises from the averred fact that defendant received the moneys for the plaintiff's use, for, if they did not so receive it, no other grounds of legal or equitable liability are set

forth. In the affidavit of defense filed this averment is traversed in the most explicit language, to wit: "And the statement contained in the plaintiff's statement of claim that said money collected under said judgment and paid to the defendants was due and received by the defendants on behalf of the plaintiff is absolutely false." This explicit traverse placed in issue the question of fact upon which, by the plaintiff's only showing, its right to recover rested, and was in itself sufficient to prevent judgment.

It is said, however, that the foregoing traverse was merely the defendants' deduction or conclusion, based upon the written contract between the parties, a copy of which defendants filed with their affidavit. As the court below based its action upon the construction of the contract, we deem it proper this court should express its views upon that point as well. By the recitals of such contract, which was between the Sigua Iron Company, the plaintiff, and E. W. Clark & Co., the defendants, it appears that on its date, June 15, 1893, the defendants held \$24,500 of the Sigua Iron Company's bonds as collateral security for the payment of \$30,000 owing to them on that company's demand note. The company had claims aggregating \$24,500 against certain named shareholders in designated sums for unpaid capital stock, among others F. F. Vandervort, who owed \$30 per share on 100 shares. Clark & Co. agreed to surrender the \$24,500 collateral bonds "upon the terms and conditions hereinafter set forth," which terms, as pertinent to the present question, were as follows:

"First. Messrs. E. W. Clark & Co. will release the aforesaid twenty-four thousand five hundred (24,500) dollars of bonds when and as the same are needed for sale or pledge by the Sigua Iron Company, the amounts realized from said sales or pledges to be deposited with Messrs. E. W. Clark & Co. to the credit of the Sigua Iron Company, to be held subject to be drawn out at will, from time to time, by the Sigua Iron Company on its check or checks. Second. The Sigua Iron Company agrees to pursue the aforesaid stockholders, to wit, Messrs. Greene, Vandervort, Berlin, and Loring, and use every effort to collect the amounts unpaid on the stock standing in their names respectively, and by litigation, if necessary. This litigation shall be placed in the hands of such attorneys as may be appointed for the purpose by Messrs. E. W. Clark & Co. Any sums collected by the company from these stockholders shall be received by the company for the benefit of Messrs. E. W. Clark & Co., and shall be paid to said Clark & Co. And any judgment which may be recovered against any or all of said stockholders shall, at the request of Messrs. E. W. Clark & Co., be assigned to them. Any sums of money realized by said Clark & Co. out of any such judgment or judgments, or any money collected by the company from the said stockholders, and paid over to said Clark & Co., shall be received by said Clark & Co. as part payment of the aforesaid note of thirty thousand (30,000) dollars."

The affidavit recites that by the contract the iron company assigned and transferred to the defendants its claim against Vandervort; the fact that the suit against him was instituted by the iron company for the benefit of the defendants under the terms of the contract, and that the money was collected and paid over to Clark & Co. as their proper money; and that they expected to prove all these facts on the trial of the case. Assuming the averments of the affidavit are true,—and they must be so assumed upon a motion for judgment,—was the plaintiff entitled to judgment? In considering that question

it is to be observed that the general principles applicable to equitable assignments are clear, the difficulty being in the application of such principles to the varying facts of individual cases. To constitute a writing an assignment, no particular form of words is necessary. "The phraseology employed is not material provided the intent to transfer is manifested." *Christmas v. Russell*, 14 Wall. 84. "Any order, writing, or act which makes an appropriation of a fund, amounts to an equitable assignment of the fund. The reason is, that the fund being a matter not assignable at law, nor capable of manual possession, an appropriation of it is all that the nature of the case admits of, and therefore it is held good in a court of equity." *Spain v. Hamilton's Adm'r*, 1 Wall. 624. "It is certainly the tendency of all modern authorities to maintain the general doctrine, which may, indeed, be stated as a formula, that wherever a party has the power to do a thing (statute provisions being out of the way), and means to do it, the instrument he employs shall be so construed as to give effect to his intention. It is but the application of the old maxim, '*Interpretatio chartarum benigne facienda est, ut res magis valeat quam pereat*;' '*quando res non valet ut ago, valeat quantum valere potest*.'" *Bond v. Bunting*, 78 Pa. St. 218. "An equitable assignment is an agreement in the nature of a declaration of trust, which a chancellor, though deaf to the prayer of a volunteer, never hesitates to execute where it has been made on valuable, or even good, consideration." *Nesmith v. Drum*, 8 Watts & S. 10. "It leaves the legal ownership and consequent right of action in the assignor; and it has, therefore, been treated as a declaration of trust for the assignee, or an agreement that he shall receive the money to his own use; or, as the case may be, to the use of the persons beneficially concerned. Any binding appropriation of it to a particular use by any writing whatever is, consequently, an assignment, or, what is the same, a transfer, of the ownership." *Watson v. Bagaley*, 12 Pa. St. 167; *Bank v. Yardley*, 165 U. S. 634, 17 Sup. Ct. 439.

Turning, then, to a consideration of the paper in connection with the situation of the parties at the time it was drawn, we note that the facts of the case in hand are not those which characterized a number of cases where the debtor, without any additional consideration given, promised to pay or expressed an intention of paying a previous existing debt from money thereafter received from a specified source. Here a present, valuable consideration passed. In consideration of the iron company's covenants, Clark & Co. covenanted to surrender the \$24,500 of bonds they held as security for their note. What did they receive in return? On plaintiff's contention, nothing save the iron company's general covenant to collect assets (which, by the recitals of the paper, were doubtful in character), and when collected apply the proceeds to defendant's debt if it chose to do so. If it refused to do so, then, so far as the money collected was concerned, the defendants were remediless, and were remitted to a suit for breach of contract against a company which, even at that time, by the statements of the contract, was procuring the released bonds "for sale or pledge." As the defendants upon their demand note already had a present right to subject all the

assets of the company, including these very claims, to process to enforce payment of its \$30,000 indebtedness, it would follow—to adopt the plaintiff's construction of the paper—that the defendants, in substance, took nothing by the paper in lieu of the \$24,500 of bonds they agreed to release. Testing such a construction by the standard of ordinary business prudence, it cannot reasonably be conceived that Clark & Co. gave up their bonds without acquiring possession, or the means of acquiring possession, of other equally valuable or tangible assets, but rather that both parties intended to make a particular appropriation of specific property in lieu of the to be surrendered bonds. It will be noted that for some reason the paper was explicit in the designation of its subject-matter. The names of the company's debtors, the nature and amount of the claims, were set forth in detail, and its provisions, whatever they were, extended to the whole amount of each individual claim. The company on its part covenanted, so far as its provisions relate to what was done in the Vandervort claim,—First, to pursue Vandervort by litigation, if necessary; secondly, that Clark & Co.'s attorneys should conduct such litigation; thirdly, that the judgment recovered should be assigned to Clark & Co. at their request; and, fourthly, that Clark & Co. should credit the money on the judgment realized upon plaintiff's note. It will be noticed that, so far as the claims collected by judgments were concerned, not a dollar of them was ever to come into the plaintiff's hands. This was, in substance, agreed to by specific provisions for a procedure in which money would not come into the iron company's hands, and that such was the intent of the parties is shown by the fact that provision was expressly made where the claim was collected without suit for receipt of the money by the company and payment of it to the defendants. Suit was instituted against Vandervort in the fall of 1893 by the iron company. Judgment was recovered on January 6, 1894, and by the terms of the agreement the plaintiff was then bound to assign the judgment to Clark & Co. The contract made no provision for the company to receive the money collected upon the judgment, but simply for the assignment of the judgment to Clark & Co. on request. It could not refuse to do so, for a court of chancery would have enforced compliance with its covenant obligation, and for such assignment it had already been compensated by Clark & Co.'s covenant to surrender the bonds. Such assignment was a mere formal duty, necessary, as against Vandervort, to clothe Clark & Co. with legal ownership, for the equitable ownership was already vested in them. As against Vandervort, the legal ownership and right of action had remained in the trustee, but when the right of action was merged in the judgment, and that, too, by the action of the attorneys of cestui que trust, the iron company was a mere dry trustee, whose sole remaining duty was to assign such judgment on request. With notice of this agreement, Vandervort could not thereafter have paid the money to the iron company, and the fact that the right to it had irrevocably passed from the iron company is one of the earmarks which stamp is as an equitable assignment. Such being the relation of the plaintiff to the judgment, and its duty to Clark & Co., it is

clear that the plaintiff was not relieved of its duty, or Clark & Co. deprived of their rights, by the subsequent appointment of a receiver. This judgment was not an asset of the company, and, if the company had no right to it, it goes without saying the appointment of a receiver created none.

Upon full and careful consideration, we are of opinion the affidavit of defense was sufficient, and the court erred in entering judgment. That judgment is therefore reversed, and the cause remanded for further proceedings.

HUGHES COUNTY, S. D., v. WARD.

(Circuit Court, D. South Dakota, C. D. May 3, 1897.)

No. 17.

1. **MOTIONS—ADDITIONAL EVIDENCE AFTER SUBMISSION.**

After a motion by defendant to dismiss has been argued and submitted with leave to file briefs on the law, the case will not be reopened in order that additional evidence offered by plaintiff may be heard, in the absence of anything to show that it was unknown to him when the case was argued.

2. **POWERS OF STATE'S ATTORNEY—SUITS ON BEHALF OF COUNTY.**

Under the statutes of South Dakota a state's attorney has no authority to commence a suit on behalf of a county without a lawful direction to do so by the board of county commissioners.

3. **SAME—RATIFICATION OF ATTORNEY'S ACTION.**

Where an attorney has general authority to prosecute and defend suits already instituted by or against his client, his unauthorized action in commencing a suit may be ratified by the client.

Action by Hughes county, South Dakota, against James A. Ward.
On motion by defendant to dismiss.

John A. Holmes, for plaintiff.

John F. Hughes, for defendant.

SANBORN, Circuit Judge. On April 20, 1897, pursuant to a written stipulation between the parties to this action, their attorneys appeared and submitted the motion of the defendant to dismiss it, on the ground that the state's attorney who brought it never had any authority to commence the suit. In support of this motion the defendant introduced in evidence the affidavit of George M. Coates, a member of the board of county commissioners, to the effect that the board of county commissioners never authorized this action to be commenced, and the affidavit of John F. Hughes, the attorney for the defendant, to the same effect. No evidence in contradiction of these affidavits was offered, and it was agreed between the counsel for the respective parties that the facts were that the state's attorney commenced the action at the suggestion of one member of the board of county commissioners, without any action whatever on the part of the board, but that in July, 1896,—more than two months after this action was commenced,—the board passed a resolution by which they ratified and approved the action of the state's attorney in commencing this suit. The evidence upon the motion was then closed

under this agreement, and the motion was argued. At the close of the argument the court intimated the opinion that a state's attorney had no authority to commence a suit on behalf of the county without any action on the part of the board of county commissioners. Thereupon counsel for the plaintiff asked for a few days' time in which to prepare a brief in support of the proposition that the board could properly ratify the action of the state's attorney in commencing the suit so that it might be maintained. Time was granted to him for that purpose, and to counsel for the defendant to reply to his brief. The time for the presentation of these briefs has expired. On the last day of this time counsel for the defendant presented copies of affidavits made on April 24, 1897, by D. A. Stinger, A. G. Swanson, and K. M. Foote, a copy of an affidavit made on April 26, 1897, by W. H. Gleckler, and a copy of an affidavit of T. H. Conniff, made on April 26, 1897, and objected to their receipt in evidence on the grounds that, although they had been served upon him since the hearing on April 20, 1897, he had refused to accept service of them; that they were not introduced in proper time; that no foundation was laid; and that they were incompetent, irrelevant, and not the best evidence. At the same time he presented a copy of the brief of counsel for the plaintiff in this matter, and the affidavits of John F. Hughes and W. L. Shunk, sworn to on April 27, 1897, and a paper to which is attached the certificate of T. H. Conniff, county auditor for Hughes county, S. D., to the effect that it contains an exact copy of the proceedings of the board of county commissioners of Hughes county since January 1, 1896. He also presented a brief, in which he insisted upon his objections to the affidavits served upon him since April 20, 1897, by counsel for the plaintiff, and prayed that the affidavits of Hughes and Shunk and the certificate of Conniff might be received in evidence in rebuttal if the questions of fact were to be reopened and reconsidered.

Upon this state of facts, the objections of counsel for the defendant to the affidavits served upon him since April 20, 1897, must be sustained. The case upon the facts was closed on that day. The counsel for the respective parties appeared, agreed upon the facts, argued the law, and submitted the case, with permission to each of them to file a brief upon the law prior to this date. If the plaintiff had been surprised by the affidavits or testimony produced upon the hearing, it would have been given ample opportunity to rebut that evidence. If, after the hearing, it had discovered important evidence unknown to it before, from which it would appear that there was a serious error in the agreed statement of facts upon which the motion was submitted, the case might have been opened, and the newly-discovered evidence received. There is no such showing here. It does not appear that any of the evidence which has been prepared since this case was submitted was unknown to the plaintiff when it was argued. The notice of motion to dismiss this action was given in July, 1896, and it was brought on for hearing by written agreement between the parties on April 20, 1897. Here was certainly ample time for the plaintiff to prepare any evidence which it desired to

present. The objections to the affidavits of D. A. Stinger, A. G. Swanson, and K. M. Foote, sworn to on April 24, 1897, and the objections to the affidavits of W. H. Gleckler and T. H. Conniff, sworn to on April 26, 1897, are sustained. The affidavits of John F. Hughes and W. L. Shunk, sworn to on April 27, 1897, and the certificate of T. H. Conniff, together with the newspaper to which it is attached, have not been considered, because the objections to the foregoing affidavits were sustained.

Two questions are presented by this motion: (1) Whether or not a state's attorney has authority, under the statutes of South Dakota, to commence a suit on behalf of a county of that state without the passage of any resolution or any other action on behalf of the board of county commissioners authorizing him to take such action; and (2) whether or not the board of county commissioners can subsequently ratify the unauthorized action of a state's attorney in commencing such an action. I am of the opinion that the authority of the state's attorney in this regard was limited to prosecuting and defending suits already instituted by or against the county, and that he exceeded his power when he brought this action without a lawful direction to do so by the board of county commissioners of Hughes county. *Comp. Laws Dak. 1887, §§ 428, 591; Frye v. Calhoun Co., 14 Ill. 132; Town of Kankakee v. Kankakee & I. R. Co., 115 Ill. 88, 3 N. E. 741; Jerauld Co. v. Williams (S. D.) 63 N. W. 905; Machine Co. v. Snedigar, 3 S. D. 626, 54 N. W. 814.* Some of these authorities tend to sustain the proposition that the act of an attorney in bringing such an action without authority is incapable of subsequent ratification. That may be true when a stranger assumes to act as the agent of one from whom he had no authority whatever. But I am unable to concur in the view that the act of commencing an action by an attorney who is vested with the authority and burdened with the duty of prosecuting and defending suits for his client is incapable of ratification by the latter. This is not a case where the attorney who brought the suit was without any authority from his client, or where no relation of attorney and client existed. On the other hand, it is a case where the lawyer who instituted the suit was the general attorney of the plaintiff, charged with the duty of enforcing and protecting its rights in the courts, but unauthorized to commence litigation on its behalf. The attorney was not without authority to act for his client, but his action in this case was in excess of that authority. The general rule is that a principal may ratify an act of his agent in excess of his authority which he might have authorized in the first instance. The board of county commissioners had express statutory authority to empower the state's attorney to commence this action when he began it. As soon as his action became known to that board it passed a resolution of ratification and approval, and directed him to prosecute the suit. The case falls under the general rule to which I have referred, and I am unable to persuade myself that this action of the board was ineffectual. A party to an action may subsequently ratify the unauthorized act of his attorney, if he could have authorized it before it

was done. *Erwin v. Blake*, 8 Pet. 16, 26; *Robb v. Vos*, 155 U. S. 13, 39, 15 Sup. Ct. 4; *Robb v. Roelker*, 66 Fed. 23; *Dresser v. Wood*, 15 Kan. 264, 277; *Ryan v. Doyle*, 31 Iowa, 53. The motion to dismiss the action must be denied.

PENNSYLVANIA CO. v. CITY OF CHICAGO.

YAZOO & M. V. R. CO. v. SAME.

(Circuit Court, N. D. Illinois. June 1, 1897.)

CONSTITUTIONAL LAW—LIABILITY OF CITY FOR DAMAGE BY MOB.

A state may constitutionally compel its counties and cities to indemnify against losses of property arising from mobs and riots within their limits, independently of any misconduct or negligence on the part of such city or county to which the loss can be attributed. The Illinois statute to that effect (Rev. St. 1895, c. 38, § 256a) is therefore valid.

These were actions on the case against the city of Chicago, brought by the Pennsylvania Company and the Yazoo & Mississippi Valley Railroad Company, respectively. Plaintiffs demur to defendant's pleas.

George Willard, for plaintiff Pennsylvania Co.

C. B. Gwinn, for plaintiff Yazoo & M. V. R. Co.

Charles S. Thornton, for defendant.

GROSSCUP, District Judge. The action is brought under that section of the Criminal Code of the state of Illinois which provides as follows:

"Whenever any building or other real or personal property, except property in transit, shall be destroyed or injured in consequence of any mob or riot composed of twelve or more persons, the city, or if not in a city, then the county in which such property was destroyed shall be liable to an action by or in behalf of the party whose property was thus destroyed or injured, for three-fourths of the damages sustained by reason thereof." Rev. St. Ill. 1895, c. 38, § 256a.

The declaration avers the possession of property by the plaintiffs, and its destruction within the city of Chicago, at the time named, in consequence of a mob of 12 or more persons, and there is in its averment substantially nothing more. The declaration in no feature proceeds upon any grounds of negligence or misconduct upon the part of the city or any of its agencies, nor upon the ground of any contract relation between the city and the plaintiffs. The defendant pleads that it in fact exercised all its power to prevent the loss complained of; that the state of Illinois and the United States of America, equally with the city of Chicago, were interested and engaged in protecting the property eventually lost, and that the city of Chicago has no property or funds except such as can hereafter be raised by taxation to meet the payment of such losses. The plaintiffs have demurred to these pleas, the consideration of which carries the case back to the declaration.

The statute upon which the case proceeds is one of indemnity, pure and simple, and can be sustained only upon the principle that a state may rightfully and constitutionally compel its subdivisions, such as counties or cities, to indemnify against losses arising from mobs

and riots within their limits, independently of any misconduct or negligence upon the part of such city or county, to which the loss can be attributed. The contract of the city to preserve property within its limits, or the misconduct or negligence of the city in the matter of police provision, or the exercise of its police equipment, might properly be the basis of a suit upon the part of those who had suffered losses by reason of the city's failure to perform its contract, or its failure to properly and carefully provide for or execute police duties. But this action calls into exercise no such legal principles. There may be no such contract; there may have been no such negligence or misconduct; and yet the plaintiffs under the theory of this declaration may be entitled to recover. The statute in question burdens the taxpayers of the city to reimburse the losses suffered within its limits by means of a mob of 12 or more persons, independently entirely of any connection, other than that arising from locality, between the city and such losses. The question thus raised has been argued with great ability by counsel for the city, and, if the question were an original one, or had not been disposed of by such weight of authority, I might have come to a conclusion different from that which I shall now announce. The same question has been before the courts of last resort: New Hampshire: *Underhill v. Manchester*, 45 N. H. 214. New York: *Darlington v. Mayor, etc.*, 31 N. Y. 164. Pennsylvania: *Allegheny v. Gibson*, 90 Pa. St. 397. In each of these cases the constitutional validity of similar statutes has been upheld. The doctrine announced in these cases has likewise received the approval of Judge Cooley. *Cooley, Tax'n*, 480. The right of a state to impose such a burden upon a municipality is touched upon in the opinion, though not involved in the decision, of the supreme court of the United States in *Louisiana v. Mayor, etc., of City of New Orleans*, 109 U. S. 285, 3 Sup. Ct. 211, where it is said:

"The right to reimbursement for damages caused by a mob or riotous assemblage of people is not founded on any contract between the city and the sufferers. Its liability for the damages is created by a law of the legislature, and can be withdrawn or limited at its pleasure. Municipal corporations are instrumentalities of the state for the convenient administration of government within their limits. They are invested with authority to establish a police to guard against disturbance; and it is their duty to exercise their authority so as to prevent violence from any cause, and particularly from mobs and riotous assemblages. It has, therefore, been generally considered as a just burden cast upon them to require them to make good any loss sustained from the acts of such assemblages which they should have repressed."

The above quotation, it is true, is obiter dicta; neither is it at all clear that the court had in mind any other than a case where, by the exercise of any or all of the city's legitimate powers, the mob could have been repressed. But there is a bearing in the intimation, taken in connection with the preceding authorities, especially in the absence of any countervailing decision, which seems to carry the sanction of the court to the constitutionality of such statutes; at least there is enough to prohibit a trial court from declaring the statute unconstitutional, except upon grounds the clearness and stability of which are beyond question. Upon these considerations, I feel it my duty to sustain the demurrers.

WHEELER v. SMITH.

(Circuit Court, N. D. Illinois. February 15, 1897.)

ACTION AGAINST RECEIVER—NECESSITY OF LEAVE OF COURT—FEDERAL COURTS.

The statute allowing receivers of federal courts to be sued without leave applies to a receiver appointed by a territorial court for a corporation created by act of congress; as, in making such appointment, the court acts as a federal, and not as a local, court.

At law. Action on the case by Rose F. Wheeler, administratrix, against Charles W. Smith, as receiver of the Atlantic & Pacific Railroad Company. Defendant filed a plea in abatement, denying jurisdiction.

Julius A. Johnson, for complainant.

Robert Dunlap, for defendant.

GROSSCUP, District Judge (orally). The defendant, Smith, is the receiver of the Atlantic & Pacific Railroad, a road running from a point in New Mexico to a point in California, and was appointed in one of the territorial courts of Arizona. The jurisdiction of the court is due to the fact that the railroad, by act of congress, is a federal corporation. The suit here is by the plaintiff as administratrix, and was brought without leave having first been obtained from the Arizona court that its receiver might be sued. The defendant, by a plea in abatement, challenges the jurisdiction of the court. The statutes of the United States provide that receivers of United States courts may be sued without leave of the court having first been obtained. The only inquiry is whether the defendant, within the meaning of this statute, is a receiver of the United States court. The territorial courts of the United States sit in a double capacity: First, as courts of the United States having cognizance of all questions that properly come within a federal court,—such, for illustration, as those arising under the constitution and laws of the United States; second, as local courts, enforcing the municipal laws of the territory.

Whether congress meant, by the act in question, to permit receivers representative of the court in its local capacity to be sued anywhere, without leave having first been obtained, is not a question I need decide. It is plain to me that the appointment of this defendant as receiver for this railroad was done by the court in its federal, as distinguished from its local, capacity. The jurisdiction is founded upon the company's being a United States corporation, and corporations created by the United States are, by virtue of that fact, amenable to the federal courts. The plea to the jurisdiction cannot be sustained.

BLUMENTHAL et al. v. CRAIG.

(Circuit Court of Appeals, Third Circuit. June 2, 1897.)

1. **JURISDICTION OF FEDERAL COURTS—CITIZENSHIP—ACTION BY NEXT FRIEND.**
A next friend conducting a suit in behalf of an infant is not a party to the action, and his citizenship is not a test of the jurisdiction of the federal courts.
2. **OPINION EVIDENCE—MASTER AND SERVANT—DEFECTIVE MACHINE.**
In an action in which one of the issues is whether the condition of a machine by which the plaintiff has been injured of itself warned plaintiff of danger, it is not error to allow a more experienced workman to testify as to whether he would have known the machine, in such condition, to be dangerous.
3. **MASTER AND SERVANT—DEFECTIVE MACHINERY—EVIDENCE.**
When a witness is called for the purpose of showing that a machine, through which an accident has happened, is not absolutely safe, even when in perfect condition, it is not error to allow him to be asked, on cross-examination, whether he had ever known of such an accident through a perfect machine.
4. **SAME—CONTRIBUTORY NEGLIGENCE—YOUTH AND INEXPERIENCE.**
In considering the question of contributory negligence, youth and inexperience of a plaintiff are to be taken into account, and it is not error, in connection with proper instructions as to the obligations of the plaintiff, to direct the jury to make proper allowance therefor, nor to refuse a requested instruction which applies to the case of a minor,—a rule applicable where minority and inexperience are not factors.
5. **SAME—DEFECTIVE MACHINERY—ASSUMPTION OF RISK.**
A defect in a machine and the risk in operating it when defective are not necessarily the same, and the risk may not be patent and obvious, though the defect is so.

In Error to the Circuit Court of the United States for the District of Delaware.

Lewis C. Vandegrift, for plaintiffs in error.

Levi C. Bird and George Gray, for defendant in error.

Before ACHESON and DALLAS, Circuit Judges, and BUFFINGTON, District Judge.

BUFFINGTON, District Judge. This case comes before us on a writ of error to the circuit court of the United States for the district of Delaware. David F. Craig, the plaintiff below, and defendant in error here, by his next friend, Andrew McDougall Craig, brought suit in the superior court of Delaware against Ferdinand Blumenthal and Julian S. Ulman, trading as F. Blumenthal & Co., to recover damages for the loss of a hand and arm while working in their employ. Subsequently the said Andrew McDougall Craig, by agreement of parties, was duly admitted by the court to prosecute the case as next friend of the plaintiff, who was a minor. Thereafter, as appears by the record of that court removed to the court below, the defendants filed a petition, signed by counsel as "Attorneys for Petitioners," alleging the petitioners were citizens of the state of New York, and that "David F. Craig, the plaintiff above named, was then, and still is, a citizen of the state of Delaware," and averring the statutory amount was in dispute. With the petition they filed a bond with surety given to David F. Craig, who was therein styled the plaintiff,

and the individual defendants were named and styled defendants and petitioners. Thereupon the cause was removed to the United States circuit court for the district of Delaware, trial there had, and a verdict recovered in favor of the plaintiff; whereupon the defendants filed a motion in arrest of judgment, alleging, *inter alia*, that the petition for removal was not the petition of the defendants, or either of them; that Andrew McDougall Craig, the next friend, was a party to the controversy, and that his citizenship was not disclosed; that the cause was improperly removed, and the trial court was wholly without jurisdiction. The court declined to allow the motion, and entered judgment, whereupon the cause was removed to this court for review of its said action and of sundry alleged errors during the trial.

So far as the questions raised by the motion in arrest of judgment are concerned, we are of opinion no error was committed by the court below. The record of the cause, certified to by the clerk of the superior court of Delaware, and returned to the circuit court, shows that the defendants presented the petition and bond for removal, and identifies their counsel by name, and the petition is signed by the same counsel as attorneys for petitioners. This part of the motion is, therefore, without merit. The other contention, based upon the absence of averment as to the citizenship of Andrew McDougall Craig, the next friend, is equally untenable. The constitution (article 3, § 2) provides that "the judicial power shall extend * * * to controversies * * * between citizens of different states." If, therefore, the parties to the present controversy are David F. Craig, the minor, and the defendants alone, the circuit court had jurisdiction. But it is asserted that the next friend is a party to the controversy, and that his citizenship must affirmatively appear, and be such as to give jurisdiction. The solution of this question involves the status and relation of a *prochein ami*, or next friend, to an action. Upon this point the authorities are clear. In the first place, the minor's rights are the subject of the action and the basis on which the right of action rests. The presence of the next friend upon the record is not in order to vest a right of action in the minor, but to aid in the enforcement of a right already vested. When the minor is so represented, he, and he alone, is recognized as the real party to the controversy, and his rights are concluded by the judgment of the court.

In *Morgan v. Thorne*, 7 Mees. & W. 407, the court, in discussing the relation of the minor to the litigation, said:

"It is clear that any *prochein ami* is to be considered as an officer of the court, specially appointed by them to look after the interests of the infant, on whom the judgment in the action is consequently binding, and who cannot be allowed, on attaining his age, to commence fresh proceedings founded on the same cause of action."

In *Sinclair v. Sinclair*, 13 Mees. & W. 645, this case was followed. The competency of the *prochein ami* as a witness under the statute there turned—as the court expressed it—upon the question "whether the *prochein ami* is a party to the suit. If he is, he is a party named in the record, and cannot be examined." It was decided that, though

named on the record, and liable for costs, he was not considered a party to the suit, and was, therefore, competent as a witness. To the same effect are numerous American decisions, among which we note *Brown v. Hull*, 16 Vt. 673; *Anon.*, 2 Hill, 417; and *Railroad Co. v. Fitzpatrick*, 36 Md. 624,—where the courts say:

"The relation of a *prochein ami* to the action, and his powers and duties, are simple and well defined. He is no party to the suit in the technical sense of the term, although he is responsible for costs. He is considered as an officer of the court, specially appointed by it to look after the action of the infant in whose behalf he acts."

Such being the law, there was no error in the court declining to arrest judgment. The citizenship of the next friend was not a test of its jurisdiction.

We now turn to the alleged trial errors as set forth in the assignments which we will consider *seriatim* save the first, second, and fifth, which are not urged. To rightly understand the rulings, charge, and answer to points, a brief statement of the facts shown on the trial is proper. A careful examination of the proofs warrant us in adopting as correct the following extract of the charge as showing such facts:

"The plaintiff entered the employment of the defendant in September, 1895. and was put to work on a fleshing machine, which is used for the purpose of removing particles of flesh that may be adhering to the skins which are passed through it. The operation does not appear to be at all dangerous when the machine is in good order. The machine is not very large, and is of simple construction. It consists of a cylinder, which is provided with spiral knives or cutters, between which cylinder and a roller, both being placed in a horizontal position, and made to revolve with great rapidity, a skin is inserted by a boy called 'the feeder,' who stands on one side of the machine, while another boy, called 'the catcher,' who stands on the opposite side, receives the edge of the skin, and pulls it out. Occasionally a skin becomes twisted or turns away in coming through, and 'the catcher's' duty is to straighten it. Sometimes the skin wraps around the roller, and the machine must be stopped, and the skin removed. The attendance on the machine does not require any considerable skill or experience. Attention and alertness of movement would seem to be all-sufficient for the work, and boys are generally employed in its performance. On the side where the plaintiff stood to receive the skins, a slated hood or box, similar to that on a 'roll top desk,' came down over the cylinder and roller to within a very short distance of the outlet for the skin, leaving a space just wide enough for the skin to come through. When this hood was in good and proper condition, there was evidence that the catcher could not get his hand under it while in the usual and ordinary performance of his work. The plaintiff had been attending the machine from the early part of September until a week or more before the lowest slat of the hood broke, leaving a space of from two inches to two and a half inches in width at the bottom. This defect was immediately made known to the foreman in chief, but was not repaired until after the happening of the accident by which the plaintiff lost his arm. * * * In the meantime the plaintiff kept at work on the defective machine without any special instruction or warning to be more careful and cautious in his work."

Among other grounds of defense it was alleged the defect of the broken hood was a patent one, and that the plaintiff, having voluntarily chosen, after knowing of such break, to work on the machine, must be deemed to have assumed the risk of injury therefrom. During the trial, Henry Quashni, a boy who had worked nine months on these fleshing machines, who saw the broken slat on the one on which

Craig was injured, and who had stated that, if the slat had been on the machine, it would have been perfectly safe, was permitted, against defendants' objection, to answer a question as to whether, with the experience he had had, he would have known the broken slate made the machine more dangerous to work upon. We can see no error in this question, which constitutes assignment No. 2½.

One of the issues was whether the broken hood of itself warned the plaintiff of increased danger. The witness, a much more experienced boy, who saw the broken slat, in substance said it did not so impress him. Clearly, this was relevant and proper testimony.

The next assignment,—No. 3,—viz.: "That the court erred in that by the charge as originally delivered orally, as well also as by the one subsequently written and herein contained, it continuously impressed upon the jury by said charge and its instructions that the said plaintiff was not of sufficient age to understand and appreciate, and did not understand and appreciate, the alleged increased danger of operating said machine with the lowest slat in the hood thereof broken, whereas the evidence in the case clearly showed that said plaintiff was fully capable of understanding and appreciating any increased danger by reason of said slat being broken as aforesaid,"—is not well taken. The court nowhere stated "that the plaintiff was not of sufficient age to understand and appreciate, and did not understand and appreciate, the alleged increased danger" complained of. This statement, it seems to us, is based on a misapprehension of the charge. What the court did say was that, after the hood was broken, the plaintiff was "without any special instruction or warning to be more careful and cautious in his work,"—a statement warranted by the evidence. Furthermore, it must be noted that the court explicitly and without qualification charged the jury in the words of defendants' fourth point: "That, in order to find a verdict for the plaintiff in this case, the jury must be satisfied from all the evidence that the plaintiff was ignorant of the danger he incurred while working with the fleshing machine in the condition it was." We are therefore of opinion this assignment is not well taken.

The witness Jettica was called by the defendants, and testified he was a machinist; that he had charge of the machinery in the works for 10 years, including the fleshing machines; and that the hoods were not a perfect protection against injury by the knives. He then explained several ways in which such injury could occur with a perfect hood on the machine. This line of proof was clearly pertinent as meeting the contention of the plaintiff that the machine was absolutely safe when hooded, and, inferentially, that plaintiff was bound to furnish such a perfect machine. Having so testified, Jettica was asked on cross-examination, against objection, whether, within his experience, such an accident had ever happened when the hood was perfect. Having questioned him in chief, as stated, we think the question in cross-examination was proper, and the assignment No. 4 is not sustained.

It is sufficient answer to the sixth assignment, which is "that the court erred in permitting the case to go to the jury upon the testimony submitted by the plaintiff," to say that the court was not asked

by any point to withdraw the case from the jury. Consequently its omission to do so was not error. Nor do we see how it could have so done had such a point been presented.

The next assignment—No. 7—is:

"That the court erred under the evidence submitted in the case in charging the jury that: 'In the meantime the plaintiff was kept at work on the defective machine without any special instruction or warning to be more careful and cautious in his work. In other words, he was not told that there was any greater danger in using the machine after the slat had been broken out than there was before; and while it was in this condition he incautiously or heedlessly, in attempting to catch the edge of the skin, inserted his hand too far under the broken hood.'"

The narrative statement by the court was warranted by the proofs. Boyle, the fleshing-machine operator, who was called by defendants, says that when he put Craig to work originally, when the hood was unbroken, he "warned him of the danger of trying to catch the skin if it was on the roller without stopping the machine." He says he put the plaintiff to work on this broken machine some two weeks before he was hurt. He was then asked: "Q. Was the machine broken when you put him to work on it? A. Yes, sir. Q. Did you give him any instructions then? A. No, sir; only for the catching; not to attempt to take the skin off the roller when the machine was in operation. He knew them instructions." The plaintiff had testified that he was trying to stop the skin, and his hand "slipped in the place where the roller was broken." We think the language used fairly stated the proofs, and consequently no error was committed by its use.

The next assignment—No. 8—refers to the court's language in reference to the warning cards posted in the factory, which plaintiff admits he saw before the accident. The court read the notice, which was as follows:

"Notice. Warning. Keep your eyes on this machine while operating, as it is dangerous. If it is necessary to converse or look around, cease operating the machine. Noticeable neglect of this warning will be met with dismissal. Per order,
F. Blumenthal & Co.,"

—To the jury, and said:

"It was a wise precaution on the part of the defendants to have these cards constantly before the boys, so that they might be daily and hourly admonished to attend to their duties, and avoid every apparent danger; but these warning cards did not inform the plaintiff of the increased and extraordinary danger of operating a machine with a broken hood, nor is there any evidence that he received instruction from any source to be more careful in operating the machine after the slat had been broken."

We see no error in this. The notice certainly was no warning of anything except the dangerous character of a perfect machine. Assuredly, there was no error in the court referring to the fact that this notice conveyed no warning of additional danger caused by a broken slat or portion of the hood which covered the revolving knives. Consequently, the assignment should not be sustained.

The next assignment—No. 9—complains of the instruction to the jury that they should "make all proper allowance for his (the plaintiff's) youth and inexperience, for his ignorance of the increased danger caused by the absence of the slat, of which he had no warning."

Taken in its proper connection with the rest of the charge, and with the facts proven in the case, we see no error in this language. The court, in the preceding portion of the charge, had instructed the jury that, if they found the plaintiff "lost his arm through his own carelessness and neglect of duty, or want of proper attention, such as could be reasonably expected from one of his age, and not through inadvertence and inexperience, in the face of an uncommon and unusual danger of which he had received no warning," their verdict should be for the defendants. It then called the jury's attention to the question of contributory negligence in connection with minors, and said the doctrine had been established of taking into consideration in passing on that question "the youth, immaturity of judgment, and the incapacity of the minor to appreciate or realize the danger to which he may be exposed, in the absence of proper instructions and training as to the work in which he is employed," and in that connection used the language complained of. Taken in its proper relation, and bearing in mind the positive instructions afterwards given in answer to the fourth point, to which reference has been made above, there certainly was no error in the court's use of the language complained of. It fairly submitted the question involved to the jury, and there was no error in the way in which it was done.

The next assignment of error—No. 10—consists in the refusal of plaintiff's second point, which was:

"The plaintiff was bound to see patent and obvious defects of the machine with which he was working, and he assumed all patent and obvious risks as well as those incident to the business; and, as he ought to have known of the defects in the hood, if he continued to work with the same, and received injuries therefrom, he is guilty of contributory negligence, and cannot recover."

This was not error. However correct the statement of general principles therein is, the affirmance of this point would have been misleading as applied to the facts of the present case. It virtually called for the application to a minor's conduct of a rule applicable where minority and inexperience were not factors. In substance, it asked the court to say the broken hood was a patent and obvious defect; that the plaintiff assumed all patent and obvious risks; and, if he worked on a broken hood, he was guilty of contributory negligence. This, to our mind, is a non sequitur, and is wholly at variance with the facts proven in this case. The proposition confounds the defect and the risk. They are not necessarily convertible terms. In this case the plaintiff admitted he knew of the defect, but denied he knew of the increased risk arising from such defect; and Boyle, the only witness of defendants' who referred to this point, testified that he considered the broken machine safe enough for a boy to work upon if he followed the directions for working a perfect machine. The inference fairly deducible from his testimony was that the broken hood conveyed no warning of increased danger, for, in his view, a broken-hooded machine was not more dangerous than a perfect one. This point asked the jury to infer a conclusion not warranted by the proofs, and at variance, not only with the testimony on plaintiff's part, but with the defendants' as well. There was no error in its refusal, or in the qualified affirmance of the defendants' third point,

which is also assigned for error as assignment No. 11. In doing so the court very properly noticed the distinction between plaintiff's knowledge of the broken slat, and of his knowledge of the increased risk to which he was exposed by such defect.

We see no error in the twelfth assignment of error, which consisted in the answer to defendants' fifth point, which was:

"That if the jury are satisfied from all the evidence in the case that the plaintiff was of such age of competency, and did have knowledge of the danger incurred by him while working in the machine with the hood thereon in the condition testified to, the fact that he was a minor does not alter the general rule of law upon the subject, and he took upon himself and assumed, not only the risks incident to his employment, but also all the risks which were patent and obvious."

The answer was substantially affirmed, but attention was not improperly called to the youth, inexperience, and length of service of the plaintiff, and his knowledge of the danger. These were all proper elements for the jury's consideration in reaching the conclusion asked for by the point.

We see no error in the answer to the plaintiff's seventh point, which constitutes the thirteenth assignment. It concerned the printed notice, to which reference has already been made, and said that notice did not have reference to a machine with a broken hood.

In the affirmance of defendants' sixth point the court had, in substance, answered what was requested in the eighth prayer. Hence its failure to give to it a categorical answer—which constitutes the fourteenth assignment—is not error.

The fifteenth assignment refers to the answer to defendants' ninth point. This point made a prudent adult's knowledge and conduct under the circumstances of this case the test and standard of the plaintiff's right. It wholly ignored the plaintiff's youth, and there would have been no error in an unqualified refusal of the point as not pertinent to the cause.

An observance by the defendants in this case of the plain duty of furnishing safe appliances to their employes would have resulted in saving them the loss of money, and the plaintiff the loss of his arm. Upon the whole case we are of opinion no reversible error has been shown, and the judgment must be affirmed.

SAYLES v. NEW YORK, N. H. & H. R. CO.

(Circuit Court, S. D. New York. June 8, 1897.)

CARRIERS—LIMITATION OF LIABILITY—WAYBILLS—QUESTION FOR JURY.

When a shipper of freight over a railroad has signed a waybill containing stipulations limiting the carrier's liability which are not very plain, and are not so situated as to be plainly included within the terms of the contract, it is for the jury, in an action to recover for the loss of the freight, to determine whether the shipper understood, or ought, under all the circumstances, to have understood, that there was such a limitation of liability.

Frederick W. Holls, for plaintiff.

Henry W. Taft, for defendant.

WHEELER, District Judge. The plaintiff's agent put into a car on the Boston & Maine Railroad some valuable horses, to be carried over that road and the defendant's road to Pawtucket, R. I. The agent of that road at the time presented to the agent of the plaintiff a waybill, to be signed by him, which said: "Forward the property mentioned below, marked and numbered as in the margin," to the plaintiff, "at Pawtucket," which included, among other things, these horses, and "Subject to the rules and regulations in the freight receipt presented with this, and which are accepted and agreed to be just and reasonable." This bill of lading was signed by the plaintiff's agent. The agent of the Boston & Maine Railroad at the same time delivered to the agent of the plaintiff a freight receipt, signed by him, which said: "Received from ———, the property described below, in apparent good order," etc., and, "It is mutually agreed, in consideration of the rate of freight to be paid for this service, as to each carrier of all or any of said property over all or any portion of said route to destination, and as to each party at any time interested in all or any of said property, that every service to be performed hereunder shall be subject to all the conditions, whether printed or written, shown or indorsed hereon, and which are hereby agreed to by the shipper, and by him accepted for himself and his assigns as just and reasonable." On the left-hand margin of both the bill of lading and receipt was a square in black lines, headed "Marks and Numbers," in the lower part of which, on the receipt, was a blank for car number, weight, and advanced charges. Across this square, and extending beyond it, in another colored ink, and lines running the other way from the rest of the print, on each, was printed: "The rates for transporting animals are based upon and intended only for those of ordinary value, viz.: If horses or mules, not exceeding \$100 each; if cattle or cows, not exceeding \$75 each; if fat hogs, or fat calves, not exceeding \$15 each; if sheep, lambs, stock hogs, or stock calves, not exceeding \$5 each; if a full chartered car, on the entire contents of each car, not exceeding \$1,200. And in giving this receipt this Co. assumes no risk for a higher value, unless by special arrangement with the general freight department." In the squares of this receipt and bill of lading was written in pencil, "B L 5566." The horses were forwarded over the Boston & Maine Railroad, and part way on the defendant's road towards Pawtucket, and killed, so that the defendant is unquestionably liable. This suit is brought for the damages for the killing of the horses and the loss of other property, and no question is made, except as to whether, upon this transaction, the defendant is liable for more than \$100 for the loss of each of the horses. That a common carrier may conclusively agree with a shipper as to the value of property carried for which the carrier may be liable, is fully settled in the United States courts. *Hart v. Railroad Co.*, 112 U. S. 331, 5 Sup. Ct. 151; *Liverpool & G. W. Steam Co. v. Phenix Ins. Co.*, 129 U. S. 397, 9 Sup. Ct. 469. And that a notice or memorandum upon the shipping papers is not conclusive as to such contract, when not plainly a part of the same as agreed to, seems to be also well settled in these courts.

Railroad Co. v. Manufacturing Co., 16 Wall. 318; *Ayres v. Railroad Corp.*, 14 Blatchf. 9, Fed. Cas. No. 689. Whether such a memorandum upon the papers is a part of the contract of shipment, where it is not over the signatures, and plainly a part of the contract signed, seems to be a question of fact. Generally, in making a contract, what the promisor fairly gives the promisee to understand is agreed to is the extent of the terms of the contract. This is elementary. Here the agent of the carrier took from the agent of the shipper the bill of lading and gave the receipt, upon each of which was this indorsement at the left hand; not very plain, and not directly above the signatures. It was not so situated as plainly to be included within the terms of the contract. It would be a part of the contract if understood to be so by the parties, or if the promisor (the carrier) fairly gave the promisee (the shipper or his agent) fairly to understand that it was a part of the contract.

In this case the testimony of the agent of the carrier tended to show that these terms as to value were expressly mentioned when the horses were taken and the papers delivered. The testimony of the agent of the plaintiff tended to show that his attention was not expressly called to this indorsement, that it was not mentioned by the agent of the carrier, nor noticed or understood by him. The defendant insisted that it became conclusively a part of the contract by being so indorsed thereon, and requested that a verdict of the plaintiff be directed for the amount of \$100 for each of the horses only. This instruction was refused, and the jury were, in substance, directed to return a verdict for the plaintiff for \$100 for each horse, only, if the plaintiff's agent in fact understood that the horses were to go at the value of \$100 each, or if from the indorsement, under all the circumstances, he ought to have understood that there was a limitation in value to \$100 for each horse, or ought to have understood that there was a provision of the contract by which the value might so be limited, although not in fact understood so by him. In this court the trial of all questions of fact must be by jury. Whether this limitation actually existed by contract could not be determined as a matter of law. The plaintiff's agent did not sign any paper which plainly and conclusively included such a provision. What he did understand about it was a question of fact for the jury, and if he did not come to an understanding about it, what he was fairly given to understand, and ought to have understood, was a further question of fact for the jury. This could not be taken from the jury without infringing upon the right of trial by jury guaranteed to all parties. If the carrier would have the limitation upon the value, it should make the limitation to be clearly understood. *Liverpool & G. W. Steam Co. v. Phenix Ins. Co.*, 129 U. S. 397, 9 Sup. Ct. 469. If it left the matter doubtful upon the facts, the only right left was to have the question of fact remaining open tried by the jury. This is exactly what the defendant in this case had, and the jury have found, upon those questions, that the plaintiff's agent neither understood, nor ought reasonably to have understood, that there was any limitation upon the value. No question is made as to the fairness

of the jury in reaching the conclusion they did; therefore no reason is apparent for setting aside the verdict. Motion for new trial overruled, and judgment on the verdict.

CITY OF CLARKSDALE, MISS., v. PACIFIC IMP. CO.

(Circuit Court of Appeals, Fifth Circuit. May 11, 1897.)

No. 550.

MUNICIPAL BONDS—BONA FIDE HOLDERS—MINUTES OF COUNCIL—PAROL EVIDENCE.

As against a bona fide holder for value of municipal bonds, parol evidence is not admissible to contradict the minutes of the board of aldermen, which, as required by statute, recite that the mayor and aldermen canvassed the returns of the election authorizing the bonds, and found that due notice had been given, and that the election had been legally and formally held.

In Error to the Circuit Court of the United States for the Western Division of the Northern District of Mississippi.

John W. Cutrer, for plaintiff in error.

J. P. Blair and W. A. Percy, for defendant in error.

Before PARDEE and McCORMICK, Circuit Judges, and NEWMAN, District Judge.

NEWMAN, District Judge. This case is before this court for the second time. On the first trial in the court below, there was a verdict for the defendant, and the plaintiff, by writ of error, brought the case here. The decision of the court reversing the judgment of the court below, and the opinion, are reported in 20 C. C. A. 635, and 74 Fed. 528. The second trial in the court below resulted in a verdict and judgment for the plaintiff, and the case is now before this court on writ of error by the defendant, the city of Clarksdale. The character of this suit and the questions involved are so fully stated in the former opinion of this court that it is not necessary to go into them elaborately here. The suit was brought on the coupons of certain bonds issued under an act of the legislature of Mississippi, approved March 7, 1882, authorizing the cities and corporate towns of Mississippi to subscribe to the capital stock of railroads. Questions were raised on the first trial in the court below and in this court, and also on the second trial in the court below, and on the present hearing here, as to the constitutionality of the act under which these bonds were issued, as to the sufficiency of the registration, the legality of the election authorizing the issuance of the bonds, and of the power of the city of Clarksdale to assume and carry into effect the agreement of its predecessor, the town of Clarksdale. All these questions are disposed of in the former opinion of this court, and to that opinion we are content to adhere, as well as to the reasoning therein.

The only question raised in the court below on the second trial which we desire to notice is the offer by the defendant of certain evidence, and the rejection of the same by the court. Counsel for

the defendant offered on the trial to prove by certain witnesses that no notices were given to qualified electors of the town of Clarksdale of the holding of the election at which the issuance of bonds was authorized, as was required by the act of March 7, 1882; that no notice of the holding of said election was given by posting up notices thereof in at least five public places in the said town of Clarksdale, nor by putting the same in any newspaper in said town for not less than 20 days before the holding of the election, notifying the legal voters of the town to meet at the usual place or places of holding the election, or any other place or places therein, for the purpose of voting for or against such proposed subscription. The court refused to allow the defendant to make the proof offered, and excluded the same from the jury, to which ruling the defendant excepted. The act of March 7, 1882, under which this election and the bonds issued, required authorities of the city or town "to post up notice in at least five public places in such county, city or town, and publish the same in any newspaper published in the same, not less than twenty days before the holding of such election, notifying the legal voters of such county, city or town to meet at the usual place of holding election in such county, city or town for the purpose of voting for or against such subscription." We need not consider the effect of the failure on the part of the authorities of the town to give this notice, except to see how it affects the plaintiff in this case. The act of the legislature under which this election was held required the mayor and aldermen, at some early day after the election, to hold a called meeting, "to canvass the returns, and declare the result of such election, which result, when determined, as aforesaid, should be entered upon the minutes of said board." The election in question having been held on the 25th day of November, 1889, on the next day, the 26th, a meeting of the mayor and aldermen of Clarksdale was held, at which, as shown in the minutes, it was declared that it appeared "to the satisfaction of this board that notice of the holding of said election was given as required by law, and the said former order of this board, for more than twenty days prior to the holding of the same, by publication of said notice for this time in the Clarksdale Banner, a public newspaper, printed and published in the city of Clarksdale, and posting up of said notice for said time in five public places within the corporate limits of said city; and it further appears to this board that such election was in all respects legally and formally held and conducted and concluded, and that correct report thereof, according to law, has been made to this board by the inspectors who held the same, which said return is in the words and figures below," etc.; and, further, "this board, having carefully, legally, and accurately canvassed the said returns so made to them, as aforesaid, hereby declare and determine the true result thereof, as shown by the said returns, the same being the true result of the legal vote of the city of Clarksdale, to be as follows, to wit: 'Total votes for the subscription, 168; total against the subscription, none.'" The board then proceeded, according to the minutes, to declare that the result of the election was such as to authorize the subscription to the capital stock of the railway company, the issuance of the bonds to pay

for the stock, and then provide the manner of carrying the same into effect.

When the offer was made by the defendant in the court below to prove that, as a matter of fact, no notice was given of this election, the court had before it already the minutes of the city, with the foregoing recitals. It also had the fact before it as to the manner in which these bonds came into the hands of the plaintiff, the Pacific Improvement Company, and as to the character of its holdings. It is clear that the court acted on the view that, these bonds having been issued to the L., N. O. & T. Railroad Company, and by it transferred to the Pacific Improvement Company for value, the Pacific Improvement Company was such a bona fide holder for value as that, in view of what had been determined by the mayor and aldermen, and entered on their minutes, in reference to the election, in the respect just mentioned, this evidence was not competent. Whether this evidence would have been competent as against the railway company need not be considered; nor need we, in view of the opinion we entertain as to the attitude of this plaintiff, consider the strong argument made by counsel for defendant in error in favor of the proposition that parol evidence in a collateral action cannot be received to contradict the records of a public corporation required by statute to be kept in writing, or to show a mistake in the matters as therein recorded. It is sufficient for the present purpose to say that under the facts and circumstances of this case, and as against these plaintiffs, we find no error in the action of the court in excluding the testimony offered.

There were other and minor objections to the admissibility of this evidence, which we need not discuss, in view of the opinion we entertain, and have just expressed, as to the propriety of excluding this testimony on other and broader grounds. We hold, therefore, that the action of the court below in directing a verdict, and entering a judgment for the plaintiff, was right, and the same is affirmed.

CONSUMERS' COTTON-OIL CO. v. ASHBURN.

(Circuit Court of Appeals, Fifth Circuit. May 25, 1897.)

No. 565.

1. FEDERAL COURTS—EXCEPTIONS TO CHARGE—STATE STATUTES.

The act of congress of 1872, providing that the practice in federal courts shall conform "as near as may be" to the practice in the state courts, does not apply to the practice of requiring exceptions to the charge to be made while the jury is at the bar, and before it retires; and a state statute dispensing with this requirement will not be followed.

2. SALES—WAIVER OF RIGHT OF ACTION FOR BREACH.

The buyer waives his right of action for the seller's breach of contract by entering into a new contract with him for the purchase of a part of the same goods.

In Error to the Circuit Court of the United States for the Northern District of Texas.

Two actions heard together, the one by Consumers' Cotton-Oil Company against E. J. Ashburn for the price of goods sold, and

the other by E. J. Ashburn against the company for damages for breach of contract. Verdict for plaintiff in the latter action, and judgment in his favor for balance due after deducting the amount sued for by the company, and admitted by him to be due. The Consumers' Cotton-Oil Company brings this writ of error.

Geo. Clark and D. C. Bolinger, for plaintiff in error.

A. C. Prendergast and Wm. Evans, for defendant in error.

Before PARDEE and McCORMICK, Circuit Judges, and NEWMAN, District Judge.

NEWMAN, District Judge. It appears from the record in this case that in September, 1893, W. I. Yopp, as the representative of the Consumers' Cotton-Oil Company, entered into negotiations with E. J. Ashburn, at Waco, Tex., for the sale by said company to Ashburn of certain cotton-seed meal and hulls. The conversation and negotiations finally resulted in what is claimed by Ashburn to have been a contract for the sale by the said company to Ashburn of 2,600 tons of hulls and 600 tons of meal; the hulls at \$2.75 per ton, and the meal at \$17.25 per ton. A memorandum was made at the request of Yopp by R. B. Dickey, superintendent of the Consumers' Cotton-Oil Company Mill, at Waco, of the transaction. While Ashburn claims that what was done was to be binding if he accepted it within 24 hours, which he did, the company claims that when Ashburn accepted it, and so notified Dickey, Yopp was to be notified by wire at Houston, and he was to have opportunity to confer with his company at its headquarters, in Chicago, before the trade became binding. The result of the matter was, however, that the company declined the contract,—declined to carry it out, according to Ashburn's version, and declined to make it, according to the company's version. After some further negotiations and correspondence, on the 30th day of October, 1893, there resulted a contract which will be shown by the following letter, written by Yopp from Houston, Tex., to Dickey, at Waco, and subsequently signed by Ashburn:

"Houston, Texas, October 30th, 1893.

"Mr. R. B. Dickey, Mng'r., Waco, Texas.

"Ashburn Contract.

"Dear Sir: Referring to contract with E. J. Ashburn for hulls and meal, I sent him telegram dated Little Rock, Sept. 29th, reading: 'Offer thousand tons hulls at \$4.00, and 300 tons meal at \$20.00, equal quantities daily for four months, beginning Oct. 15th, but will not furnish ground. This subject immediate acceptance by wire.' Ashburn's answer on same date as follows: 'Your telegram received, pricing meal and hulls. I will accept your proposition.' You will therefore deliver hulls and meal as above outlined, and collect for same on the 1st of each month, beginning with the 1st of November, as originally understood between Mr. Ashburn and myself. To avoid any misunderstanding, you better submit this letter to Mr. Ashburn for his signature, and advise me whether he signs same or not.

"Yours truly,

W. I. Yopp, Genl. Mng'r. Mills.

"E. J. Ashburn."

This contract having been made for 1,000 tons of hulls, at \$4, and 300 tons of meal, at \$20, the company proceeded to deliver both the hulls and the meal in accordance with the contract. At the conclu-

sion of the contract Ashburn was indebted to the company in the sum of \$2,395.77, which he failed to pay, and for which suit was brought by the company against Ashburn in the circuit court of the United States, on March 29, 1894. Prior to the time that this suit by the company against Ashburn came on for trial, suit had been brought by Ashburn against the company, in the state court, for \$10,000, damages for breach of what he alleged was a contract for the sale to him of the 2,600 tons of hulls and 600 tons of meal, in September, 1893. This latter case was removed on application of the defendant into the circuit court of the United States, and by consent and by order of the court both cases were tried together. When the cases came on for trial, Ashburn admitted in open court that he was indebted to the company in the sum of \$2,395.77, which, with interest to that date, amounted to \$2,818.20, and the trial proceeded on his suit for damages, and resulted in a verdict for Ashburn against the company for \$4,900, from which was deducted the amount of the company's recovery against Ashburn, leaving a net recovery by Ashburn against the company for \$2,081.80, for which judgment was entered.

For a proper disposition of this case here, two questions only need be considered. It is claimed that the court erred in instructing the jury that the measure of damages was the difference between the price at which the Consumers' Company agreed to sell the hulls and meal to Ashburn, and the price Ashburn subsequently had to pay, the contention being that the correct measure of damages under the law applicable to the case was the difference between the price stipulated in the contract sued on by Ashburn, and the market value of the cotton-seed hulls and meal at the place of delivery, on the several days when the several deliveries should have been made under the contract. While we think the contention is sound, and that the court erred in this instruction, it cannot be considered here, for the reason that no proper exception was taken and reserved by counsel for the company at the time. It is claimed that under the statutes of Texas (Rev. St. Tex. art. 1318) which provide that exceptions may be assigned to any part of the charge of the court, without having the same noted at the time, that this court will consider exceptions made here, although not properly saved in the court below. The contention is that the rule and practice of the state court are applicable in this respect in the federal court. We do not so understand it.

It is well settled that the act of congress of 1872, providing that the practice, etc., in the federal courts shall conform "as near as may be" to the practice, etc., in the state courts, does not apply to the established practice relating to the manner of submitting cases to the jury by the judge of the federal court; nor does it apply to the well-understood practice of requiring exceptions to the charge to be made while the jury is at the bar, and before it retires.

See the following extract from *St. Clair v. U. S.*, 154 U. S. 134, 153, 14 Sup. Ct. 1002, 1010, on this point, and the former decisions of the supreme court cited therein:

"What is necessary to be done in a circuit court, even in civil cases, in order that its action upon any particular question or matter may be reviewed or refused in this court, depends upon the acts of congress and the rules of

practice which this court recognizes as essential in the administration of justice. Such is the result of our decision. Rev. St. § 914; Act June 1, 1872, c. 255, § 5 (17 Stat. 197); *Nudd v. Burrows*, 91 U. S. 426; *Railroad Co. v. Horst*, 93 U. S. 291; *In re Chateaugay Ore & Iron Co.*, 128 U. S. 544, 553, 9 Sup. Ct. 150; *Pacific Co. v. Denton*, 146 U. S. 202, 208, 13 Sup. Ct. 44; *Luxton v. Bridge Co.*, 147 U. S. 337, 338, 13 Sup. Ct. 356; *Lincoln v. Power*, 151 U. S. 436, 442, 14 Sup. Ct. 387. See, also, *Logan v. U. S.*, 144 U. S. 263, 303, 12 Sup. Ct. 617."

But the further consideration of this alleged error as to the charge of the court on the measure of damages is really unnecessary, because of the opinion we entertain of another question in the case.

The court was requested by counsel for the company to instruct the jury as follows:

"The jury in this case are instructed, as matter of law, that where a contract has been made between two persons, and at a subsequent period another contract, having reference to the same subject-matter, but changing the relations of the first contract, is entered into, the last contract controls or rescinds the first, though there be no such effect expressed between the parties. The jury are therefore instructed that if they believe from the evidence that an absolute contract for the sale and delivery of 2,600 tons of cotton-seed hulls, at \$2.75 per ton, and 600 of cotton-seed meal, at \$17.25 per ton, was made and entered into between the Consumers' Cotton-Oil Company and E. J. Ashburn, on or about the 12th or 13th day of September, 1893, and thereafter, before any part of said contract was executed, and before the time for its execution had arrived, another and different contract was entered into between said parties, and whereby the Consumers' Cotton-Oil Company agreed to sell to Ashburn only 1,000 tons of cotton-seed hulls, at \$4.00 per ton, and 300 tons of cotton-seed meal, at \$20.00 per ton, then you are instructed that in that event, if Ashburn agreed to the modification of the original contract, no right of recovery upon the original contract remained in existence, but such new contract is tantamount to a waiver on the part of Ashburn of the original contract, and in that event the jury will find for the Consumers' Cotton-Oil Company."

In giving this charge as requested to the jury, the court accompanied it with the following:

"The request which the counsel for the company has asked me to read I believe is good law, and I give it to you. It is in regard to the waiver of the first contract, if you find it was made by the making of the second. You will determine whether or not, at the time of making the second contract, it was the intention of the parties making the contract to waive or modify the first contract, and whether it was the intention of the parties to make a new contract, separate and independent of the first, and without any relation thereto."

It will be seen that, according to this qualification of the presiding judge, the jury were to determine the effect of the second contract on the first contract by the intention of the parties at the time the second contract was made. The question was, and is here: What was the legal effect of the second contract on the first? Did the second supersede, abrogate, and take the place of the first contract, as matter of law? If the legal effect of the second contract, referring to and covering the same general subject-matter as the first contract, was that it took the place of the first contract, then the intention of the parties is not material. We think the effect of the second contract was, as contended for by the counsel for the company, that it superseded the first entirely. It is very doubtful as to whether what transpired in the first instance amounted to a contract, but even

assuming the strongest view of this for the defendant in error, assuming that the first negotiations resulted in a contract, when he entered into the second contract he lost all rights he might have claimed under the first. If he desired to insist upon his rights under the first contract, he should have stood by it, insisting on its performance, and not have made a subsequent arrangement.

In the case of *U. S. v. Lamont*, 155 U. S. 309, 15 Sup. Ct. 99, a similar question was presented, and the view entertained by that court will be shown by the following extract from the opinion:

"But, even if the writ of mandamus could be so perverted as to make it serve the purposes of an ordinary suit, the relator is in no position to avail himself of such relief. He entered of his own accord into the second contract, and has acted under it, and has taken advantages which resulted from his action under it, having received the compensation which was to be paid under its terms. Having done all this, he is estopped from denying the validity of the contract. *Oregonian Ry. Co. v. Oregon Ry., etc., Co.*, 10 Sawy. 464, 22 Fed. 245. Nor does the fact that, in making his second contract, the relator protested that he had rights under the first, better his position. If he had any such rights, and desired to maintain them, he should have abstained from putting himself in a position where he voluntarily took advantage of the second opportunity to secure the work. A party cannot avoid the legal consequences of his acts by protesting at the time he does them that he does not intend to subject himself to such consequences. In the case of *Bank of U. S. v. Bank of Washington*, 6 Pet. 8, certain payments had been made to the first bank upon a decision of the court below, with notice that the payor intended to take the case to the supreme court of the United States, and would expect payee, the Bank of the United States, to refund the money if that court should reverse the decision of the court below, and hold that it was not due. The court said: 'No notice whatever could change the rights of the parties so as to make the Bank of the United States responsible to refund the money.' The whole case of this relator is covered by *Gilbert v. U. S.*, 8 Wall. 358, in which this court, through Mr. Justice Miller, said: 'If the claimants had any objection to the provisions of the contract they signed, they should have refused to make it. Having made it and executed it, their mouths are closed against any denial that it superseded all previous arrangements.'"

Other authorities might be cited, but it is unnecessary. We think the plaintiff in error was entitled to the instruction requested, without any qualification. For this reason, the judgment of the court below must be reversed, with instructions to grant a new trial, and for further proceedings in accordance with this opinion.

PACKER v. WHITTIER.

(Circuit Court, D. Massachusetts. May 27, 1897.)

1. FEDERAL COURTS—FOLLOWING STATE LAW.

The federal courts will follow the law of the state where a judgment is rendered as to its effect in merging the original cause of action.

2. BANKRUPTCY—DISCHARGE—JUDGMENTS.

In Massachusetts a judgment merges the original cause of action, and will be extinguished by a discharge under the United States bankrupt act, even when the original claim would not have been.

This case was heard upon the following agreed statement of facts:

"By writ dated June 23, 1873, the partnership of Packer, Healy & Co. commenced a suit in the superior court of the commonwealth of Massachusetts,

for the county of Suffolk, against the city of Chelsea and Albert R. Whittier; and on the 29th day of December, 1875, judgment was entered by said superior court in favor of said Packer, Healy & Co. against said Albert R. Whittier, for the sum of \$2,729.95, damage, and \$208.41, costs of suit. Said court had jurisdiction both of the parties and the subject-matter, and said judgment has not been reversed or annulled, except as herein stated. Said judgment has been satisfied only to the extent of \$65.20. After verdict and before judgment, certain exceptions to the ruling of the said superior court in the trial of said case were taken by said Whittier, and duly allowed, and said exceptions were not entered in the supreme judicial court, and upon complaint said exceptions were overruled. The plaintiff in the present suit, Elisha A. Packer, was at the beginning of this suit, and still is, a citizen and resident of the state of New York, and is the sole surviving partner of said partnership of Packer, Healy & Co. The defendant in the present suit, Albert R. Whittier, was at the beginning of this suit, and still is, a citizen and resident of the state of Massachusetts, and is the person against whom said judgment was recovered. Exhibit A, hereto annexed, is offered in evidence by the plaintiff as an exemplified record of the judgment in said suit, duly certified and binding upon the court; but the defendant reserves the right to object to the admission of any parts thereof, though he admits that the copies are true copies of the original papers and records on file in said superior court relating to said suit. Exhibit B is a certified copy of the complaint to the supreme judicial court, and of the rescript of said court, and is offered in evidence so far as it may be material. The defendant Albert R. Whittier, on the 24th day of August, 1878, filed in the district court of the United States, sitting in bankruptcy for the district of Massachusetts, a petition to take advantage of the act relating to bankrupts, and on the 6th day of December, 1878, was duly granted his discharge. Said district court had full jurisdiction of the subject-matter and of the parties. The copies annexed hereto, marked 'Exhibit C,' are true copies of the discharge, and of the papers and records on file in and of said district court, so far as they relate to said proceeding, and may be used in evidence, so far as material, in the same manner as the original. The firm of Packer, Healy & Co., named in the schedule of creditors, is the same firm which recovered judgment against said Whittier as aforesaid, and the indebtedness therein mentioned was the debt due upon said judgment. Each party reserves the right to object to the materiality of any of the facts, papers, or records hereinbefore mentioned. The foregoing are all the facts which either party claims are material to the issue; and from the above facts the court is authorized to draw such inferences as a jury might draw, and to enter such order hereon as justice may require."

The exhibits above referred to, and which are contained in the record, although not here set out, are made a part of the agreed statement of facts.

Fish, Richardson & Storrow, Robert F. Herrick, and Guy Cunningham, for plaintiff.

Gaston & Snow, for defendant.

COLT, Circuit Judge. Upon the foregoing agreed statement of facts, the opinion and ruling of the court are as follows:

1. As to the effect of the judgment upon which this suit is brought in merging the original cause of action, this court will follow the law of Massachusetts, where the judgment was rendered. *Christmas v. Russell*, 5 Wall. 290; *Amory v. Amory*, 3 Biss. 266, Fed. Cas. No. 334; *Green v. Sarmiento*, 3 Wash. C. C. 17, Fed. Cas. No. 5,760; *Rogers v. Odell*, 39 N. H. 452; *Chew v. Brumagim*, 21 N. J. Eq. 520; *Suydam v. Barber*, 18 N. Y. 468; *Freem. Judgm.* (3d Ed.) § 575.

2. In Massachusetts a judgment merges and takes the place of the original cause of action, so that a debt which would have been ex-

empt from discharge in bankruptcy under the United States bankruptcy act is extinguished, although the original claim would not have been. *Wolcott v. Hodge*, 15 Gray, 547; *Sampson v. Clark*, 2 Cush. 173; *Bangs v. Watson*, 9 Gray, 211; *Pierce v. Eaton*, 11 Gray. 398; *Light v. Merriam*, 132 Mass. 283; *In re Gallison*, 5 N. B. R. 353, Fed. Cas. No. 5,203.

3. The plaintiff cannot enter into the inquiry whether the original cause of action was founded upon fraud, because such cause of action became merged in the judgment; and, the judgment debt having been discharged by the proceedings in bankruptcy, it follows that judgment must be entered for defendant.

In re RODRIGUEZ.

(District Court, W. D. Texas. May 8, 1897.)

1. **NATURALIZATION—ELIGIBILITY OF MEXICANS.**

Native citizens of Mexico, whatever may be their status from the standpoint of the ethnologist, are eligible to American citizenship, and may be individually naturalized by complying with the provisions of the naturalization laws.

2. **SAME—QUALIFICATIONS.**

An alien who is ignorant and unable to read and write, and who cannot explain the principles of the constitution, is, nevertheless, entitled to be naturalized, where it is clearly shown that he is a thoroughly law-abiding and industrious man, of good moral character.¹

At the May term, 1896, of this court, Ricardo Rodriguez, a citizen of Mexico, filed an application, in due form, by which he sought to become a naturalized citizen of the United States. Two affidavits, embodying the essential requisites prescribed by the naturalization laws, accompanied the application, and also a copy of the affidavit made by the applicant, and filed in the county court of Bexar county, Tex., January 25, 1893, in which he declared his intention to become a citizen of the United States.

At the hearing of the application, two attorneys of the court, Mr. A. J. Evans and Mr. T. J. McMinn, appeared for the purpose of contesting the same, and filed a paper setting forth the ground of their opposition, of which the following is a copy: "Come now the undersigned, as amici curiæ, and respectfully suggest to the court that the applicant, Ricardo Rodriguez, is ineligible to citizenship, for this, to wit: that he is not a white person, nor an African, nor of African descent, and is therefore not capable of becoming an American citizen, and of this they ask the judgment of the court." In addition to the supporting affidavits filed with the application, the testimony of the applicant and J. G. Fisk was taken in open court. From the proofs on file it appears that the applicant is a citizen of Mexico by birth, having been born in the state of Guanajuato, about thirty-seven years ago. He is a very ignorant and illiterate man, not being able to read or write either English or Spanish. He speaks the latter tongue as it is spoken by others of his class and humble condition in life. It appears from his own statement that he traces his descent from neither the Spaniards nor Africans. As to color, he may be classed with

¹ See, at end of case, an opinion of Hon. T. M. Paschal, judge of the Thirty-Eighth judicial district of Texas, on the application for naturalization of one Richard V. Sauer.

the copper-colored or red men. He has dark eyes, straight black hair, and high cheek bones. He knows nothing of the Aztecs or Toltecs. He is not an Indian, and his parents informed him that he was a Mexican, and he claims to be "a pure-blooded Mexican." To extract from the applicant what knowledge he possessed concerning himself, counsel propounded, among others, the following questions: "Q. Do you not believe that you belong to the original Aztec race in Mexico? A. No, sir. Q. Do you belong to the aborigines or original races of Mexico? A. No, sir. Q. Where did your race come from? Spain? A. No, sir. Q. Where did your race come from? A. I do not know where they came from. Q. Does your family claim any religion? What religion do they profess? A. Catholic religion." The supporting affidavits show upon their face that the applicant is "attached to the principles of the constitution of the United States, and well disposed to the good order and happiness of the same." The inability of the applicant, made manifest upon his examination, to explain the nature of those principles, may well be attributed to his illiteracy. The testimony of J. G. Fisk, in support of the application, is here inserted at length: "Q. I see by your affidavit that you are acquainted with this applicant. A. Yes, sir. Q. And have been acquainted with him for how long? A. I couldn't say exactly, but it has been in the neighborhood of ten years. Q. Well, do you know anything about his ancestry? A. No, sir; no more than judging by his appearance, and about what he had told me previously,—that he was of pure blood. Q. I see that you make an affidavit in which you say he is of good moral character, and attached to the principles of the constitution of the United States. A. Well, I have known the man for a good while. Q. What reasons did you have for saying that he was attached to the principles of the constitution? What induced you to say that he was attached to the principles of the constitution of the United States? Did you have any intimation that he had any knowledge of the principles of the constitution of the United States? A. Not exactly, but I know the man. I know that he is a good man, and know that if, whatever the principles of the constitution of the United States might be, that he would uphold them if he knew what they were. Q. You say that you have known him for about ten years? A. In the neighborhood of ten years. Q. Has he been a peaceable citizen? A. Yes, sir; a very good man. Q. A hard-working citizen? A. Yes, sir. Q. Any children,—a man of family? A. A wife; no children. Q. Do you know what his occupation has been? A. He has been working for the city a greater part of the time; that is, working on the ditches, cleaning the ditches and river. Q. A man of good moral character? A. Yes, sir. Q. A good, law-abiding citizen? A. Yes, sir; to a remarkable degree."

Brief of T. M. Paschal:

As a member of the committee to whom has been referred by the court the application of Ricardo Rodriguez, a citizen of the republic of Mexico, to be granted final letters of citizenship, for an opinion touching the eligibility of the applicant under the constitution and laws of the United States and the testimony offered in support of said application, I beg leave to submit the following preparatory observations, views, and conclusions in the premises, the same having been formed and arrived at without previous conference, consultation, or comparison with my associate brothers of the committee, deeming it more likely that conclusions thus independently reached would be more nearly correct than would those actuated, more or less, by a desire for mere unanimity, such as preconcert usually inspires:

I believe I speak within a record for official action and public and official utterance when I suggest to this court that I realize the peril that confronts the free republican institutions of our country by a loose, indiscriminate—indeed, a criminally negligent—administration of our extraordinarily liberal and lenient naturalization laws. To say that the peril becomes more grave with each succeeding year is to affirm that which must be apparent to every thoughtful, intelligent, and patriotic citizen, natural or naturalized. In fact, under a system of government where the people make, interpret, and execute the laws, their reasonable intelligence, education, and virtue are indispensable prerequisites to the preservation and transmission of civil liberty and republican institutions. Patriotism, in its highest and truest sense, in a republic, cannot exist

unless resting securely upon this trio of cardinal qualities. It is true that a low form, or germ, of patriotism, that leads primitive man to defend his home, however humble or rude, may exist, and, under a monarchy more or less absolute, would suffice, without the qualities referred to, in so high a degree, at least; but where wise and just laws are to be framed to-day, to meet the complex existing conditions of a mighty republic, and to-morrow must needs be modified or repealed, to meet still more complex industrial, economic, or political changes, and yet avoid a conflict with organic state or federal law, it will readily be conceded that no graver responsibility rests upon jurist, legislator, or citizen of that republic than to see to it, within their several spheres, that the greatest practicable amount of intelligence, education, and morality is diffused among those who are charged with the tremendous responsibility of handing down to posterity, untarnished, our free institutions and best traditions, and, to this end, equally their duty to guard the "outer and inner door" of the sanctuary of American citizenship, lest those unworthy to wear it should enter.

When our form of government is considered in connection with the duties and functions of citizenship therein, we will find a polar star by which we may be guided in our interpretation of every clause of our naturalization laws, where judicial interpretation, legislative enactment, or diplomatic recognition has left the same in doubt, if not in fact obnoxious to criticism. It is the right of each nation to establish the forms and requisites for the naturalization of aliens, and to determine what acts must be done in order to acquire the new nationality. To fix the conditions in accordance with which an individual may be admitted to form part of a society cannot be the attribute of any power except the rules of such society, and it is, for the same reason, the natural and peculiar privilege of each nation to point out who may be naturalized, and by what means. *Martin's Case*, before Mixed Commission on Mexican & American Claims Treaty of July 10, 1868.

Citizenship may be acquired in one of the following ways, and no other: (1) By birth; (2) by compliance with our naturalization laws; (3) by constitutional amendment; (4) by collective naturalization, as where a country or province becomes incorporated in another country by conquest, cession, or free gift, and the treaty which ratifies such annexation usually provides for allowing the residents within the annexed territory a certain time within which to decide and take steps to preserve the nationality of his origin, and thus to defeat naturalization by annexation. *J. C. Bancroft Davis*, 1 *Phillimane Internat. Law*, p. 382; *Pasch. Ann. Const.* p. 222; 13 *Ops. Attys. Gen.* 397, *Akerman*. Illustrations of naturalization collectively or by treaty are found in the cases of those who were born in the colonies, or who resided here prior to 1776, and who adhered to the cause of independence. Again, in 1819 (October 24th) the inhabitants of Florida who adhered to the United States, and remained in the country, were by treaty of that date made citizens. All persons who were citizens of Texas at the date of annexation, December 29, 1848, became citizens of the United States by virtue of collective naturalization effected by the act of that date. See [1871] 13 *Ops. Attys. Gen.* 397, *Akerman*. So, likewise, were the citizens of California and other territory acquired by the treaty of Guadalupe-Hidalgo on the 2d of February, 1848, and who remained and adhered to the United States (*McKinney v. Saviego*, 18 *How.* 239); and again, in 1854, all the Mexican citizens, inhabitants of Arizona, who adhered to and remained in the United States (10 *Stat.* 1035, art. 5); and, finally, all the free white or European inhabitants of Louisiana, and the creoles, of native birth, residing there at the time of the purchase from Napoleon First, and who remained in and adhered to the United States, and the descendants of all such were, by the treaty of April 30, A. D. 1803, made citizens (8 *Stat.* 202, art. 3). Nationality obtained in this manner, said the arbitrator, must be as sound and valid as that procured by individual specific compliance with the naturalization laws. In *re Galetes Marnot v. Spain*, United States and Spanish Commission under Agreement of February 12, 1871.

While it seems to be true that no treaty exists (that of 1868 having been rescinded, under notice from Mexico) by virtue of which the applicant may claim the right or privilege to become naturalized, yet these illustrations and authorities, together with others equally cogent, are of great importance as

to the main question which is at issue in this case, viz. as to the eligibility of the applicant for naturalization, because of the ethnological feature involved in the case, or, in other words, because he is not a "white" man, and apparently belongs to the Indian or red race (nations of North and South America), and as going to show what interpretation or construction was placed upon our naturalization laws by the treaty-making power of the government, confessedly, as to a large class of inhabitants incorporated in our country by annexation, treaty, or purchase, and who were not, in the strict and narrow meaning of the term, of the white, or Caucasian, race.

The cases of *In re Ah Yup*, 5 Sawy. 155, 1 Fed. Cas. 223, and *In re Camille*, 6 Fed. 256, have been cited, and are strongly relied on in support of the proposition that the white, or Caucasian, and negro, or African, race, alone are eligible to citizenship under the statute of February 18, 1875. In the former (which is much the ablest and best-considered case of the two) this principle is not asserted by implication, much less distinctly enumerated, but the decision is clear and emphatic that the Chinese or Mongolian was intended expressly to be excluded by congress when the whole question was under discussion, in 1869-70, on Senator Sumner's amendment to strike out the word "white" from the naturalization law, that had been omitted after the adoption of the thirteenth and fourteenth amendments, and subsequently inserted under the revision of the statutes by section 2169 of the act last above referred to. The debates attending the passage of an act are, by well-settled canons of construction, an infallible guide to determine the legislative intent; and these leave no shadow of doubt touching the race that was intended to be denied the boon of American citizenship, and what was the motive that prompted the American congress to deny that privilege to that race,—unquestionably the same that actuated the congress to insert the word "white" in the first instance, viz. the fear of interference with the unrestricted operation of slavery, by giving the large number of Africans that were then being imported an opportunity to become American citizens. So it refused to strike out the word "white," even to allow the negro the benefit of citizenship,—the most natural mode,—but decided, by separate provision, that the naturalization laws should apply to Africans and persons of African descent. The fear of Mongolian citizenship arose from considerations of the highest national policy. That race was not only alien in color, but was, in all things that render possible a sound citizenship, the very antipodes of the Anglo-Saxon or even native American races. His total inability to assimilate with our people in their laws, customs, institutions, or religion, or even to suffer his acquisitions to go into the general store of national prosperity; his idol worship; his mode of living; his very vices; and, lastly, the countless myriads who stood hovering on the shores of the Chinese waters, ready and anxious to swarm upon us, like the Goths and Huns upon ancient Rome,—were a menace that it would have been unpatriotic and unwise in the extreme to have disregarded; and yet, when the word "white" was first inserted, no such danger confronted us, nor was anticipated, and it was solely intended to meet the then solely existing danger or evil of African citizenship, possibly of the numerous tribes of Indians in their wild or tribal state. The term "Caucasian," while used and commonly understood to embrace only the white races, is now abandoned by all acknowledged writers on ethnology as too restricted a term to embrace all those races who first peopled and flourished on the shores of the Mediterranean, and erroneously supposed to be a pure Caucasian stock. The term now applied is "Mediterraneans." These are now scattered over the whole world, and, as a species, have no equal, physically or mentally. The skin is, as a rule, of a light color, but appears in all tinges from pure white or a ruddy white, through yellow and yellow brown, to dark and even black brown. Their species are divided into four races, connected only by the roots. Two of these races, the Basques and Caucasians, are represented by only very small remnants. The Basques formerly inhabited the whole of Spain and south of France, but now dwell near the northern coast of Spain, at the foot of the Bay of Biscay. The Aztec, Indian, or copper-colored races have been for over 350 years amalgamating, assimilating, and incorporated with the Spanish and Basque stock who subjugated these original peoples. Their tribal or wild state has been for centuries abandoned. Under most adverse conditions, they have displayed an ability

to advance modern Christian civilization along the lines of its best traditions,—truly remarkable when those conditions are considered. The first really great step forward and blow struck for liberty and free government in Mexico was by Hidalgo and Inanez, both of pure Indian or Aztec stock; and to-day one of the most enlightened, progressive, and ablest rulers of this or any other age occupies the presidential chair, in whose veins runs more of the Aztec or Indian strain than of the Spanish or Caucasian. These instances, however, can be multiplied beyond number. What is true of the ability and aptitude of the Aztec or native races of Mexico to assimilate the ideas in government, morals, progress, political economy, social and domestic regulations, and, above all, our religious codes, is equally true of many of the races of North American Indians. If the American people, as a whole, have faith, as they do, that in time the African or negro will prove to be a stock on which can be grafted an excellent, if not the best, type of American citizenship, surely the evidences are not wanting that equal or greater possibilities exist in a race who, in religion, war, statesmanship, letters, science, music, art, painting, have shown so many and such conspicuous examples. Add to this the fact that no legal barriers exist to the union or mingling of the whites of either country and native Mexican races, and the further fact that, among the comparatively few who might seek citizenship, not a sufficient number apply to make any appreciable effect upon our institutions as a nation, and it will be conceded that no analogy exists, in the very fundamental nature of things, between the exclusion of the Mongolian and the proposition to exclude a citizen of Mexico, not living in a wild or tribal state, and who for many years has resided among us, subject and obedient to our laws. In my judgment, the highest test, looking to the preservation and transmission of civil liberty and free republican institutions, that can and that ought to be applied to races,—other than the Mongolian, whose ineligibility is settled,—of their eligibility to American citizenship, is stated in the pregnant language of the statute itself, viz. that "he is a man of good moral character, and that he is attached to the principles of the constitution of the United States, and that he is well disposed to the good order and happiness of the same." * * * In these words are written the whole law and the prophets." This involves a reasonable and fair knowledge of the general outlines of our form of government and republican institutions; i. e. the right of trial by jury, elective franchise, subordination of the military to the civil authority, immunity from search, seizure, attainder, or confiscation, save as authorized by law. It involves intelligence to that extent, for how, otherwise, could the applicant swear to an attachment to what he is ignorant of, or be well disposed to the good order and happiness of a country, the rudiments of whose institutions he was densely ignorant of? It is admitted that the Case of Camille, before referred to, is in point adversely to the eligibility of an Indian; but it is respectfully submitted that the case bears not the slightest evidence of having been well considered, and abounds in inaccuracies as well. For instance, it avers that the court, in *Ah Yup's Case*, before alluded to, declared that "the words 'white person,' as used in the naturalization laws, mean a person of the Caucasian race," etc. That case (*Ah Yup*) simply decides that a Mongolian is ineligible, and concludes as follows: "It was intended to exclude some classes, and, as all white aliens and those of the African race are entitled to naturalization under other words, it is difficult to perceive whom it could exclude, unless it be the Chinese." Again, the learned judge wholly and erroneously ignores the accurate and restricted sense in which the term "Caucasian" is used by ethnologists, when he says: "One using the term 'white person' would intend a person of the Caucasian race." The most serious criticism, however, to which that decision is obnoxious, and that which to my mind discloses the fact that the learned judge fully realized that the construction which he gave, and fancied had been given also by Judge Sawyer, in *Re Ah Yup*, had led to an illogical and most inconsistent conclusion, is shown by the following language: "From the first, our naturalization laws only applied to the people who had settled the country,—the Europeans or white race,—and so remained until 1870, when, under the pro-negro feeling, generated and inflamed by the war with the Southern states, and its political consequences, congress was driven at once to the other extreme, and opened the

door, not only to persons of African descent, but to all those of 'African nativity,' thereby offering the boon of American citizenship to the comparatively savage and strange inhabitants of the 'Dark Continent,' while withholding it from the intermediate and much better qualified red and yellow races." The court then assumes that this "inconsistency" was due to congress indulging in "buncombe," and being under no apprehension that the natives of Africa would avail themselves of the "boon"; but it is respectfully submitted that these are violent assumptions to excuse or assume so grave inconsistency.

In *Elk v. Wilkins*, 112 U. S. 94, 5 Sup. Ct. 41, a very elaborate, learned, and able presentation of some of the questions we have been considering is made by the supreme court of the United States, Justice Gray delivering the opinion. In that case, Elk sued Wilkins, registrar, for refusing to register him as a voter in Omaha. He alleged that he had "severed his tribal relations with the Indian tribe to which he belonged," and "had fully and completely surrendered himself to the jurisdiction of the United States," and declared that, by virtue of the fourteenth amendment (he having been born in the United States), he was a citizen of the United States, and entitled to the rights and privileges of a citizen. A demurrer to the petition was sustained. Plaintiff electing to stand by his pleadings, a writ of error was sued out. I do not deem it necessary, for the purposes of this discussion, to follow that opinion throughout its lengthy reasoning, because it is wholly unnecessary to a clear perception of the proposition upon which this case turns, but I will only quote such portions as will substantiate and enforce those propositions, and the inevitable deductions therefrom, which are: (1) That the word "white" was inserted in our naturalization laws in the beginning wholly to exclude the negro from citizenship. (2) It was subsequently omitted when danger from this source no longer existed. (3) It was inserted again when the laws were revised, when the new danger from hordes of Mongolians on our Pacific border confronted us; and (4) when political conditions seemed, in the opinion of the party in power, to demand it, the amendment to strike it out was defeated expressly to exclude that race, and the African was specially excepted from its operations, from which we deduce the following: That the question of eligibility of an Indian depends not on his color; but (1) whether there are treaty stipulations that make him a citizen, or by compliance with some of its provisions he may become one; or (2) whether he has abandoned his tribal relations, and become subject to the jurisdiction of the United States, and been recognized and accepted by the state or United States as such, and makes application under our law to be naturalized.

We think we might safely rest the case with the ethnological question before referred to, as to the strictly proper classification of the descendant of an aboriginal inhabitant of Mexico, whose ancestors had been, politically and religiously, incorporated for over 300 years with one of the proudest, finest, and purest scions of the true Caucasian race,—the Spaniards and their fellow countrymen, the Basques,—during which time even their very language has been lost, and their blood so freely intermingled with the pure stock of either that the fair, blue-eyed Castilian, or tawny, low-browed, straight coarse haired Aztec, is seldom met with. One might as well affirm, almost, that prior to the restoration of Alsace and Lorraine to the Fatherland, from which they had been forcibly torn 300 years before, those provinces were aught else but French in any essential particular. As well say the Normans left no indelible impress or modification upon the laws, customs, religion, and institutions of the Saxons. All history points with unerring fingers to the inevitable fading away of every lesser and ruder form of civilization when brought in contact with that great dominant Latin race, whether Cæsar, Charlemagne, Columbus, Cortez, Pizarro, or Napoleon marched at the head of their conquering legions, as it points with equal unerring certainty to the fact that the Anglo-Saxon has carried his language, his laws, his customs, his progress, and his institutions to every quarter of the globe where floats his flag. I repeat, I think it might be safely left to the broad principles involved in these considerations, rather than to a hair-splitting, technical, and meaningless consideration of who are meant by "white people," save such as we know are excluded by express judicial interpretation and legislative intent, and those expressly declared to be excepted from that

interpretation. The spirit of the law must be present, whatever may be its letter, else we may have no flavor in its meat, or saving grace in it.

But, recurring to the decision last alluded to, the court says (page 100, 112 U. S., and page 45, 5 Sup. Ct.): "Chief Justice Taney, in the passage cited for the plaintiff from his opinion in *Scott v. Sandford*, 19 How. 393-404, did not affirm or imply that either the Indian tribes or individual members of those tribes had the right, beyond other foreigners, to become citizens of their own will, without being naturalized by the United States. His words were: 'They (the Indian tribes) may, without doubt, like the subjects of any foreign government, be naturalized by the authority of congress, and become citizens of the state and of the United States; and if an individual should leave his nation or tribe, and take up his abode among the white population, he would be entitled to all the rights and privileges which would belong to an immigrant from any other foreign people.'" Again, on same page, the court says: "The alien and dependent condition of the members of the Indian tribes could not be put off at their own will, without the action or assent of the United States," and it is this reason—i. e. failure to recognize in some manner, by the state or United States, this act of subjection to its authority or jurisdiction—that was the basis of the court's action in sustaining the demurrer to the plaintiff's petition. They were never deemed citizens of the United States except under explicit provision of treaty or statute to that effect, either declaring a certain tribe, or such members of it as chose to remain behind on the removal of the tribe westward, to be citizens, or authorizing individuals of particular tribes to become citizens on applications to a court of the United States for naturalization and satisfactory proof of fitness for civilized life. See, for examples of which, treaties, in 1817 and 1835, with Cherokees, and, in 1820, 1825, 1830, with Choctaws; *Wilson v. Wall*, 6 Wall. 83; *Ops. Attys. Gen.*, Taney; *Karrahoo v. Adams*, 1 Dill. 344, 346, Fed. Cas. No. 7,614; Acts Cong. March 3, 1839, c. 83, § 7, concerning Brothertown Indians; and other authorities there cited. The court further says that, though plaintiff alleges that he had fully and completely surrendered himself to the jurisdiction of the United States, he does not allege that the United States accepted his surrender, or that he has ever been naturalized or taxed, or in any manner recognized or treated as a citizen by the state or by the United States. I apprehend that the converse of this proposition would be that, had this allegation been made by Elk, his right to citizenship would not have been questioned by the court, regardless of his color.

Is there, then, anything in the law, or in this decision, or in the underlying reasons therefor, which raises a presumption or inference that while an Indian born here may be naturalized or otherwise become a citizen, despite his color, yet, if he be born in Mexico, South America, or Canada, he is ineligible on that account? I confess I see no shadow of reason for any such assumption, either in the law in its underlying principles, or in the conditions that confront the country to-day. Every danger, real or imaginary (and I concede that there is a serious danger to our institutions from the loose and indiscriminate administration of our naturalization laws), can be amply remedied by a sensible, logical, and yet plain, interpretation of their several provisions, and a rigid enforcement of them, without such an illogical one as is sought in this instance. That interpretation has been outlined in the first stages of this opinion. There is no shadow of a doubt that the safety and welfare of our government, its people and institutions, depend largely on those charged with granting citizenship, whether by treaty, constitutional amendment, legislative enactment, or through the medium of the courts, to see to it that all who seek admission to our political family should have a fair knowledge or understanding of our form of government, its basic structure and underlying principles, as hereinbefore specified, of his general rights, duties, and privileges as a citizen. If it be contended that to acquire even that rudimentary knowledge would involve several years of study, reading, or observation, and perhaps more or less knowledge of the English language, I reply: (1) The American youth, though generally of rare intelligence and clear perceptions and knowledge upon this and kindred subjects, is denied the right to vote, hold office, or sit on a jury, before he is 21 years old; (2) that a man born here has the advantage of inherited love of the country, its traditions and institutions, all of which must take time to acquire by one raised to manhood under another

flag, other laws, customs, and ties of a numberless character. Can he complain justly, then, that before we exact his allegiance in war, and trust to his wisdom in peace, to assist us in framing laws that have taken centuries to crystallize, and to preserve and transmit our sacred traditions and free institutions to posterity,—in short, to help govern this great people,—he shall, at least, have a fair knowledge of these principles which he is swearing to support, and that he is attached to? Shall we suffer him to take a meaningless oath? Is it unfair to insist that he shall stand in this respect approximately where the great mass of native-born American youths stand before they—our sons and brothers—are suffered to participate in governmental affairs? Tens of thousands of citizens of Texas are excluded from jury service under our educational qualifications. The civil service rules exclude hundreds of thousands of bright, brainy, deserving American youths and maidens from lucrative and needful employment, all of which require a fair knowledge of geography, history, mathematics, our form of government and its general principles, and yet good citizens rejoice at the placing of our governmental affairs on a higher plane than heretofore. So self-evident do these propositions appear to my mind that I am tempted to declare that no patriotic American citizen of barely average intelligence, whether native born or naturalized, will raise a voice in opposition thereto. Whence, then, comes the protest when the voice of sturdy American patriotism is lifted in warning to his fellow countrymen to check the evils alluded to? From the political trickster and demagogue alone.

If the reasoning herein is sound, the conclusion is inevitable that the applicant, Rodriguez, admitting that he is clearly shown by the testimony to be of Indian origin or extraction, of whole or part blood, but conceding that he has severed his tribal relations, and is a citizen of Mexico, is eligible; but, so far as the evidence discloses, it does not appear to my mind that he has even a fairly approximate knowledge of the form or general structure of our government, of any of the rights, duties, or privileges of a citizen thereof, and hence it is impossible for him to swear either intelligently or conscientiously that he is "attached to the principles of the constitution" of the United States, or "well disposed to its good order and happiness." This, however, is a fact upon which the court must be "satisfied," in the language of the statute, and the degree of intelligence that is requisite is a question that must appeal to the individual judgment of the judge.

I beg to express my regret that, owing to absence due in part to sickness in my family, to a futile effort to obtain originals of debates, treatises, reports, and documents that bear on the question involved, much of the time allotted by the court has slipped away; and I have at last been unable to systematize and present in a logical manner such observations and conclusions as I have reached, not even to make a redraft of them, to eliminate repetitions, or render more perspicuous that which I fear has been often somewhat crudely expressed; but my object has rather been to attack the apparent and too literal interpretation of the law,—its *raison d'être*,—and merely to quote authorities in so far as they clearly bore on this phase of the question, and to invoke the court's serious and thoughtful consideration of that which it seems to me beyond cavil to be the great pivotal point upon which the admission to American citizenship should depend, feeling confident that the trained legal mind of the court will as quickly grasp any suggestions worthy of its attention, though deficient in grace, elegance, or force of expression, and even segregated from their logical or proper sequence, as though all had been pearls of thought strung in their proper proportion. All of which is respectfully submitted.

Brief of Floyd McGown:

The facts succinctly are: (1) Ricardo Rodriguez filed, in accordance with the law, his declaration of intention to become a citizen of the United States of America, on the 25th day of January, A. D. 1893, with Thad W. Smith, county clerk Bexar county, Tex. In this declaration it is shown that he was then 35 years of age, a natural-born subject of Mexico, born in Villa de Hijules, and arrived in Port Laredo February 15, 1883. (2) His application for final papers was filed in the United States circuit court, in and for the Western district of Texas, at San Antonio, on May 11, 1896, and was in due form. Accompanying this application are the affidavits of L. G. Peck and

Lorenzo Galvan, to the effect that the applicant has resided in the United States for more than five years, and has behaved as a man of good moral character, is attached to the principles of the constitution of the United States, and is well disposed to the good order and happiness of the same. (3) At the hearing of this application it was proved that the applicant was born in Ojueles, Mex., and had been there and in Lampasos, Mex., prior to coming to San Antonio, Tex., some 13 years ago. His father's name was ——— Rodriguez, and his mother's name was Petra Hernandez. They were both born and lived near Ojueles, in the state of Guanajuato, Mex. They were of Mexican parentage, and he never heard of them speaking any other language, or of having come from any other country. His parents told him he was a Mexican. The applicant stated that he wished to become a citizen of the United States, because he lived here. He knew nothing about the constitution or laws of the United States, nor did he know how it was governed, nor could he read or write in any language. He knew the name of the president of Mexico, having seen his picture. He did not know the name of the president of the United States. He believed that Texas was a state, but did not know the name of the governor. He stated he was a pure-blooded Mexican, having neither Spanish nor African blood in him. The applicant has dark eyes, straight, black hair, chocolate brown skin, and high cheek bones.

The conditions to naturalization are: (1) The constitution (article 1, § 8, cl. 4) gives to congress the power "to establish an uniform rule of naturalization"; and section 2165, Rev. St. U. S., declares: "An alien, being a free white person, may be admitted to become a citizen of the United States in the following manner, and not otherwise": (1) By declaration of his intention, etc. (2) By declaring his support of the constitution, etc. (3) By proving five years' residence, etc., moral character, attachment to the principles of the constitution of the United States, and well disposed to the good order and happiness of the same. Section 2169, Id., declares: "The provisions of this title shall apply to aliens (being free white persons, and to aliens) of African nativity, and to persons of African descent." 18 Stat. 318 (Act Feb. 18, 1875).

Application of the Requirements to the Facts in This Case.

The applicant has complied with all the requirements, and is entitled to citizenship, unless defeated: (1) Because he is not a free white person; (2) because of his ignorance of the principles of the constitution of the United States of America. In *re Kanaka Nian* (Utah) 21 Pac. 994. The amendment of 1875, limiting the right of naturalization to free white persons (and Africans, not involved in this case), restored the restrictions found in the old statutes. These words must be held to have their natural and ordinary meaning, and, fortunately, we are not left in doubt as to their significance, for this statute has come under repeated judicial scrutiny, and these words are definitely construed. On April 29, 1878, in the case of *In re Ah Yup*, 1 Fed. Cas. 223, Mr. Justice Sawyer said: "As ordinarily used in the United States, one would scarcely fail to understand that the party employing the words 'white person' would intend a person of the Caucasian race." On November 2, 1880, in the case of *In re Camille*, Mr. Justice Deady, 6 Fed. 256, after quoting from the opinion in the *Ah Yup* Case, used this language: "In all classification of mankind hitherto color has been a controlling circumstance, and for this reason Indians have never, ethnologically, been considered white persons, nor included in any such designation. From the first our naturalization laws only applied to the people who had settled the country, the European or white race." And these cases were approved by Mr. Chief Justice Zane, of the supreme court of Utah, on June 7, 1889, in the Case of *Kanaka Nian*, a native of Hawaii, reported 21 Pac. 993. Mr. Justice Colt, on June 24, 1894, in the case of *In re Saito*, a Japanese, reported in 62 Fed. 126, said: "These words were incorporated in the naturalization laws as early as 1802. At that time the country was inhabited by three races: The Caucasian, or white, race; the negro, or black, race; and the American, or red, race. It is reasonable, therefore, to infer that when congress, in designating the class of persons who could be naturalized, inserted the qualifying word 'white,' it intended to exclude from the privilege of citizenship all alien races except the Caucasian." In the *Deportation Cases*, 149 U. S. 698, 13 Sup. Ct. 1016, the *Ah Yup* and

several of the above cases are cited with approval by the United States supreme court. See, also, *U. S. v. Perryman*, 100 U. S. 235; *Lynch v. Clarke*, 1 Sandf. Ch. 583; *Chirac v. Chirac*, 2 Wheat. 259; *Elk v. Wilkins*, 112 U. S. 94, 5 Sup. Ct. 41; *Nevada v. Ah Chew*, 16 Nev. 50; 9 and 13 Ops. Attys. Gen.; 5 Myer, Fed. Dec. "Citizenship," 829 (1 Fed. Cas. 223); *U. S. v. Rhodes*, 1 Abb. (U. S.) 28, 27 Fed. Cas. 785. These latter authorities we have not examined. *U. S. v. Ritchie*, 17 How. 525, is an interesting case, showing who are citizens of Mexico. Its population is composed of several races.

Under these authorities, the applicant is not entitled to naturalization, unless he is of a Caucasian, or white, race. His appearance indicates that he is a descendant of the original races of Mexico. To determine to what races these people belong, we have examined the following authorities: According to E. B. Tylor, author of the article on "Anthropology," in 2 Enc. Brit. p. 111, the popular terms describing white, yellow, brown, and black races, which often occur in ancient writings, are still used. But, for scientific purposes, greater accuracy is required. This is obtained by Dr. Brocas' table, by which "the varieties of the human skin may be followed from the fairest hue of the Swede, and the darker tint of the Provencal, to the withered leaf brown of the Hottentot, the chocolate brown of the Mexican, and the brown black of the West African." In discussing Blumenbach's division (Caucasian and Malay), he says: "The ill-chosen name of 'Caucasian,' used by B—— to denote what may be called 'white men,' is still current. It brings into one race peoples such as the Arabs and Swedes, although these are scarcely less different than the Americans and Malays." By "Americans" here is meant the aborigines of this continent, who clearly, in his opinion, constitute a distinctive race from the Caucasians, or whites.

It seems, then, that, by the scientific classification, the applicant is not a white person. He certainly is not in the sense in which these words are commonly used and understood in the every-day life of our people. Hence, under the rule placing the burden upon the applicant to show his eligibility to citizenship, we are of the opinion that his application ought to be refused. And, incidentally, we are of the opinion that, if he were a white person, his utter ignorance of the principles of our constitution would defeat his application.

Brief of A. J. Evans:

Admitted and proven facts: Applicant is a native-born person of Mexico, 33 years old, and of pure Aztec or Indian race, one of the races found in Mexico when conquered by Cortez, in 1519; came to the United States before 1883, and in that year made his first declaration of intention, and now offers his final declaration, in due form of law, and supports his declaration by two witnesses.

As a friend of the court, I challenge the right of the applicant to become a citizen of the United States, on the ground that he is not a man or person entitled to be naturalized under the laws of the United States. Laws Cong. "To establish a uniform rule of naturalization." Const. U. S. art. 1, § 8, cl. 4. "That any alien (being a free white person) may be admitted to become a citizen of the United States, or any of them, on the following conditions, and not otherwise." Act April 14, 1802. The act of July 17, 1862, extended naturalization to soldiers in the army and navy, but did not otherwise change the law. "The provisions of this title ["Naturalization"] shall apply to aliens (being free white persons), and to aliens of African nativity, and to persons of African descent." Act 1870. The above are the acts of congress in force on the subject; and if the applicant is an alien, and a free white person, or of African nativity or descent, then he is entitled to naturalization. It is confessed that he is an alien, but it is denied that he is a "white person," in the eyes of the acts of congress, or an African, or of African descent. The applicant is a native Mexican. Mr. Dana, in his American Encyclopedia, published in 1876 and 1881, says: "The population of Mexico comprises about six million Indians of unmixed blood, nearly one-half of whom are nomadic savage tribes of the mountain districts of the north; about five million whites or creoles, chiefly descended from the early Spanish colonists; perhaps twenty-five thousand Africans or hybrids, possessing some negro blood, whether mixed with the European or the Indian

element; and the Mestizos, or half-breeds, derived from the union of the whites and Indians." "Of the Indians, there are thirty-five tribes," etc.

Now, it is clear from the evidence of Mr. Fisk in this case, and from the appearance of the applicant, that he is one of the 6,000,000 Indians of unmixed blood, named above, and most probably a member of one of the 35 tribes above. If so, is he a "white person"? If an Indian, he cannot be naturalized. *Elk v. Wilkins*, 112 U. S. 94, 5 Sup. Ct. 41; *Rev. St. U. S. § 2169*. "This section does not include Indians." See 7 Ops. Attys. Gen. p. 746; *In re Camille*, 6 Sawy. 541, 6 Fed. 256; 2 Kent, Comm. p. 72; *Lynch v. Clarke*, 1 Sandf. Ch. 583; 9 Ops. Attys. Gen. 373. Something has been said about naturalization or extending the right of naturalization by treaty. I opine no treaty can be found with Mexico that makes her citizens citizens of the United States, or that extends to her citizens the rights of naturalization when they come to the United States, for the simple and cogent reason that the power of naturalization is in congress, and not in the treaty-making power; i. e. the president and the senate. Judge Deady, in a single sentence in the case above cited (*In re Camille*), settles that question when he says: "The power to say when and under what circumstances aliens may become citizens belongs to congress." The last act of congress on the subject, that of adding the African and his descendants "to free white persons," was passed in 1870, and I know of no treaty with Mexico since that date affecting our naturalization laws. If such a treaty did exist before that date, it is wiped out by the act of 1870, which covers the whole ground. The most probable account of the origin of the aborigines of Mexico is that they are of Asiatic or Mongolian descent, and "crossed from Asia to America by a chain of islands, which in the remote ages stretched at the north from the shores of the eastern to those of the western continent." 11 Dana, Am. Enc. art. "Mexico." The questions here raised have no political significance whatever, for the reason that the state of Texas, in her sovereign capacity, determines who shall or shall not vote, and Texas, if she chooses, can make the wildest Indian of Mexico a voter upon one hour's arrival.

Brief of T. J. McMinn:

Mexicans eligible: (1) Zavala and other patriots; (2) sons, descendants of patriots; (3) Mexicans, residents on Independence Day; (4) descendants of such residents; (5) Spanish, Caucasian Mexican citizens. Mexicans ineligible: Excepting above, all Mexicans. Because, first, the Texas revolution was fought to get rid of the "Mexican people," who, in the declaration of independence, were declared to be "unfit to be free, and incapable of self-government." See Declaration of Independence. Because, second, at the first convention, in 1835, it was held that "all free whites and Mexicans opposed to central government" should vote. See Brown's Hist. Tex. 445. Because, third, Sam Houston wrote to Gov. Smith, January 17, 1836: "I have no confidence in them." Because, fourth, the Mexican, a genuine Mexican, is an Indian, a Mexican Indian; and Indians are ineligible. *Nevada v. Ah Chew*, 16 Nev. 50, 61; 1 Internat. Dig. pp. 344-568; 9 Ops. Attys. Gen. p. 356, Black; *Rev. St. U. S. § 2169*; *In re Ah Yup*, Myer, Fed. Dec. "Citizenship," p. 829, 1 Fed. Cas. 223; *In re Camille*, 5 Myer, Fed. Dec. 827, 6 Fed. 256; *In re Kanaka Nian* (Utah) 21 Pac. 993. Because, fifth, it was not ever politically contemplated by the United States that Mexicans should become citizens. Opponents of the Mexican war in congress charged the Democrats with the intention of introducing to citizenship a foreign, alien, and antagonistic class of people, incapable of self-government. Senator McDuffie denied that charge. *Globe*, vol. 14, p. 335. And H. S. Foote, answering Dayton, said: "No sane man of practical intellect would think of intrusting them [Mexicans and Indians] with American citizenship." *Globe*, vol. 19, p. 127. John C. Calhoun said, January 4, 1848: They "were incompetent to become Republicans." "They cannot govern themselves. Shall they govern us?" Sam Houston (1850), in the senate, said: "A proposition to extend suffrage to Mexicans would involve the greatest responsibilities." Because, sixth, the treaty of Guadalupe-Hidalgo excludes the Mexicans, and was so understood by Mexican diplomatists. See Extr. Sess. Senate, pp. 19-27. The proposition and desire of Mexico, not accepted by United States, is found on page 48. Letter sent to Buchanan (page 171) expresses fear of those people becoming citizens. See Mex. Project, pp. 341-343.

MAXEY, District Judge, after stating the case, delivered the following opinion:

Recognizing the delicacy and gravity of the question which the present application involves, it was thought advisable to obtain the views of several members of the bar as to the proper construction of that clause of the naturalization statute which the court is called upon to consider and construe. With that object in view, the court addressed letters to Mr. T. M. Paschal and Mr. Floyd McGown, inclosing therewith copies of the papers and testimony on file. Generously responding to the wish of the court, these gentlemen have submitted able and interesting briefs, which have received, together with those of Mr. Evans and Mr. McMinn, the attentive consideration which the nature of the case and importance of the question demand. And the court now desires to express its acknowledgments to all counsel appearing in the case for the valuable aid thus rendered.

The applicant, a citizen by birth of the republic of Mexico, desires to avail himself of the inherent right of expatriation, and to invest himself with the rights and privileges pertaining to citizenship of our country. Although 49 years have elapsed since the negotiation of the treaty of Guadalupe-Hidalgo, which greatly increased our territorial area, and incorporated many thousands of Mexicans into our common citizenship, as will be hereinafter shown, the question of the individual naturalization of a Mexican citizen is now for the first time, so far as the court is advised, submitted for judicial determination. To the question, why may not he be naturalized under the laws of congress? it is replied that by section 2169 of the Revised Statutes it is provided: "The provisions of this title shall apply to aliens (being free white persons, and to aliens) of African nativity, and to persons of African descent." The contention is that, by the letter of the statute, a Mexican citizen, answering to the description of the applicant, is, because of his color, denied the right to become a citizen of the United States by naturalization; and, in support of this view, the following authorities are relied upon: *In re Ah Yup* (decided by Judge Sawyer in 1878) 5 Sawy. 155, 1 Fed. Cas. 223; *In re Camille* (decided by Judge Dedy in 1880) 6 Fed. 256; *In re Kanaka Nian* (decided by the supreme court of Utah in 1889) 21 Pac. 993; *In re Saito* (decided by Judge Colt in 1894) 62 Fed. 126; and 2 Kent, Comm. 73, where the learned chancellor expresses a doubt in these words:

"Perhaps there might be difficulties also as to the copper-colored natives of America, or the yellow or tawny races of Asiatics, and it may well be doubted whether any of them are white persons, within the purview of the law."

Of the four cases above cited, *In re Ah Yup* is the first in point of time, and the leading one. The four applications were denied, Ah Yup being a native of China, Camille a native of British Columbia, and of half Indian and half white blood, Nian a native of the Hawaiian Islands, whose ancestors were Kanakas, and Saito a native of Japan. When the Case of Ah Yup was decided, the Chinese question was flagrant on the Pacific slope, and Judge Sawyer seemed to think, predicating his conclusion upon the debates in congress, that

the purpose of the amendment extending the right of naturalization to Africans and persons of African descent was to exclude Chinese from the benefits of naturalization. To quote his own language:

"Many other senators spoke pro and con on the question, this being the point of the contest, and these extracts being fair examples of the opposing opinions. * * * It was finally defeated [the amendment to strike the word "white" from the naturalization laws]; and the amendment cited, extending the right of naturalization to the African only, was adopted. It is clear from these proceedings that congress retained the word 'white' in the naturalization laws for the sole purpose of excluding the Chinese from the right of naturalization. * * * Thus, whatever latitudinarian construction might otherwise have been given to the term 'white person,' it is entirely clear that congress intended by this legislation to exclude Mongolians from the right of naturalization. I am therefore of the opinion that a native of China, of the Mongolian race, is not a white person, within the meaning of the act of congress. The second question is answered in the discussion of the first. The amendment is intended to limit the operation of the provision as it then stood in the Revised Statutes. It would have been more appropriately inserted in section 2165 than where it is found, in section 2169. But the purpose is clear. It was certainly intended to have some operation, or it would not have been adopted. The purpose undoubtedly was to restore the law to the condition in which it stood before the revision, and to exclude the Chinese. It was intended to exclude some classes, and, as all white aliens and those of the African race are entitled to naturalization under other words, it is difficult to perceive whom it could exclude, unless it be the Chinese."

The opinion of Judge Sawyer is by no means decisive of the present question, as his language may well convey the meaning that the amendment of the naturalization statutes referred to by him was intended solely as a prohibition against the naturalization of members of the Mongolian race. The naturalization of Chinese is, however, no longer an open question, as section 14 of the act of May 6, 1882, expressly provides "that hereafter no state court or court of the United States shall admit Chinese to citizenship; and all laws in conflict with this act are hereby repealed." 22 Stat. 61.

If Chinese were denied the right to become naturalized citizens under laws existing when *In re Ah Yup* was decided, why did congress subsequently enact the prohibitory statute above quoted? Indeed, it is a debatable question whether the term "free white person," as used in the original act of 1790, was not employed for the sole purpose of withholding the right of citizenship from the black or African race and the Indians then inhabiting this country. But it is not necessary to enter upon a discussion of that question; nor is it deemed material to inquire to what race ethnological writers would assign the present applicant. If the strict scientific classification of the anthropologist should be adopted, he would probably not be classed as white. It is certain he is not an African, nor a person of African descent. According to his own statement, he is a "pure-blooded Mexican," bearing no relation to the Aztecs or original races of Mexico. Being, then, a citizen of Mexico, may he be naturalized pursuant to the laws of congress? If debarred by the strict letter of the law from receiving letters of citizenship, is he embraced within the intent and meaning of the statute? If he falls within the meaning and intent of the law, his application should be granted, notwithstanding the letter of the statute may be against him.

In *Holy Trinity Church v. U. S.*, 143 U. S. 459, 12 Sup. Ct. 512, it is said by the supreme court:

"It is a familiar rule that a thing may be within the letter of the statute, and yet not within the statute, because not within its spirit, nor within the intention of its makers. This has been often asserted, and the reports are full of cases illustrating its application. This is not the substitution of the will of the judge for that of the legislator, for frequently words of general meaning are used in a statute, words broad enough to include an act in question; and yet a consideration of the whole legislation, or of the circumstances surrounding its enactment, or of the absurd results which follow from giving such broad meaning to the words, makes it unreasonable to believe that the legislator intended to include the particular act. As said in *Plowden*, 205: 'From which cases it appears that the sages of the law heretofore have construed statutes quite contrary to the letter in some appearance, and those statutes which comprehend all things in the letter they have expounded to extend to but some things, and those which generally prohibit all people from doing such an act they have interpreted to permit some people to do it, and those which include every person in the letter they have adjudged to reach to some persons only, which expositions have always been founded upon the intent of the legislature, which they have collected sometimes by considering the cause and necessity of making the act, sometimes by comparing one part of the act with another, and sometimes by foreign circumstances.'"

A reference to the constitution of the republic of Texas and the constitution, laws, and treaties of the United States will disclose that both that republic and the United States have freely, during the past 60 years, conferred upon Mexicans the rights and privileges of American citizenship, not individually, it is true, but by various collective acts of naturalization. The first of such acts will be found in the language of section 10 of the general provisions of the constitution of the republic of Texas, adopted in 1836. By that section it is provided:

"All persons (Africans, the descendants of Africans, and the Indians excepted) who were residing in Texas on the day of the declaration of independence [March 2, 1836] shall be considered citizens of the republic, and entitled to all the privileges of such."

Under this provision, Mexicans who resided in Texas on March 2, 1836, became citizens of the republic (*Kilpatrick v. Sisneros*, 23 Tex. 113; *Hardy v. De Leon*, 5 Tex. 212; 13 Ops. Attys. Gen. 397, 398); and by the resolutions of March 1, 1845, and December 29, 1845, passed by the national congress, all such citizens, without express authorization, became incorporated into the citizenship of the Union. Thus, it is said by the supreme court, in *Boyd v. Nebraska*, 143 U. S. 169, 12 Sup. Ct. 385:

"By the annexation of Texas, under a joint resolution of congress of March 1, 1845, and its admission into the Union on an equal footing with the original states, December 29, 1845, all the citizens of the former republic became, without any express declaration, citizens of the United States. 5 Stat. 798; 9 Stat. 108; *McKinney v. Saviego*, 18 How. 235; *Cryer v. Andrews*, 11 Tex. 170; *Barrett v. Kelly*, 31 Tex. 476; *Carter v. New Mexico*, 1 N. M. 317."

See, also, *Lawr. Wheat.* (Append.) 897; *Morse*, Citizenship, § 94.

The next collective act in chronological order, providing for the naturalization of Mexicans, is the treaty concluded between the United States and Mexico, February 2, 1848, commonly known as the

"Treaty of Guadalupe-Hidalgo." The eighth article of that treaty is as follows:

"Art. 8. Mexicans now established in territories previously belonging to Mexico, and which remain for the future within the limits of the United States, as defined by the present treaty, shall be free to continue where they now reside, or to remove at any time to the Mexican republic, retaining the property which they possess in the said territories, or disposing thereof, and removing the proceeds wherever they please, without their being subjected, on this account, to any contribution, tax, or charge whatever. Those who shall prefer to remain in the said territories may either retain the title and rights of Mexican citizens, or acquire those of citizens of the United States. But they shall be under the obligation to make their election within one year from the date of the exchange of ratifications of this treaty; and those who shall remain in the said territories after the expiration of that year, without having declared their intention to retain the character of Mexicans, shall be considered to have elected to become citizens of the United States. In the said territories, property of every kind, now belonging to Mexicans not established there, shall be inviolably respected. The present owners, the heirs of these, and all Mexicans who may hereafter acquire said property by contract, shall enjoy with respect to it guaranties equally ample as if the same belonged to citizens of the United States."

That Mexicans who remained in the territory ceded by the treaty of 1848, and who failed to declare their intention within the time limited to remain citizens of Mexico, became citizens of the United States, is a fact scarcely open to serious controversy. In *Boyd v. Nebraska*, supra, it is said by the supreme court, speaking through Mr. Chief Justice Fuller, that:

"By the eighth article of the treaty with Mexico of 1848, those Mexicans who remained in the territory ceded, and who did not declare within one year their intention to remain Mexican citizens, were to be deemed citizens of the United States."

Speaking of the treaty with Spain, which is similar in essential particulars to the treaty of 1848 with Mexico, the supreme court says:

"On the 22d of February, 1819, Spain ceded Florida to the United States. The sixth article of the treaty of cession contains the following provision: 'The inhabitants of the territories, which his Catholic majesty cedes to the United States by this treaty, shall be incorporated in the Union of the United States as soon as may be consistent with the principles of the federal constitution, and admitted to the enjoyment of the privileges, rights, and immunities of the citizens of the United States.' This treaty is the law of the land, and admits the inhabitants of Florida to the enjoyment of the privileges, rights, and immunities of the citizens of the United States. It is unnecessary to inquire whether this is not their condition, independent of stipulation. They do not, however, participate in political power. They do not share in the government till Florida shall become a state." *Insurance Co. v. Canter*, 1 Pet. 542.

It is said by Mr. Justice McLean, in his dissenting opinion in *Scott v. Sandford*, 19 How. 533, that:

"On the question of citizenship it must be admitted that we have not been very fastidious. Under the late treaty with Mexico, we have made citizens of all grades, combinations, and colors. The same was done in the admission of Louisiana and Florida. No one ever doubted, and no court ever held, that the people of these territories did not become citizens under the treaty. They have exercised all the rights of citizens, without being naturalized under the acts of congress."

Upon articles 8 and 9 of the treaty of Guadalupe-Hidalgo a similar construction has been placed by the supreme court of California.

People v. De La Guerra, 40 Cal. 311. See, also, *Morse*, *Citizenship*, § 94.

On September 9, 1850, congress passed three acts having more or less bearing upon the question under discussion, to wit, the act for the admission of California into the Union (9 Stat. 452), and the acts establishing territorial governments for New Mexico and Utah (9 Stat. 446, 453). By the act admitting California, Mexicans who were recognized as citizens by the treaty of Guadalupe-Hidalgo became citizens of the new state. See authorities above referred to.

Section 5 of the act "to establish a territorial government for Utah," which adopts literally the language of section 6 of the New Mexico act, provides as follows:

"And be it further enacted, that every free white male inhabitant above the age of twenty-one years, who shall have been a resident of said territory at the time of the passage of this act, shall be entitled to vote at the first election, and shall be eligible to any office within the said territory; but the qualifications of voters and of holding office, at all subsequent elections, shall be such as shall be prescribed by the legislative assembly: provided, that the right of suffrage and of holding office shall be exercised only by the citizens of the United States, including those recognized as citizens by the treaty with the republic of Mexico, concluded February second, eighteen hundred and forty-eight."

It has been shown that Mexicans (and the term includes all Mexicans, without discrimination as to color) who remained in the ceded territory, and who failed to declare their intention within one year to remain Mexican citizens, became, by virtue of the stipulations of the treaty of February 2, 1848, citizens of the United States. Whether congress intended to include Mexicans in the expression "white male inhabitants," as employed in the territorial acts above mentioned, may admit of question. But it is entirely clear, whatever meaning may be attached to those words, that the language of the acts explicitly recognized Mexicans who remained in the ceded territory, and who did not renounce their Mexican citizenship within one year, as citizens of the United States, and conferred upon them the elective franchise, and the important and valuable right to hold office. It is equally true that by article 5 of the treaty between the United States and Mexico proclaimed June 30, 1854, known as the "Gadsden Treaty," Mexicans who remained within the territory ceded by Mexico to the United States in article 1 of the treaty, and who failed to renounce their Mexican citizenship within a year, became citizens of the United States.

The next act affecting the question of citizenship to which attention will be directed is the fourteenth amendment of the constitution, declared to be part of the organic law, by resolution of congress, July 21, 1868 (15 Stat. 709, 711). By this amendment, which completely overthrew the last remaining vestige of the doctrine announced in *Scott v. Sandford*, 19 How. 393, touching the question of citizenship of the African, and invested the native-born negro with the rights of an American citizen (*Slaughterhouse Cases*, 16 Wall. 36; *Elk v. Wilkins*, 112 U. S. 101, 5 Sup. Ct. 41; *Strauder v. West Virginia*, 100 U. S. 306-308; *In re Look Tin Sing*, 21 Fed. 909), it is provided:

"All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside."

See, also, Rev. St. § 1992.

While this amendment, as held in the authorities last cited, was intended primarily for the benefit of the negro race, it also confers the right of citizenship upon persons of all other races, white, yellow, or red, born or naturalized in the United States, and "subject to the jurisdiction thereof." The language has been held to embrace even Chinese, to whom the laws of naturalization do not extend. In *re Look Tin Sing*, supra; *Gee Fook Sing v. U. S.*, 1 C. C. A. 211, 49 Fed. 146; *Ex parte Chin King*, 35 Fed. 354; In *re Yung Sing Hee*, 36 Fed. 437; In *re Wong Kim Ark*, 71 Fed. 382. Mexicans, therefore, born in the United States, and who, at the date of birth, were subject to the jurisdiction of our government,—as all were, except children of diplomatic officers, and a few others, not necessary in this connection to notice (In *re Look Tin Sing*, supra),—are citizens of the United States and of the state wherein they reside. The intimation in some of the briefs of counsel that *Elk v. Wilkins*, 112 U. S. 94, 5 Sup. Ct. 41, excludes Mexicans from citizenship, is not maintainable. That case refers exclusively to tribal Indians born and residing within the territory forming a part of the United States. The following extract taken from the syllabus of the case will disclose the point decided:

"An Indian, born a member of one of the Indian tribes within the United States, which still exists and is recognized as a tribe by the government of the United States, who has voluntarily separated himself from his tribe, and taken up his residence among the white citizens of a state, but who has not been naturalized or taxed or recognized as a citizen either by the United States or by the state, is not a citizen of the United States, within the meaning of the first section of the fourteenth article of amendment of the constitution."

In a word, *Elk's* severance of his tribal relations had not been accepted by the United States, and, within the meaning of the amendment, he was not regarded as having been born "subject to the jurisdiction thereof." The dissimilarity between the *Elk* Case and the one at bar is so pronounced that further reference to it is not deemed essential.

There was concluded at Washington, July 10, 1868, it may be said contemporaneously with the adoption of the fourteenth amendment, a treaty between the United States and Mexico, "relative to naturalization." Pursuant to notice given by the Mexican government, this treaty, as the court is informed by the secretary of state, was terminated February 11, 1882. It is therefore not now operative, and reference is made to it only for the purpose of indicating the construction placed upon our naturalization laws at that time by the treaty-making power of the respective governments. The first article of that treaty provides:

"Article 1. Those citizens of the United States who have been made citizens of the Mexican republic by naturalization, and have resided without interruption in Mexican territory five years, shall be held by the United States as citizens of the Mexican republic, and shall be treated as such. Reciprocally, citizens of the Mexican republic who have become citizens of the United States, and who have resided uninterruptedly in the territory of the United States

for five years, shall be held by the republic of Mexico as citizens of the United States, and shall be treated as such. The declaration of an intention to become a citizen of the one or the other country has not for either party the effect of naturalization. This article shall apply as well to those already naturalized in either of the countries contracting as to those hereafter naturalized."

Two conclusions are fairly deducible from an analysis of the foregoing language: (1) The two high contracting parties recognized that Mexicans were embraced within our naturalization laws; and (2) that they had the right, individually, to invoke the aid of the statute, notwithstanding the provision which at that time limited the right of naturalization to free white persons.

When all the foregoing laws, treaties, and constitutional provisions are considered, which either affirmatively confer the rights of citizenship upon Mexicans, or tacitly recognize in them the right of individual naturalization, the conclusion forces itself upon the mind that citizens of Mexico are eligible to American citizenship, and may be individually naturalized by complying with the provisions of our laws. And this conviction is further strengthened by a consideration of the first section of the act of July 27, 1868, re-enacted as section 1999 of the Revised Statutes. Its language is as follows:

"Whereas the right of expatriation is a natural and inherent right of all people, indispensable to the enjoyment of the rights of life, liberty, and the pursuit of happiness; and whereas in the recognition of this principle this government has freely received emigrants from all nations, and invested them with the rights of citizenship; and whereas it is claimed that such American citizens, with their descendants, are subjects of foreign states, owing allegiance to the governments thereof; and whereas it is necessary to the maintenance of public peace that this claim of foreign allegiance should be promptly and finally disavowed: Therefore any declaration, instruction, opinion, order, or decision of any officer of the United States which denies, restricts, impairs, or questions the right of expatriation, is declared inconsistent with the fundamental principles of the republic."

It will be observed the preamble declares that we have freely received emigrants from all nations, and invested them with the rights of citizens; and the enacting clause denounces, as inconsistent with the fundamental principles of the republic, any opinion, decision, or order of any United States officer which denies, restricts, impairs, or questions the right of expatriation. It may appropriately be said that naturalization is the final step in the process of expatriation, and, literally construed, any order, opinion, or decision of a United States officer denying, restricting, or questioning the right to become a naturalized citizen, save as to Chinese, would come within the denunciation of the statute. It is probable that the statute was not intended to have an effect so far reaching in its consequences, and that the primary purpose was, as the title of the original act asserts, to protect the rights of American citizens in foreign states. But the language of the act is significant as illustrating the policy of the government "to bestow," using the words of Vice Chancellor Sandford, "the right of citizenship freely, and with a liberality unknown in the old world." *Lynch v. Clarke*, 1 Sandf. Ch. 661.

After a careful and patient investigation of the question discussed, the court is of opinion that, whatever may be the status of the applicant viewed solely from the standpoint of the ethnologist, he is em-

braced within the spirit and intent of our laws upon naturalization, and his application should be granted if he is shown by the testimony to be a man attached to the principles of the constitution, and well disposed to the good order and happiness of the same. It is suggested that the proof fails in this respect; and the objection appears to be based upon the ground, intimated in the briefs, of his inability to understand or explain those principles. That the applicant is lamentably ignorant is conceded, and that he is unable to read and write the testimony clearly discloses. Naturally enough, his untrained mind is found deficient in the power to elucidate or define the principles of the constitution. But the testimony also discloses that he is a very good man, peaceable and industrious, of good moral character, and law abiding "to a remarkable degree." And hence it may be said of him, notwithstanding his inability to undergo an examination on questions of constitutional law, that by his daily walk, during a residence of 10 years in the city of San Antonio, he has practically illustrated and emphasized his attachment to the principles of the constitution. Congress has not seen fit to require of applicants for naturalization an educational qualification, and courts should be careful to avoid judicial legislation. In the judgment of the court, the applicant possesses the requisite qualifications for citizenship, and his application will therefore be granted.

NOTE BY THE COURT. The first naturalization act was approved March 26, 1790 (1 Stat. 103). By section 1 of this act it is provided "that any alien, being a free white person, * * * may be admitted to become a citizen," etc. This act was repealed by the act approved January 29, 1795 (1 Stat. 414), which was in turn repealed by the act of April 14, 1802. Both of these last-named acts confined naturalization to aliens being free white persons. This rule continued in force until 1870, when the law was amended to include aliens of African nativity and persons of African descent. "Such was the law on the statute book," says Mr. Morse, "when the revisers of the United States statutes prepared their revision, which, in the first draft, was formulated as follows: 'The provisions of this title shall apply to aliens of African nativity, and to persons of African descent.'" Morse, *Citizenship*, § 189. In 1875 this section was so amended as to include free white persons, and the law as amended and now in force reads as follows: "The provisions of this title shall apply to aliens (being free white persons, and to aliens) of African nativity, and to persons of African descent." Rev. St. (2d Ed.) § 2169.

Ex parte SAUER.

(District Court of Texas, Uvalde County. September Term, 1891.)

PASCHAL, J. In the matter of the application of Richard V. Sauer, an alien and subject of the emperor of Germany, to be admitted to become a citizen of the United States of America, I have refused to grant the application for final naturalization, and assign the following reasons therefor:

The witnesses whom he presented in support of his application had no personal or direct knowledge as to applicant's "attachment to the principles of the constitution of the United States," never having heard him refer to the constitution or the principles contained in that instrument; neither had they any such knowledge of his being "well disposed to the good order and happiness of the same," but inferred such to be the case from the fact that applicant was an industrious, law-abiding man. I then questioned Sauer upon these important points, he failing to tender other evidence upon them, when he asserted that he was a socialist, and a firm believer in the doctrines of socialism, Johann Most, the great apostle, being, as he informed me, greatly misunderstood. Thereupon I stated that, in the judgment of the

court, the principles of socialism are directly at war with and antagonistical to the principles of the constitution of the United States of America, and absolutely inconsistent with his being "well disposed to the good order and happiness" of the people and government of this country. I then asked him to state some of its leading principles. He replied that they contemplated the ownership and operation of all railroads and transportation lines of the country by the government, and that, as land was as free as air and water, socialists demanded the forced sale of all lands owned by the citizens in excess of that which was actually necessary to make a living upon (estimated by him at 200 acres), to the government, for the purpose of giving it to those who owned none. I sought to point out to him how such ideas were un-American, impracticable, and dangerous in the extreme to society as organized throughout the civilized world, and particularly in this free country. I furthermore explained to him that private property could not, under the constitution, be taken by the government for private use, and that this was a fundamental principle of the government, and one of the most sacred and jealously guarded rights of the citizen. He repelled these suggestions with derision and scorn, maintaining his right to his views. I informed him that while it was true that he or any naturalized citizen had an indisputable right to such sentiments, and to their free utterance, as well as to any other views they might entertain upon government, yet when a foreigner openly confesses to have such opinions, and, declaring his intentions to promulgate and carry them out, seeks to be admitted to American citizenship, it would be contrary to his oath of naturalization, and violative of the spirit and principles on which this government is founded and depends for its welfare, to admit him to citizenship.

For these reasons, and because I am of opinion that the time is upon us when the safety and perpetuity of our free institutions and of constitutional government in the land, as well as the good order and happiness of the people, demand that those who apply for the privilege, honor, and distinction of becoming American citizens should be free from doctrines which are not only subversive of constitutional government and our free institutions, but of organized society itself, have I deemed it wise and meet to deny the application of Richard V. Sauer, while he harbors such views, to become a citizen of the United States of America.

In re MOORE.

(Circuit Court, D. Washington, E. D. May 12, 1897.)

1. **VALIDITY OF TERRITORIAL STATUTE—TITLE OF ACT.**

A statute entitled "An act to amend section 812 of the Code of Washington Territory" (Laws 1885-86, p. 84), which changes the age of consent to 16 years, is not in conflict with Rev. St. U. S. § 1924, providing that every territorial law "shall embrace but one object, and that shall be expressed in the title."

2. **SAME — TERRITORIAL LAWS ADOPTED BY STATE—EFFECT OF DECISION DECLARING LAW VOID.**

Under a provision of the constitution of the state of Washington that all laws of the territory in force at the time of its adoption not repugnant to the constitution shall be continued as laws of the state, a territorial law which seems to the court to be valid will be so treated, though it had been declared by the supreme court of the territory to be in conflict with a statute of the United States, the state court having repudiated the doctrine of that decision.

This was an application by Ira Moore for a writ of habeas corpus.

Del Carey Smith, for petitioner.

Alex M. Winston, Asst. Atty. Gen., John A. Pierce, Pros. Atty., and Harris Baldwin, opposed.

HANFORD, District Judge. The petitioner shows that he was arraigned and tried in the superior court of the state of Washington for Spokane county upon an information charging him with the crime of rape, and, being convicted, he was sentenced to the state penitentiary for a term of years, and is now incarcerated pursuant to said sentence, which proceedings and imprisonment he alleges to be without due process of law, and contrary to the provisions of the constitution and laws of the United States. In obedience to an order to show cause why the writ should not issue, the state of Washington has appeared, by the assistant attorney general, and filed an answer denying the jurisdiction of this court, and alleging that the petition fails to state any facts from which a question of federal law can arise, or any legal grounds for the writ. The prosecuting attorney for Spokane county has also appeared, and, on similar grounds, moved to dismiss. Section 753, Rev. St. U. S., limits the power of this court to grant a writ in a case of this kind, so that the petitioner must show that he "is in custody in violation of the constitution or of a law or treaty of the United States." As the case has been presented, therefore, the question at issue is whether the petition shows that the imprisonment of the petitioner is in violation of the constitution or any law of the United States.

The alleged criminal act of the petitioner, as set forth in the information against him, was that on the 23d day of October, 1894, in Spokane county, he did willfully, unlawfully, and feloniously carnally know and abuse a certain named female child, under 16 years of age. The petitioner shows that he was not accused in the information of using force, and in the evidence it was not pretended that the girl did not consent; and in fact she was at the time over 12 years of age,—the common-law age of consent. Section 812 of the Code of Washington Territory of 1881 also, by a positive enactment, makes that the age of consent. The legislature of Washington territory, however, in 1886, passed an act entitled "An act to amend section 812 of the Code of Washington territory," by which act the age of consent was changed to 16 years (Laws Wash. T. 1885-86, p. 84); and this amendatory act was never annulled by congress, nor repealed by the territorial legislature, nor by any act of the state legislature, prior to the conviction of the petitioner. The constitution of the state provides that all laws of the territory in force, which are not repugnant to the constitution, shall be continued as laws of the state. In the case of *Harland v. Territory*, 3 Wash. T. 131, 13 Pac. 453, and *Rumsey v. Territory*, 3 Wash. T. 332a, 21 Pac. 152, the supreme court of Washington territory held an act entitled "An act to amend section 3050, chapter 238 of the Code of Washington Territory," void, because the title failed to express the object of the act, and therefore came in conflict with that part of section 1924, Rev. St. U. S., which provides that every law enacted by a territorial legislature "shall embrace but one object, and that shall be expressed in the title." And in the cases of *State v. Halbert*, 14 Wash. 306, 44 Pac. 538, and *State v. Smith*, 15 Wash. 698, 46 Pac. 1119, the supreme court of the state of Washington decided

that the act raising the age of consent to 16 years was not in force at the time of the adoption of the state constitution, and therefore was not continued as a law of the state, because the decisions of the supreme court of the territory in *Harland v. Territory* and *Rumsey v. Territory* robbed it of all vital force. If, in fact, the act raising the age of consent to 16 years is repugnant to section 1924, Rev. St., then the prosecution of the petitioner founded upon the act referred to is in violation of a law of the United States, and the writ should issue. But I find that the act does embrace but one object, and the title serves as well to express that object as any title that might have been contrived. The design or object of the legislature was to amend one particular section of the then existing law, and the title adopted shows clearly that the legislative mind was intent upon that, and that only. The organic law of the territory required nothing more than that the one particular object of the law should be expressed in the title, and did not require the title to specify minutely the means by which it was proposed to reach the object in view. The supreme court of the state has repudiated the doctrine of *Harland v. Territory* and *Rumsey v. Territory*, and fully exposed the unsoundness of those decisions, in the able and exhaustive opinion of Mr. Justice Hoyt in the case of *Marston v. Humes*, 3 Wash. St. 267, 28 Pac. 520. I concur in the reasoning and conclusions of that opinion, and will follow it in my decision of the case now in hand. I hold also that the erroneous decisions referred to could not have the effect ascribed to them in the opinions rendered by a majority of the justices in the cases of *State v. Halbert* and *State v. Smith*. The courts are not authorized to repeal or nullify valid laws, and their erroneous decisions are subject to correction upon further consideration of the same questions in cases which may be subsequently brought before them. The law which was declared to be void in *Harland v. Territory* had been held to be valid in a series of cases, commencing with *Rosencrantz v. Territory*, 2 Wash. T. 267, 5 Pac. 305. The change in the position of the court was in consequence of a change of judges composing the court, and, inasmuch as some of the judges who composed the court when the *Harland* and *Rumsey* Cases came before it were displaced by other judges prior to the formation of the state government, there is no reason for supposing that the court as it was then constituted would have extended the errors of those decisions so as to nullify the act amendatory of section 812, if a case founded upon that law had been presented. The supreme court of the state seems to have become tired of the rule laid down in the *Halbert* and *Smith* Cases; for in this case the petitioner shows that he has made an application to that court to be discharged upon a writ of habeas corpus, and said application had been denied.

It is my opinion that the act of 1886, raising the age of consent to 16 years, is not void, that it was in force as part of the laws of Washington territory adopted by the people as laws of the state, that the prosecution and conviction of the petitioner founded upon said act were not in violation of the constitution or any law of the

United States, and that this court has not jurisdiction to grant the application of the petitioner for a writ of habeas corpus. The motion of the district attorney for Spokane county to dismiss the proceedings under the petition herein will be granted.

In re WAITE.

(District Court, N. D. Iowa. June 14, 1897.)

1. OFFICERS OF UNITED STATES—ACTS IN OFFICIAL CAPACITY—STATE PROSECUTIONS.

An officer or agent of the United States, engaged in the performance of a duty arising under the laws and authority of the United States, is not liable to a criminal prosecution in the courts of a state for acts done by him in his official capacity.

2. SAME—RELEASE ON HABEAS CORPUS.

When an officer of the United States is sought to be held in a state court for punishment for acts done in the performance of his duty to the United States, it is not a sufficient reason for refusing his release upon habeas corpus that he may raise the question of his immunity in the state court, and carry the matter by writ of error to the United States supreme court, if necessary, since the operations of the federal government would in the meantime be obstructed by the confinement of its officer.

3. SAME—CONSTITUTIONAL LAW—STATE AUTHORITY—PENSION EXAMINERS.

In matters committed to the sole jurisdiction of the United States, statutes of the state have no application, and a criminal prosecution for violation of a state statute cannot be based upon acts done in such matters, but the determination of the rightfulness of such acts depends wholly upon the laws of the United States, and belongs to their courts. Accordingly *held*, that the statute of Iowa (Code, § 3871), providing for the punishment of one who maliciously threatens to accuse a person of a crime in order to compel him to do an act, has no application to a United States pension examiner, charged with the duty of investigating fraudulent pension claims.

4. SAME.

Petitioner, a duly-authorized United States pension examiner, was indicted and convicted in a state court for an alleged violation of the statute of Iowa for the punishment of threats to accuse a person of crime in order to compel him to do an act, based upon his acts while investigating, in the course of his duty, an alleged fraudulent claim. His conviction was affirmed by the state supreme court, and he applied to the federal court for his release upon habeas corpus. *Held*, that he should be discharged.

Upon Writ of Habeas Corpus. Submitted on petition, return, reply, and evidence.

F. W. Reed, Daniel Fish, and Cato Sells, U. S. Dist. Atty., for petitioner.

Wilbraham & Upton and Botsford, Healy & Healy, for respondent.

SHIRAS, District Judge. The facts out of which this proceeding has arisen, briefly stated, are as follows: Early in the year 1893 facts had come to the knowledge of the commissioner of pensions tending to show that many frauds were being perpetrated upon the United States in connection with claims for pensions and for increase of pensions which were represented by George M. Van Leuven, as pension attorney, whose office was located at Lime Springs, Howard

county, Iowa. For the purpose of having a thorough examination made of these frauds, and tracing home the responsibility therefor, it was deemed advisable by the pension bureau that a number of special examiners, in the employ of the bureau, should be detailed to undertake the necessary investigations, and a detail was made of some seven examiners, who were known as the "Van Leuven Commission." At the head of this detail or commission was placed the petitioner, Edward F. Waite, who for some years had been in the employ of the pension bureau as a clerk, and who had, under date of June 29, 1887, been commissioned as an examiner, the commission reciting that:

"In virtue of the authority vested in me by section 4744 of the Revised Statutes and the amendments thereto, Edward F. Waite is hereby detailed to examine claims made under and by virtue of the provisions of the pension law, and to aid in prosecuting any person violating the same, in accordance with such instructions, both general and special, as shall be given to him from time to time. Under the provisions of the above-named section as amended he has the power to administer oaths, and take affidavits, in the course of any such examination.

John C. Black, Commissioner."

Section 4744, Rev. St., enacts that:

"The commissioner of pensions, is authorized to detail from time to time clerks in his office to investigate suspected attempts at fraud on the government, through and by virtue of the provisions of the pension laws, and to aid in prosecuting any person, so offending, with such additional compensation as is customary in cases of special service; and any person so detailed shall have the power to administer oaths and take affidavits, in the course of any such investigation."

The pension bureau, for the purpose of directing examiners in the proper mode of performing their duties, has adopted a series of general instructions to special examiners, in which it is stated that:

"Examiners are expected and required to obtain whatever facts are necessary to prevent the payment of improper pensions, and to assist in bringing to punishment those who are knowingly guilty of violating the provisions of the pension laws."

In addition to these general instructions, verbal authority or instructions were given to Examiner Waite by the commissioner of pensions regarding the investigation of the Van Leuven cases to the general effect that a thorough examination must be had, in order to ascertain the truth; that in the view of the pension bureau it was of greater importance to the interests of the government and of the pensioners, if it appeared that frauds had been committed in which the pension attorney and members of the boards of surgeons were implicated, to bring home to these parties the commission of the wrong acts by them done, than to simply fasten the fraud upon an applicant for a pension, who might have been led into the commission of wrong acts by the inducements held out by the attorney representing him. Thus commissioned, authorized, and instructed by the pension bureau, acting under the authority conferred upon it by the congress of the United States, the so-called "Van Leuven Commission," under the direction of the petitioner, entered upon the discharge of the duties imposed upon them, and, briefly stated, the result of the investigation showed that Van Leuven

had been and was engaged in carrying on a systematic course of fraud and corruption in connection with his business as pension attorney, as is evidenced by the records of this court, which show that a large number of indictments were returned against him, upon which he was tried, or to which he pleaded guilty, and was by this court sentenced to imprisonment in the penitentiary.

During the progress of this investigation and under date of July 12, 1893, a list of pension claims was referred to "Special Examiner E. F. Waite, for use in connection with his investigation of certain charges against George M. Van Leuven, Jr., of Lime Springs, Iowa, the attorney of record." This list included the claims of Daniel P. Andrus for an increase of pension. The evidence shows that this matter was first placed in the hands of Examiner Perham, who visited Andrus, and obtained an affidavit from him with regard to three letters purporting to have been written by the pension claimant to his wife during the months of May, June, and July, 1864, and which had been filed in support of the claim. Subsequently the petitioner, Edward F. Waite, took charge of the matter, and visited Andrus at his home near Cresco, Iowa, for the purpose of interrogating him with regard to these letters, touching which doubt had arisen whether they had all been written on the day they bore date or not. When at the house of the claimant, Andrus, a discussion was had between Andrus, his wife, and Examiner Waite, with regard to the letters, touching the details of which discussion the parties are not in entire accord in their testimony. At the time of this interview, Mr. Waite testifies that his belief was that one at least of the letters in question was not genuine, and that doubt existed as to the other two, and his purpose in seeking the interview with the claimant Andrus was to induce him to admit the fraud, if in truth it existed, or, if he would not do so, then to get an affidavit specifically indentifying the letters, and affirming the genuineness thereof, so that, in case it should afterwards be shown that the letters, or either of them, were fraudulent, there would be no difficulty in procuring an indictment against Andrus for perjury in case the proper authorities should deem it advisable to proceed against him for that offense. The final result of the interview at the house of Mr. Andrus was that he refused to make any affidavit with regard to the letters until he could see and consult with his attorney, who resided in Cresco. Mr. Waite then offered to take him in the vehicle in which he himself had come from Cresco to the attorney's office, which offer Mr. Andrus accepted, his own team being at the time away from his place; and the two parties then drove, with the same team, to Cresco, where Mr. Andrus consulted with his attorney, and then refused to make any affidavit, except one affirming the genuineness of the letters, which was prepared for him, and by him signed and sworn to before the examiner, and the parties separated. Shortly afterwards an indictment was procured in the district court of Howard county, charging Examiner Waite with having violated the provisions of section 3871 of the Code of Iowa, which provides for the punishment of one who maliciously threatens to accuse a person of a crime in order to compel him to do an act against his

will. Upon this indictment the defendant thereto was arrested, put upon trial before a jury, a verdict of guilty was rendered, upon which the court sentenced him to pay a fine of \$250, and upon error the supreme court of the state affirmed the sentence. *State v. Waite* (Iowa) 70 N. W. 596. Pending the hearing before the supreme court, the defendant was released upon bail, but upon the affirmance of the judgment of the district court he surrendered himself to the sheriff of Howard county, who took him into custody, under the sentence imposed, which, in pursuance of the provisions of the Code of Iowa, directed that if the fine imposed was not paid the defendant should be imprisoned. Thereupon Waite filed in this court a petition for a writ of habeas corpus, averring that he was unlawfully imprisoned by the sheriff of Howard county. The writ was issued directed to A. C. Campbell, sheriff, and thereto due return has been made, it being averred by the respondent that he, as sheriff of Howard county, holds the petitioner, Waite, in his custody under a writ duly issued for the enforcement of the sentence of the district court of Howard county. To the return a replication was filed, setting forth the authority under which Waite acted, and claiming that under the facts the state court had no jurisdiction in the premises, and that the sentence and all proceedings upon which it was based were wholly void. Upon the pleadings and the evidence adduced by the parties the case has been submitted.

Upon behalf of the respondent it is urged that the case is not one in which the writ of habeas corpus is a proper remedy; that the petitioner can avail himself of a writ of error from the supreme court of the United States to the supreme court of the state on the ground that the petitioner claimed a defense or protection under the laws of the United States which was denied him by the ruling of the state court, and therefore it is a case of which the supreme court of the United States can take jurisdiction upon error, and consequently this court should not undertake to deal with the matter by means of the writ of habeas corpus. The general principle is well settled that this writ must not be used simply to serve the purposes of a writ of error. *Davis v. Beason*, 133 U. S. 333, 10 Sup. Ct. 299; *In re Frederich*, 149 U. S. 70, 13 Sup. Ct. 793. It is equally well settled that where the basis of the relief sought by means of the issuance of a writ of habeas corpus is that the court under whose sentence or judgment the petitioner is deprived of his liberty had no jurisdiction in the premises, then the courts of the United States may grant the writ. *Ex parte Royall*, 117 U. S. 241, 6 Sup. Ct. 734; *In re Frederich*, 149 U. S. 70, 13 Sup. Ct. 793; *In re Nielsen*, 131 U. S. 176, 9 Sup. Ct. 672; *In re Wood*, 140 U. S. 278, 11 Sup. Ct. 738. The grounds upon which relief is sought in this case bring it within the rule recognized in the cases last cited, and this court is justified in proceeding with the hearing and determination of the question whether the state court had jurisdiction to hear and determine the criminal prosecution wherein the sentence was imposed under which the petitioner is now deprived of his liberty. The sole question properly arising before this court is that of the jurisdiction of the district court of Howard county,

and under the facts established by the evidence adduced the first matter for consideration is whether an officer or agent of the United States, engaged in the performance of a duty arising under the laws and authority of the United States, is liable to a criminal prosecution in the courts of the state for acts done by him in his official capacity. This presents a matter of moment much beyond the mere question of the detention of the liberty of the petitioner as an individual. Broadly stated, it involves the proposition whether the operations of the government of the United States in matters within its sole control, and which operations of necessity must be carried forward by means of officers and agents duly appointed, can be interfered with by criminal proceedings instituted in the state courts, and based upon acts done by such officers or agents within the scope of the duties imposed upon them. By this it is not meant to assert that because a person is an officer or agent of the federal government he is thereby excepted out from the jurisdiction of the state or the binding force of its laws. The mere fact that when the acts by him done were done he was an officer of the United States, charged with certain duties to that government, will not afford him immunity from prosecution under the laws of the state, nor will the mere fact that he claims that the acts done were within the line of his official duty afford him protection, if the acts are such as to show that the claimed immunity is a mere subterfuge, and that under no fair consideration of his official duty could he have assumed that he was acting in his official capacity when the acts complained of were done by him. But when an officer of the United States is charged with the performance of certain duties under the laws of the United States, and in the general performance thereof he does acts which it is claimed are in excess of his proper duty, or which are violative of the rights of other citizens, the question is whether a prosecution therefor can be sustained in the state courts, when it is apparent that the institution and maintenance thereof may interfere with the enforcement of the laws of the United States, or with the operations of that government. Under this aspect of the question, the point is not what the rights of individual citizens might require for their proper protection, but whether the government of the United States, acting in the interest of the entire community, has not the right to assert that its operations within the jurisdiction conferred by the constitution, and wherein it is supreme and paramount, cannot be interfered with under the laws of the state; and that to prevent such interference it must be held that an officer or agent of the United States, when engaged in the performance of his official duties, is not amenable to the laws or courts of the state in a criminal prosecution based upon acts by him done in connection with his official duties. If in the performance of these duties the officer so acts as to violate his duty to the United States, that government, and not the state, is the proper party to call him to account. If the acts done are violative of the rights of individuals, a civil action for damages may be maintained, or protection may be sought under the laws of the United States, and thus a remedy may be afforded to the citizen without

bringing the federal and state governments into conflict, or without unduly interfering with the operations of that government under whose authority the officer is acting.

In the case of *Tennessee v. Davis*, 100 U. S. 257, this general subject was before the supreme court. In that case James M. Davis was indicted for murder in a court of the state of Tennessee, and he petitioned for a removal of the case into the federal court upon the ground that when the killing was done he was a deputy collector of internal revenue of the United States; that the act was in self-defense, he having been assaulted when endeavoring to seize an illicit distillery; and the right of removal was based upon the provisions of section 643, Rev. St. In dealing with the question of the right of congress to provide for the removal into courts of the United States of criminal cases based upon state laws, in which a defense is set up under the provisions of the laws of the United States, the supreme court said:

"We come, then, to the inquiry most discussed during the argument, whether section 643 is a constitutional exercise of the power vested in congress. Has the constitution conferred upon congress the power to authorize the removal from a state court to a federal court of an indictment against a revenue officer for an alleged crime against the state, and to order its removal before trial, when it appears that a federal question or a claim to a federal right is raised in the case, and must be decided therein? A more important question can hardly be imagined. Upon its answer may depend the possibility of the general government's preserving its own existence. As was said in *Martin v. Hunter*, 1 Wheat. 363: 'The general government must cease to exist whenever it loses the power of protecting itself in the exercise of its constitutional power.' It can only act through its officers and agents, and they must act within the state. If, when thus acting, and within the scope of their authority, those officers can be arrested and brought to trial in a state court for an alleged offense against the law of the state, yet warranted by the federal authority they possess, and if the general government is powerless to interfere at once for their protection,—if their protection must be left to the state court,—the operations of the general government may at any time be arrested at the will of one of its members. The legislation of the state may be unfriendly. It may affix penalties to acts done under the immediate direction of the national government, and in obedience to its laws. It may deny the authority conferred by those laws. The state court may administer not only the laws of the state, but equally federal law, in such a manner as to paralyze the operations of the government. And even if, after trial and final judgment in the state court, the case can be brought into the United States court for review, the officer is withdrawn from the discharge of his duty during the pendency of the prosecution, and the exercise of acknowledged federal power arrested. We do not think such an element of weakness is to be found in the constitution. The United States is a government extending over the whole territory of the Union, acting upon the states and upon the people of the states. While it is limited in the number of its powers, so far as its sovereignty extends it is supreme. No state government can exclude it from the exercise of any authority conferred upon it by the constitution, obstruct its authorized officers against its will, or withhold from it for a moment the cognizance of any subject which that instrument has committed to it."

In the noted case of *In re Neagle*, 135 U. S. 1, 10 Sup. Ct. 658, the supreme court reviewed at length many of the cases in which writs of habeas corpus had been granted in favor of parties held under indictments in state courts for acts done under the authority of the laws of the United States, and also gives the progress of congressional legislation upon the subject; and the conclusion reached

was that when Neagle took the life of Terry he was acting as a deputy marshal under authority of the law, "and that he is not liable to answer in the courts of California on account of his part in that transaction." In the course of the opinion in that case the supreme court cite with approval the language used by Mr. Justice Grier in *Ex parte Jenkins*, 2 Wall. Jr. 521, Fed. Cas. No. 7,259, wherein the marshal was arrested under a warrant of a justice of the peace for assault with intent to kill, to the effect that:

"The authority conferred on the judges of the United States by this act of congress gives them all the power that any other court could exercise under the writ of habeas corpus, or gives them none at all. If, under such a writ, they may not discharge their officer when imprisoned 'by any authority' for an act done in pursuance of a law of the United States, it would be impossible to discover for what useful purpose the act was passed."

In the case of *Tennessee v. Davis*, the supreme court decided that congress could lawfully provide for the removal from state to federal courts of all criminal proceedings wherein it might be sought to charge one acting under authority of the United States with a criminal violation of the state laws, and in *Re Neagle* the supreme court held that by means of the writ of habeas corpus all such cases can be taken from a state court into a federal court, and in *Ex parte Royall* the supreme court held that it was discretionary with the United States court to determine whether it would grant the writ before a trial in the state court, or await the action of the state court upon the matter; that discretion, however, to be subordinated to any special circumstances requiring immediate action. All these cases hold clearly, however, that when it is made to appear that an officer of the United States, or one acting under the authority of a law of the United States, is sought to be held in a state court for punishment under the provisions of a statute, for an act done while in the performance of the duty he owed to the United States, the federal courts, either by removal, where the statute provides for that mode, or by writ of habeas corpus, must assume jurisdiction over the matter, and prevent further action in the state court, and the principle underlying the cases is that the state has not jurisdiction over a person when he is acting under the authority of the United States. It is no sufficient answer to this position to urge that protection can be given to the one acting under the authority of the United States by requiring him to assert his defense in the state court, and then, if the decision is against him, to carry the matter by writ of error to the supreme court of the United States. This is a proper course to pursue when in a suit between individuals, affecting only private interests, a right is asserted based upon the constitution or laws of the United States, for in such case the operations of the government are not impeded or obstructed. If, however, it should be held that the officers of the United States, when engaged in the performance of their official duties, can be arrested by a warrant from a state magistrate, or from a court of record of the state, upon the charge that in the performance of the duties imposed upon him the officer has violated some provision of the state statutes, it is apparent that the enforcement of the laws of the United States and the carrying on of the operations of the

government may be seriously embarrassed or wholly arrested. Even though it be true that the officer, by making the defense in the state court, can ultimately obtain the protection of the laws of the United States, the injurious effect in the way of impeding the enforcement of the laws of the United States would not be obviated, for, as is pointed out by the supreme court in *Tennessee v. Davis*, *supra*, during the time the officer is under arrest or is engaged in defending himself in the state court he is withdrawn from the discharge of his duty, and the exercise of acknowledged federal power is arrested. Hence the justification of the true rule that it cannot be permitted to the state to assert jurisdiction over one acting under the authority of the United States for acts by him done in furtherance of the duty he owes to the federal government, upon the assumption that these acts are violations of a state statute.

But there is another view that may be taken of the general question, which perhaps may show even more clearly the correctness of the claim that the state court was without jurisdiction, and that is that the provision of the state law under which the petitioner was indicted and tried has no application to a case wherein an examiner of pensions, acting under the laws of congress, is endeavoring to ascertain the facts with regard to claims for pensions pending under the laws of the United States. It will not be questioned that to sustain a criminal prosecution the statute upon which it is based must be binding upon the person, and applicable to the acts which form the basis of the prosecution. If, when the acts were done, the same were not within the plane of the jurisdiction of the state, then the statute of the state has no application thereto, and it cannot be predicated of the acts that they constitute violations of the statutes of the state. Thus in *Re Loney*, 134 U. S. 372, 10 Sup. Ct. 584, it appeared that Wilson Loney had been placed under arrest upon a warrant issued by a justice of the peace in the city of Richmond, Va., charging him with perjury in giving his deposition before a notary public in a case of a contested election of a member of the house of representatives of the United States, the proceeding being based upon the statute of the state of Virginia, which enacts that, "if any person, to whom an oath is lawfully administered on any occasion, willfully swears falsely on such occasion, touching any material matter, or thing, he is guilty of perjury." The circuit court of the United States granted a writ of habeas corpus, and upon the hearing released the petitioner upon the ground that the statute of Virginia did not apply to the facts, and the case was thence carried to the supreme court, which affirmed the ruling, and in the course of the opinion it was said:

"It is essential to the impartial and efficient administration of justice in the tribunals of the nation that witnesses should be able to testify freely before them, unrestrained by the legislation of the state, or by fear of punishment in the state courts. The administration of justice in the national tribunals would be greatly embarrassed and impeded if a witness testifying before a court of the United States, or upon a contested election of a member of congress, were liable to prosecution and punishment in the courts of the state upon a charge of perjury, preferred by a disappointed suitor or contestant, or instigated by local passion or prejudice."

And the conclusion reached was that:

"The courts of Virginia having no jurisdiction of the matter of the charge on which the prisoner was arrested, and he being in custody, in violation of the constitution and laws of the United States, for an act done in pursuance of those laws by testifying in the case of a contested election of a member of congress, law and justice required that he should be discharged from such custody, and he was rightly so discharged by the circuit court on writ of habeas corpus."

It will be noticed that neither the circuit nor supreme court examined into the question whether the prisoner had or had not sworn falsely in giving his testimony. The point of the decision was that the statute of Virginia, under which the prisoner was held, was not applicable to the case, and therefore there was no jurisdiction in the state courts, and this holding was based upon the proposition, in support of which authorities are cited in the opinion, that with relation to such matters as congressional elections, proceedings under the United States bankrupt acts, or matters connected with the public lands the state statutes for the punishment of perjury do not apply, because these are matters outside of state control and jurisdiction, and within federal control.

It will not be questioned that the whole subject of the pensions paid to the soldiers and sailors of the United States is a matter wholly within federal jurisdiction, and wholly outside the plane of state control. The state cannot, either by legislative enactment or by judicial action, create or deny the right to a pension under the laws of the United States, nor direct, prescribe, or control the mode of obtaining pensions, the manner of submitting evidence in support thereof, the kind or amount of evidence needed to establish a claim, or the methods to be followed by the United States in examining into claims presented, or the safeguards to be adopted to prevent frauds upon the federal government. The government of the United States has created the pension system now in force; and the whole thereof, in substance and in form of procedure, is without the plane of state control. When D. P. Andrus filed in the pension office his application for an increased pension, he then invoked and set in action the machinery of the pension system, and subjected himself to the provisions of the laws of congress and the rules established by the pension bureau upon this subject-matter, and in all things connected with the claim thus presented by him he was subject to the laws of the United States, and, on the other hand, was entitled to the protection of the United States in all that he did or sought to do in the prosecution of his pension claim. If an indictment had been procured against him in the district court of Howard county charging him with perjury, or some other violation of the statutes of the state, in the testimony he gave in support of his claim for a pension, and he had been arrested thereon, and thereupon he had applied to this court to be released from this arrest by means of a writ of habeas corpus, can there be any question that it would have been the duty of this court to have granted the writ, and upon the hearing to have discharged him, upon the ground that the laws of the state have no application to the acts of a party who is pro-

ceeding under the pension system of the United States, and where the acts are done in furtherance of the application for a pension. Under the ruling of the supreme court in *Re Loney*, *supra*, it is clear that in the supposed case Andrus would have been entitled to his discharge on the ground that the state court had no jurisdiction in the premises, for the reason that the statutes of the state are not applicable to the conduct of a party in seeking to secure a pension under the laws of the United States.

The legality of the acts of the pension claimant in support of his claim cannot be determined by the state statutes. They are not the test of what he may or may not do. So long as the acts of the pension claimant, in support of his claim, do not violate the provisions of the laws of the United States, he cannot be held to account criminally therefor. If the act he does violates the statutes of the United States, he can be held liable therefor, even though the statute of the state might justify the act. The rule deducible from the decided cases, and well sustained on principle and authority, is that when a person seeks the benefit of the laws of the United States upon some matter wholly within federal control, as where one applies for a discharge in bankruptcy, or seeks to purchase or enter any of the public lands of the United States, or applies for a pension or for an increase thereof under the pension system of the United States, the test of the legality of the acts by him done in furtherance of the relief sought or of the claim made is to be found in the laws of the United States. It is clear that the state cannot directly legislate upon these matters, because they are outside of the plane of state control and jurisdiction, and therefore the general statutes of the state cannot, by judicial interpretation, be made applicable thereto.

If, then, in the supposed case, Andrus would have been entitled to a discharge from arrest upon the warrant of the state court on the ground that he was not amenable to the jurisdiction of the state because the act done for which it was sought to hold him criminally liable was done in connection with and in furtherance of a claim for an increased pension by him presented under the laws of the United States,—a matter wholly within federal control, and wholly without state control or jurisdiction,—is it not equally clear that the state law cannot be held applicable to the acts done by the pension examiner in connection with the claim in question? It would be a curious anomaly to hold that Andrus, the pension claimant, was not amenable to the state jurisdiction for acts by him done in furtherance of his claim, but that the pension examiner, acting under the authority of the United States, when engaged in the examination of the validity of the Andrus claim, was amenable to the state jurisdiction for acts by him done in furtherance of the duty imposed upon him as an agent of the pension bureau. The state statutes do not furnish the test of the legality or criminality of the acts done by the pension claimant in furtherance of the claim by him made under the laws of the United States governing the granting of pensions, nor of the acts done by the pension examiner when engaged in investigating the merit of the claim presented under the

pension laws. When the pension claimant, Andrus, filed his claim for an increase of pension, he then invoked the benefit of the laws of the United States creating the pension system, and he became entitled to the benefits of the system, in case he sustained his right to an increased rate, and he became entitled to the protection of the laws and governmental powers of the United States while engaged in prosecuting the claim by him filed. In what he did, or sought to do, in support of or in furtherance of the claim by him asserted under the pension system of the United States, he was not lawfully subject to be impeded or embarrassed by criminal proceedings instituted under the statutes of the state based upon acts done by him in support of his claim; and if for an act thus done he had been arrested in a criminal proceeding instituted in a state court, he would have been entitled to his discharge from such arrest upon a writ of habeas corpus issued by this court. The immunity, however, which he could lawfully claim under these circumstances, based upon the principle that the whole subject-matter of pensions, created by the laws of the United States, is outside of the plane of state jurisdiction, must be equally applicable to the officer or agent of the United States charged with the duty of examining into the validity of the claim thus asserted under the laws of the United States. No other conclusion is permissible, and it thus appears that the statutes of the state of Iowa are not applicable to the acts done by a pension examiner when engaged in the investigation of the validity of a claim preferred by one who seeks the benefit of the pension bounty provided for by the laws of the United States, the acts done being in furtherance of the duty imposed upon the examiner by the laws of the United States.

But it is said that of necessity there is placed upon the state court the duty of determining in each case whether it has jurisdiction; that this necessitates inquiry into the facts of the particular case; that the duty of inquiry must be supplemented by the right to determine and adjudicate on the question of jurisdiction; that in this case the district court of Howard county held that it had jurisdiction, which ruling has been affirmed by the supreme court of the state; and that the only remedy, if any exists, is by writ of error to the supreme court. The state court proceeded upon the theory that the statute of the state was applicable to the acts of the examiner, acting under the authority of the United States, in investigating the validity of the claim made by Andrus for an increase of pension, and the genuineness of the letters filed in support of the claim, and, making the state statute the guide to the examiner in the performance of the duties he owed to the government of the United States, the court held that the acts done violated the state statute, and rendered the examiner amenable to the punishment provided for in that statute. In reaching this conclusion the supreme court of the state held that in the performance of his duties as an examiner appointed under the laws of the United States he had no right to resort to duress or intimidation for the purpose of procuring information; it being further said in the opinion that: "The officers of the general government owe obedience to the laws of this

state when within its limits, and may be detained and prosecuted for the commission of felonies thereunder." By this it is made clear that the state court undertook to hear and determine the question whether the laws of the United States justified the acts done by the examiner in his efforts to obtain information touching the validity of the claim preferred by Andrus for an increase of pension, and, reaching the conclusion that he had overstepped the proper limits of his authority, the court, in effect, held that he had thereby become amenable to a prosecution under a state statute. In effect, the state court undertook to punish the examiner under the provisions of the state statutes for acts done by him as an agent of the United States, the acts being intended to further the duty imposed upon the examiner by the laws of the United States, upon the ground that in doing the acts the examiner exceeded the authority conferred upon him by the laws of the United States. It is not questioned that if a person who is an officer or agent of the United States commits a felony in a matter aside from that committed to his care as an officer of the United States, he may be prosecuted therefor in the state courts, but in such case he is not proceeded against as an officer or agent of the United States. If, however, he is proceeded against for acts done in his official capacity, on the theory that what he did was not required in the performance of his duty, but was in excess thereof, then it is clear that the vital question is the extent of the authority conferred upon him by the laws of the United States, and it certainly is the law that the officers and agents of the United States, such as the marshals, the deputy marshals, post-office inspectors, pension examiners, and the like, cannot be called to account before the courts of the states for the manner in which they perform the duties intrusted to them. Suppose it were true that the examiner in this case, in his efforts to get at the truth with regard to the Andrus claim, did threaten Andrus that if he did not own up to the fraud charged against him he would be prosecuted for perjury or other crime. What right has the state of Iowa to inquire into the mode or manner in which the United States, through its officers and agents, administers the pension system of the United States? If the examiner, while conducting the investigation into the validity of the claim preferred by Andrus, may have overstepped the limits he should have observed in the examination of Andrus (which, however, I do not assert nor believe), it is for the government of the United States to call him to account, and not for the state of Iowa. It is true that, when in the state of Iowa, the officers and agents of the United States owe obedience to the laws of the state, but they, in common with all others, owe obedience to such laws only in matters to which the state laws are properly applicable. Thus, if the legislature of the state should enact that pension examiners appointed by the United States, when engaged in the performance of their duties in Iowa, should not have the right to examine applicants for pensions with regard to their claims, or in such examination should not have the right to call for papers or letters in possession of the claimant, or should not have the right to warn a claimant of the dangers he would expose himself to if he

presented a false claim, is it not clear beyond question that all such attempted legislation would be held utterly void, because the subject-matter of pensions is wholly without the plane of state control, and for the further reason that it is not within the province of the state to define, prescribe, or limit the duties or the mode of performance thereof of officers and agents of the United States? That which is beyond the plane of state jurisdiction by direct legislation cannot be brought within such plane by indirection, and therefore it is that the officers and agents of the United States cannot be held responsible, under the criminal statutes of the state, for acts done in their official capacity, because, if that were permitted, it would be possible to control or nullify the action of the authorities of the United States by the action, legislative and judicial, of the several states. The question which marks the limit of the state jurisdiction is whether the person sought to be called to account was acting under the authority of the United States when the acts complained of were done, in and about a subject-matter within federal jurisdiction. The mode or manner in which the officer or agent undertakes to perform the duty imposed upon him by the laws or authority of the United States is not a matter of state cognizance, for the criminal statutes of the state are not applicable to acts done within the plane of federal jurisdiction, and under the authority of the United States.

Whenever it is made to appear in a criminal case pending in the state court that the acts charged in the indictment were done by the defendant as an officer or agent of the United States in and about a matter within federal control, and when engaged in the performance of the duties imposed upon him by the laws or authority of the United States, then it is made to appear that the state court is asked to assume a jurisdiction which it cannot rightfully exercise; and if that court entertains the case, and proceeds to adjudicate on the question of the extent of the authority possessed by the officers of the United States, and the mode and manner in which his official duty has been performed, testing the same by the provisions of state statutes not applicable to the subject-matter, it proceeds at the peril of having its jurisdiction questioned and denied either by writ of error to the supreme court of the United States or by a writ of habeas corpus from either of the courts of the United States.

In the present case the evidence shows beyond possible question that Edward F. Waite was duly commissioned as a special examiner of the pension bureau; that he was charged specially with the duty of examining into the pension claims filed by residents of Northern Iowa and Minnesota through George M. Van Leuven, as their attorney, which included the claim for an increase of pension filed by D. P. Andrus; that in pursuance of the authority of the United States he went to Andrus' house for the purpose of examining him about his claim; that during the whole interview between Waite and Andrus, Waite was acting in his capacity of pension examiner; that in all he did or said at that interview he was seeking to get at the truth with regard to the claim for pension, and the genuine-

ness of the letters filed in support thereof; and therefore it is made clear beyond question that during that entire interview, and in all that he did or said, he was acting in his official capacity under the authority of the United States, in and about a subject-matter wholly within federal control and jurisdiction, and therefore for the mode or manner in which he performed the duty imposed upon him by the laws of the United States he cannot be called to account in a criminal case brought in a state court, based upon provisions of a state statute. For any dereliction of duty in the mode and manner of conducting the investigation which he was empowered to make under the authority of the United States he is amenable to the laws of the United States, but not to those of the state, for, as is said, in effect, by the supreme court in the Neagle Case, acts done under the authority of the United States cannot be violations of the criminal laws of the state. Being done within the general scope of the authority conferred by the laws of the United States, the rightfulness or validity thereof cannot be tested by the provisions of the criminal statutes of the state. Therefore, when it was made to appear to the district court of Howard county that it was sought in the case before it to hold Edward F. Waite liable for a criminal violation of the statutes of the state for acts by him done as a special examiner of pensions appointed under the laws of the United States, when he was engaged in the performance of the duties imposed upon him as an officer or agent of the United States, then it was made to appear to that court that it had no jurisdiction to further proceed in the case or to further restrain the liberty of the defendant therein for the reasons:

First. That it thus appeared that it was being attempted to apply the criminal provisions of the statute of the state to acts done and proceedings had under the laws of the United States creating and regulating the pension system of the United States, which system, as to substance and mode of procedure, lies wholly without the plane of state jurisdiction; second, that it was thus made to appear that the criminal process of the state was being used to interfere with, impede, and embarrass the operations of the government of the United States in connection with a subject-matter touching which the laws of the United States are not only paramount and supreme, but touching which the jurisdiction of the United States is exclusive; and, third, that it was thus made to appear that it was sought to subject an officer and agent of the United States to punishment under the criminal statutes of the state for acts by him done under the authority of the United States in connection with a subject-matter wholly within federal control and jurisdiction. In thus undertaking to review the actions of the district court of Howard county, affirmed as it has been by the opinion of the supreme court of the state, this court has been called upon to exercise a very delicate duty, but it is one imposed upon this court by the laws of the United States, and which cannot be evaded, when the liberty of a citizen of the United States is involved in the controversy. Having reached the conclusion that for the reasons assigned the district court of Howard county was without jurisdic-

tion in the premises, it follows that in holding the petitioner to trial before a jury, in receiving a verdict of guilty in the case, in entering sentence thereon, in holding the petitioner to bail pending the appeal to the supreme court, and in endeavoring to enforce the sentence by committing the petitioner to the custody of the sheriff, the state court and its officers acted without due authority or warrant of law, for want of jurisdiction in the premises, and, as it thus appears that the petitioner is deprived of his liberty without due warrant of law, he is entitled to his discharge as prayed for.

UNITED STATES v. ONE CASE CHEMICAL COMPOUND (two cases).

In re SOCIÉTÉ FABRIQUES DE PRODUITS CHIMIQUES DE THANN
ET DE MULHOUSE (two cases).

(District Court, S. D. New York. May 12, 1897.)

CUSTOMS DUTIES—FORFEITURE PROCEEDINGS—INTERVENTION BY PATENT OWNER.

A patent owner, who is suing an importer for infringement by the importation of infringing goods, which have been detained by the customs officials, and libeled for forfeiture, because of fraudulent undervaluation, may, for the protection of his interests, be permitted to intervene in the forfeiture proceedings, on giving proper security.

Libel for Forfeiture. Intervention.

On petitions by Société Fabriques de Produits Chimiques de Thann et de Mulhouse, owner of United States letters patent, for leave to intervene in forfeiture proceedings for its interest in the res, the following facts appeared:

These proceedings were begun by the government for the forfeiture of two cases of chemical compounds for fraudulent undervaluation. The petitioner herein claimed that the said compound was trinitrobutylxylene, or artificial musk, an article covered by United States letters patent to Albert Baur, No. 451,847, dated May 5, 1891. The owner of the patent (the petitioner herein) had brought suit in the United States circuit court against one Sander, the consignee of the goods, for infringement of the patent, and being unable to learn the whereabouts of said Sander and ascertaining that he was acting through the firm of Messrs. Hatch & Wickes, who represented him as proctors in the forfeiture proceedings, made Messrs. Hatch & Wickes parties to the infringement suit. Service could not be effected on Sander. The other parties appeared.

The bill of complaint prayed for the usual injunction, and that the defendants be enjoined from obtaining possession of the shipments of artificial musk before mentioned. There was also a prayer that the goods be delivered up to be destroyed.

A preliminary injunction was granted by his honor, Judge Lacombe, against Messrs. Hatch, Wickes and Clute, composing the firm of Hatch & Wickes, from acting as attorneys in fact of the defendant Sander to obtain the possession or control of said merchandise. It was expressly provided that the writ was not to operate in restraint of their "appearing and acting for said Sander as attorneys at law, counsellors or proctors in the forfeiture proceedings now pending" in this court.

B. F. Lee, for petitioner.

That it is not necessary to show a claim enforceable in admiralty to entitle a petitioner to intervene in a proceeding in rem for his interest in the res. *The Two Marys*, 10 Fed. 919, at page 925, 12 Fed. 152, and 16 Fed. 697.

That the court may order an article made in infringement of a patent right to be delivered up to be destroyed. *Frearson v. Loe*, 9 Ch. Div. 48, 67; *Birdsell v. Shallol*, 112 U. S., at page 487, 5 Sup. Ct. 244.

James R. Ely, Asst. U. S. Atty.

Hatch & Wickes (Walter C. Low, of counsel), for claimant.

BROWN, District Judge. The petitioner has a sufficient interest to justify his intervention on giving security; the other parties should then answer the petition unless they admit the facts stated in it. If its statements are denied and any issues are presented not appropriate for trial in this court, they can be sent to the appropriate court and the proceedings here stayed in the meantime.

DRAPER et al. v. WATTLES.¹

(Circuit Court, D. Massachusetts. February 21, 1879.)

1. COSTS IN EQUITY—APPORTIONMENT.

A plaintiff is not to be refused costs merely because he may not have recovered all that he has in good faith and with reasonable prudence supposed himself entitled to.

2. SAME—PATENT SUITS.

Where three patents were sued on, and two were held valid and infringed, but as to the third it was found that infringement had not been fully made out by a preponderance of evidence, *held*, that plaintiff would not be denied full costs, especially as there had been no attempt to discriminate sharply the infringements of the third patent from the others.

This was a suit in equity by George Draper and others against Joseph W. Wattles for alleged infringement of three patents. The cause was heard upon a question as to the allowance of costs.

Thomas L. Livermore, for complainant.

David Hall Rice, for defendant.

LOWELL, Circuit Judge. The bill of complaint was brought upon three patents, and in the opinion of the court two of them were valid and had been infringed, and as to the third the finding was that the infringements had not been fully made out by a preponderance of the evidence. Under these circumstances the respondent contends that the costs should be apportioned in some equitable mode, and the complainants maintain that they should have full costs.

The court, undoubtedly, has control over the subject of costs, excepting when the case comes within section 4922, Rev. St., which provides that, if the patentee has claimed in his specification more than that of which he was the first inventor or discoverer, he shall recover no costs, unless he shall have entered a proper disclaimer at the patent office before suit. This power to award or refuse costs, in whole or in part, may prove to be useful in the very long and expensive litigations which are so much in vogue at the present time, and I should be unwilling to abdicate that power. But this case

¹ Not previously reported, and now published by request.

seems to come within that general rule, which is adopted in all courts of equitable jurisdiction, that a plaintiff is not to be refused his costs merely because he may not have recovered all that he has in good faith and with reasonable prudence supposed himself to be entitled to. The parties cannot always foresee what the evidence may be to meet their apparently sound case. Especially is this true in patent causes, in which the history of the art is often developed for the first time in the course of the suit. If the invention has been anticipated in any substantial part, the statute deals with the costs. Here, the court may be said to have determined a single issue out of many upon a failure to sustain the burden of proof, rather than upon any decided opinion that the plaintiffs had no right to complain of the defendant's acts.

It was for the interest of both parties that the plaintiffs should unite all their claims in one suit in equity, and there was no action taken to discriminate sharply the issue of infringement under the third patent from the others. The validity of all the patents was assailed, as well as the infringement of all, and the result has been to sustain the plaintiffs in a great majority of the many points which were raised by the pleadings. It would operate as a surprise and a hardship upon the plaintiffs, under these circumstances, to undertake to pick out the costs of the single issue upon which they have failed to make out their case to the satisfaction of the court. Costs to be taxed in full.

WARREN CHEMICAL MANUF'G CO. V. UNITED STATES.

(Circuit Court, S. D. New York. February 16, 1897.)

CUSTOMS DUTIES—CLASSIFICATION—COAL-TAR PRODUCT.

The merchandise known as "coal-tar product," or "dead oil," is not dutiable under the provision for "products known as distilled oils" in paragraph 60 of the act of August 28, 1894, but is entitled to free entry under paragraph 443, as a product of coal tar not a color or dye, and not specifically provided for.

This was an appeal by the Warren Chemical Manufacturing Company from a decision of the board of general appraisers in respect to the classification of certain merchandise.

Albert Comstock, for importers.

James T. Van Rensselaer, for the United States.

TOWNSEND, District Judge (orally). The merchandise in question is known as "coal-tar product," or "dead oil." The finding of the board of general appraisers that it is a product of coal tar is supported by the preponderance of the evidence, and is affirmed. It was assessed for duty at 25 per centum ad valorem, under the provision for "products known as distilled oils" in paragraph 60 of the tariff act of August 28, 1894. The importer has protested, claiming that it is free, as a "product of coal tar, not a color or dye, not specifically provided for," under the provisions of paragraph 443 of said act. Counsel for the United States contends that the term "distilled oils"

has in the trade a definite meaning, synonymous with "essential oils," or oils derived from vegetable substances, and that, as congress has included in paragraph 60 both the terms "essential oils" and "distilled oils," it must thereby have intended to include under the two terms something more than the commercially known distilled oils, namely, oils in fact distilled from nonvegetable substances, such as oils distilled from coal tar. Whether the contention of the importer, that the word "known" necessarily means, in this connection, "commercially known," it is unnecessary to determine. It has not been shown, however, that this article is an oil in fact, or that it is chemically or commercially or commonly known as "distilled oil." The decision of the board of general appraisers is therefore reversed, and the article should be admitted free, under paragraph 443 of said act.

MICHIGAN STOVE CO. v. FULLER-WARREN CO.

(Circuit Court, E. D. Wisconsin. June 22, 1896.)

1. PATENTS—COMBINATIONS—AGGREGATIONS.

Where a patent for an improvement in stoves includes as part of the combination an in-turned, mica-filled section over the fire pot, and a reflector, which, as their joint product, give a new illuminating effect, making the stoves attractive and popular, this is sufficient to show a patentable combination, as distinguished from a mere aggregation of old elements.

2. SAME—EVIDENCE OF POPULARITY—REBUTTAL.

Testimony as to the popularity of an improved structure may be received in rebuttal to overcome any doubt which may arise because the patent is so close to the line between true combinations and mere unpatentable aggregations.

3. SAME—IMPROVEMENT IN STOVES.

The Keep mechanical patent, No. 368,770, for an improvement in stoves, construed, and *held* not anticipated, valid, and infringed as to the second and fifth claims, and not infringed as to the third claim.

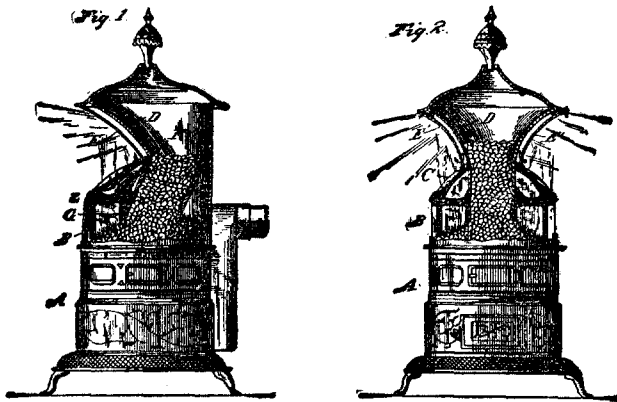
4. SAME—DESIGN PATENT—STOVES.

The Keep and Wipfler patent, No. 18,190, for a design for a heating stove, *held* not infringed.

This was a suit in equity by the Michigan Stove Company against the Fuller-Warren Company for alleged infringement of certain patents for improvements in stoves.

The bill alleges infringement of two letters patent owned by the complainant: (1) Mechanical patent, No. 368,770, for improvement in stoves, granted to William J. Keep, August 23, 1887; and (2) design patent, No. 18,190, for heating stove, granted to William J. Keep and Charles Wipfler, March 21, 1888.

First. Of the mechanical patent infringement is alleged of the second, third, and fifth claims, which read as follows: "(2) The combination, in a stove, of a vertical section, as, A, B, inclosing the fire pot, an in-turned section, C, arranged over the fire pot, a reflector, E, arranged above said in-turned section, and mica interposed between the fire and reflector, substantially as described. (3) The combination, in a stove, of a vertical section, an in-turned section, C, having mica-filled openings, an overhanging section, D, and a reflector set in front of said overhanging section, and with a space between the two, substantially as described." "(5) The combination, in a stove, of a vertical section, an in-turned section, C, having openings filled with mica, and multiple reflectors, as, E', E'', arranged to diffuse and spread the rays of light and heat in various directions substantially as described."



Second. The design patent embodies substantially the same mechanical combinations covered by the foregoing patent, and infringement is alleged of the three following claims: "(2) In a design for a stove, an overhanging top, 3, having an in-turned concave recess in front above the cover, as shown. (3) In a design for a stove, the substantially cylindrical fire-pot section, comprising the three mica sections; the lower one flaring, the upper one of sector shape, and the intermediate one substantially straight, as shown. (4) In a design for a stove, the rail ornamented at its ends with rosettes arranged at an oblique angle to the length of the rail, as shown."

The defenses to both patents allege noninfringement and invalidity. Numerous prior patents are introduced to show the prior state of the art and want of novelty, and it is especially urged that the second and fifth claims of the mechanical patent are mere aggregations of old devices, and that the third claim is not infringed.

George H. Lothrop, for complainant.
Davenport & Hollister, for defendant.

SEAMAN, District Judge (after stating the facts as above). In the mechanical patent, No. 368,770, invention is asserted generally upon the following features: In drawing inwardly the wall of the stove over the fire pot, putting mica in the in-turned wall to permit the passage of heat and light rays, and placing a reflector over the fire in position to catch and reflect the light rays. These features are all clearly set forth in the letters patent, especially in the second and fifth claims. The defendant contends that each of the elements entering into these claims is an old and well-known feature of stove structure; and the evidence of prior patents, introduced on its behalf, supports that contention. An in-turned section above the fire pot and mica-filled openings appear in several prior patents, notably in the drawings which accompany the following: No. 107,597, for a magazine stove, issued to A. C. Corse, September 20, 1870; No. 129,534, to A. C. Corse, July 16, 1872, for a base-burning stove; No. 8,567, to Philip Rollhaus, Jr., August 6, 1875, for design for fireplace heater. Reflectors in various forms are a common structure, and appear in several exhibit patents, although none is shown of strictly analogous use. The expert on behalf of the defendant places much stress on the above-mentioned Corse patents as anticipatory of all

the essential features of the patent in question, but they clearly have no reflector, and, in my opinion, do not suggest this combination. The main defense, however, against the second and fifth claims is that they do not present a patentable combination, but are mere aggregations of old elements of stove structure. It is clear that if "the result in this case is a mere aggregation of the several functions of the different elements of the combination, each performing its function in the old way," there is nothing upon which to base a claim to invention. *Richards v. Elevator Co.* (on rehearing) 159 U. S. 477, 487, 16 Sup. Ct. 53. Whether these claims fall within such definition was the inquiry which seemed to me, upon the argument, to present the main, if not the only, difficulty in the case. In *Loom Co. v. Higgins*, 105 U. S. 580, 591, Mr. Justice Bradley, speaking for the court, says:

"It may be laid down as a general rule, though perhaps not an invariable one, that if a new combination and arrangement of known elements produce a new and beneficial result never attained before, it is evidence of invention."

The testimony shows that the result obtained by this combination was beneficial, in that it gave an illuminating effect which made the stoves attractive, and gave them great popularity in the trade; and it is my opinion that this effect is new as the joint product of the in-turned mica-filled section and the reflector. As stated by the complainant's expert:

"It is necessary in a coal-burning stove of this kind, particularly when hard coal is used, that the space above the fire pot be inclosed, so that the chimney will draw the air through the fuel instead of over it. It is therefore necessary that the in-turned section, if it permits light and heat rays to pass through it, must have mica placed in the openings of this in-turned section, in order that it may be closed, and at the same time transparent to light and heat rays. The in-turned section, having mica in it, therefore co-operates with the section inclosing the fire pot and with the reflector above the in-turned section, because it permits the heat and light rays to pass from the fire pot to the reflector through the in-turned section, and still maintains a closed space above the fire pot. The mica interposed between the fire pot and reflector serves also to prevent the smoke and dust from the fire pot coming in contact with the reflector, and obscuring its bright surface, so that the in-turned section filled with mica co-operates with the fire pot and the reflector to prevent the former from destroying the latter."

Although the mica and the reflector each performs its old function, it is not in the old way, for they are so positioned that they co-operate, and obtain a result which is joint, and not individual. This distinction is the same noted by Judge Acheson in *Stutz v. Armstrong*, 20 Fed. 843, 847, that "it is sufficient if all the devices co-operate with respect to the work to be done, and in furtherance thereof, although each device may perform its own particular function only." In this view the device meets the requirements for a patentable combination, namely, "while every element remains a unit, retaining its own individuality and identity as a complete and operative means, the combination embodies an entirely new idea of means, and thus becomes another unit, whose essential attributes depend on the co-operative union of the elements of which it is composed." 1 Rob. Pat. § 155. The testimony regarding the popularity of the structure thus obtained is well worthy of consideration to overcome

any doubt which may arise because the device comes close to the line of these definitions; and I do not think this testimony should be excluded as not strictly in rebuttal, under the objection interposed by the defendant. The infringement of the second and fifth claims appears to be clearly established, and the complainant is entitled to an injunction thereupon.

The other allegations of infringement are unsupported by the evidence. The third claim of the mechanical patent makes the provision of an air space between the reflector and the overhanging section, D, the distinguishing element; and this is neither employed in the defendant's stove, nor is there any equivalent for it. This omission avoids infringement. The defendant's stove does not conflict with the design patent, if that is assumed to be valid. In its appearance, either generally or in detail, it does not so far resemble the complainant's design as to deceive purchasers or dealers, but, on the contrary, seems to be well distinguished in form and ornamentation.

No proof is furnished under section 4900, Rev. St., and there can be no decree for damages or profits as the case now stands. Decree may be prepared for entry in accordance with the views above indicated.

On Rehearing.

(May 19, 1897.)

Banning & Banning, for complainant.

Nelson Davenport, for defendant.

SEAMAN, District Judge. Rehearing was granted in this case for the production of further and newly-discovered evidence upon the issue of anticipation. This evidence on behalf of the defendant presents two devices: (1) A fireplace heater, called the "New Golden Sun," purporting to have been manufactured by James Spear at Philadelphia, put upon the market about 1883, and exhibited in a catalogue dated in 1884. (2) A stove called the "Standard Base Burner," manufactured by the Magee Furnace Company, of Boston, and claimed to have been placed upon the market in 1876. The Spear device is the only one which seems to me to be entitled to serious consideration. The testimony relating to the Magee stove shows an original construction in which the upper mica section was slightly curved or in-turned, and above this a section or ring which would be capable of use as a reflector, to some extent, if properly plated or polished for that object. No exhibit stove is produced by the defendant of this form, but it is asserted by some of the witnesses that this ring was polished and served as a reflector; and one witness states that a stove which was made for exhibition at the Philadelphia Centennial had the ring section nickel plated. This construction was abandoned after the first season, and the testimony is too indefinite to establish actual provision for use of the feature of reflection which is dominant in the complainant's device. If the feature was present in any degree, it was as a mere incident, and not so far developed or recognized as to anticipate the patent in suit. And, on the other hand, the com-

plainant produced a stove of that make, which was identified as one of those named by the defendant's witness as made and sold by the Magee Company, and of the pattern referred to, in which the under side of the ring was unpolished, and it was conceded that it could not serve as a reflector. The Spear fireplace device, called the "New Golden Sun," has an arched border or frame nickel plated, which serves to reflect the rays of light and heat to a certain extent at the sides, although not at the top. The only witness upon this point is the designer and manufacturer, James Spear, who gives enthusiastic description of the "dazzling glow" which was produced. A cut of it is shown in his catalogue of 1884, and the feature of reflection is referred to in the context. But there is no provision of an in-turned mica section and reflector serving in any manner to reflect the rays of light and heat from the upper surface of the fire pot, which is the distinguishing feature of the complainant's device, and gives it the large measure of success shown in this record. While there is incidental use of the feature of reflection, there was, in my opinion, no such recognition of its benefits as should appear to constitute anticipation in view of the success obtained by the complainant's device. The question of patentable invention is close, but the new testimony is not sufficient, in my view of the case as a whole, to disturb the opinion heretofore reached. Decree will be entered in favor of the complainant according to the former opinion.

ROEMER v. PEDDIE et al.

(Circuit Court of Appeals, Third Circuit. May 17, 1897.)

No. 4, March Term, 1897.

1. PATENTS—CONSTRUCTION OF CLAIMS—INFRINGEMENT—SATCHEL FRAMES.

The Roemer patent, No. 340,459, for a bag or satchel frame, is strictly limited by the prior state of the art, and its third claim is not infringed by a frame which does not have the described groove "adapted to receive the edge of the bag material."

2. SAME.

The Roemer patent, No. 378,263, for a bag or satchel frame, covers, in its first claim, a combination of elements, all of which, excepting the two ears described as pivoted on the end sections of the frame, were old; and said claim is not infringed by a frame having but one ear, instead of two, and a single rod in place of two pins. The second claim is for a combination of old elements without producing any new result, and is, therefore, void.

Appeal from the Circuit Court of the United States for the District of New Jersey.

This was a suit in equity by William Roemer against T. B. Peddie & Co. for alleged infringement of two patents for bag or satchel frames. The circuit court dismissed the bill, and the complainant appealed.

R. Wayne Parker, for appellant.

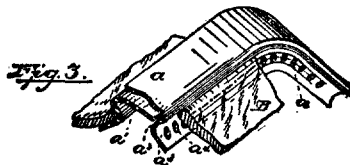
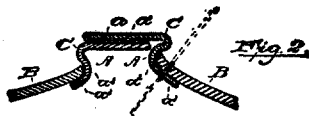
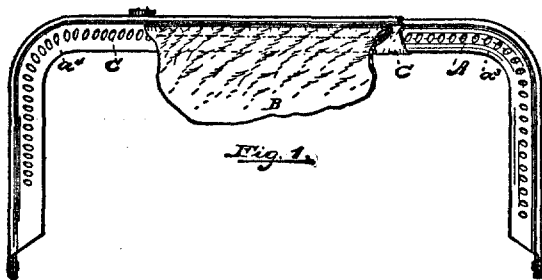
Louis C. Raegener, for appellees.

Before **ACHESON** and **DALLAS**, Circuit Judges, and **BUFFINGTON**, District Judge.

DALLAS, Circuit Judge. This is an appeal from a decree dismissing a bill for alleged infringement of two patents.

1. Patent No. 340,459, dated April 20, 1886, was issued to the appellant for a bag and satchel frame. The claim in question is as follows:

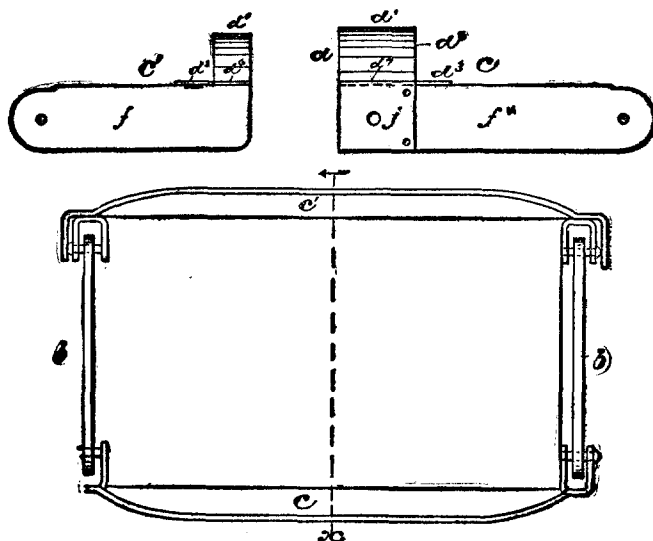
"(3) A bag or satchel frame having grooved sides adapted to receive the edge of the bag material, the lower edge or portion of said groove projecting outwardly beyond the upper edge of the said groove under the bag material, the said outwardly projecting portion being provided with perforations therein through which the stitches or rivets pass that secure the bag material to the frame, substantially as and for the purposes set forth."



The prior state of the art, as necessarily admitted, imperatively requires the limitation of this claim to the particular groove described; and as inspection plainly reveals that the defendants' frame does not have such a groove "adapted to receive the edge of the bag material," the charge of infringement cannot be sustained.

2. Patent No. 378,263, dated February 21, 1888, was also issued to the appellant for a bag or satchel frame. The claims alleged to have been infringed are as follows:

"(1) In a bag or satchel frame, the combination with end sections, b, b, of a frame, of jaws, c, c', pivoted at the opposite ends of and connecting said end sections, each of said jaws consisting, essentially, of a seat, d', a vertical portion, d², to elevate said seat, and a perforated flange, d³, to receive the body material, and end sections, f, f, secured to the ends of said section d, and provided with ears f³, f⁴, pivoted on the end sections, b, b, of the frame, substantially as set forth.



"(2) In combination with jaws, c, c', of a bag frame, strap-like end sections, b, b, disposed vertically edgewise at the ends of the frame, and providing pivotal bearings for said jaws, substantially as and for the purposes set forth."

The first of these claims is for a combination, all the elements of which, with the exception of the two ears especially described as pivoted on the end sections of the frame, were unquestionably old. The appellees' construction comprises but one ear, not two, and, instead of two pins, it has a single rod, and without giving to the claim a breadth of construction which its language does not warrant, and which pre-existing devices render wholly inadmissible, these differences cannot be regarded as immaterial.

The second claim of this patent has been several times in litigation, and upon each occasion has either been not insisted upon, or has been held to be invalid; and the record in the present case leaves no room for doubt that each and all of its constituent contrivances were well known long before this patent was applied for. The utmost that can be justly credited to the appellant is that, in their aggregation, he exhibited an appreciative realization of the utility of each of them. It does not appear that he so associated them as to produce any new result as the consequence of their union; and therefore he did not create a patentable combination. Upon the whole case we are of opinion that no error was committed in the disposition made of it by the circuit court, and its decree is affirmed.

CONSOLIDATED FASTENER CO. v. TRAUT & HINE MANUF'G CO.

(Circuit Court, D. Connecticut. May 6, 1897.)

PATENTS—PRELIMINARY INJUNCTION—VIOLATION OF AGREEMENT.

A preliminary injunction will not be issued to prevent the alleged violation of a contract by the manufacture of a certain kind of article, where the affidavits show that it will be contended at the trial that the construction of the written contract depends upon the intention, to be gathered from the surrounding circumstances, and the conduct of the parties before and after execution of the contract, which questions cannot be satisfactorily determined upon the affidavits.

This was a suit in equity by the Consolidated Fastener Company against the Traut & Hine Manufacturing Company to enjoin the alleged violation of an agreement in respect to patent rights. The cause was heard on a motion for preliminary injunction.

W. B. H. Dowse and John R. Bennett, for complainant.
Mitchell, Bartlett & Brownell, for defendant.

TOWNSEND, District Judge. On motion for a preliminary injunction. The parties hereto are manufacturers of lock fasteners and buttons for gloves, suspenders, and other similar articles. On November 17, 1893, they executed the following agreement, the statements whereof sufficiently show their prior relations:

"Memorandum of agreement made this day by and between the Traut & Hine Mfg. Co., of New Britain, Conn., and Geo. E. Adams, of said New Britain, and Jno. C. Knowles, of Providence, R. I., and the Consolidated Fastener Co., of Portland, Me.: Whereas, a suit is pending against Hewes & Potter, of Boston, in the U. S. circuit court, by said Consolidated Fastener Co., for infringement for one of its patents, for the use of fasteners made by the said Traut & Hine Mfg. Co.; and whereas, it is desired by the said Adams & Knowles to dispose of their patents under which said T. & H. Co. made said fasteners, and by said T. & H. Co. to dispose of its tools and all fasteners it has made or in the process of making, together with any good will it may have acquired in the sale of said fasteners herein mentioned: Now, therefore, it is agreed by and between said parties that a decree may be entered in said suit against said Hewes & Potter, and the said Adams & Knowles, and the said Traut & Hine Mfg. Co., for the sum of one thousand dollars paid them by the Consolidated Fastener Co., agree to convey, sell, and deliver to the said Consolidated Fastener Co. the following letters patent of the U. S., viz.: No. 489,891, dated Jan. 10, 1893, and No. 489,890, dated Jan. 10, 1893, both granted to Geo. E. Adams; all the fasteners made up and in process of manufacture (it being estimated that there are at least six hundred gross of fasteners so made up); the tools in existence for the manufacture of said fasteners; the dies for setting the same; the machines for setting the same, wherever situated,—together with all the said good will in trade connected with the sale of said fasteners. And the Consolidated Fastener Co. agrees, for said transfer, to pay the sum of one thousand dollars; and both parties agree to execute said papers, deliver said goods, and pay said sum, within ten days from the date of this agreement.

"Witness our hands, at New York City, this 17th day of Nov., 1893.

"The Traut & Hine Mfg. Co.,

"By Justus A. Traut, Pres.

"Consolidated Fastener Co.,

"By Louis A. Douillet, Pres.

"Geo. E. Adams,

"Jno. C. Knowles,

"By Geo. E. Adams."

The parties to said agreement duly fulfilled its conditions. George E. Adams, the patentee therein named, on April 21, 1896, obtained patent No. 558,580, and on September 1, 1896, patent No. 566,731; both of said patents being for glove fasteners. The defendant is now engaged in making and selling fasteners under said patents, which differ in construction from, but are like in appearance and adaptation for use to, the fasteners made under the patents transferred under said agreement.

The single question presented herein is whether the defendant has thereby violated said agreement. It is unnecessary, in the disposition of this motion, to finally determine the respective rights and obligations of the parties. The complainant is obliged to concede that the fasteners now sold by defendant are not the same fasteners as those made under said earlier patents, and transferred under said agreement. It contends, however, that, under the transfer of "the good will in trade connected with the sale of said fasteners," the defendant agreed that it would not thereafter sell similar fasteners, such as would be likely to interfere with the business of the complainant. This contention and concession and the affidavits herein show that it will be claimed upon the trial that the question between the parties depends upon their intention, to be gathered from the surrounding circumstances, their conduct before and after the execution of said agreement, the objects which they respectively had in view, the consideration paid for said transfer, and other questions of interpretation, as well as from the terms of said contract. Inasmuch as this question cannot be satisfactorily determined upon affidavits, but only by testimony of witnesses with the privilege of cross-examination, I do not feel justified in granting the extraordinary relief of a preliminary injunction.

The defendant, in the affidavits introduced by it, and in argument, contends that the good will transferred was limited to that connected with the particular fasteners covered by said patents; and to the stock, tools, and machinery transferred as a part of said agreement, and that it has not violated the terms thereof, and has acted in good faith. Inasmuch as the affidavits show the necessity of a resort to a practical interpretation, which can only be determined after a full hearing, and as a decision now, if improper, might cause material loss, the motion is denied.

CONSOLIDATED SAFETY-VALVE CO. v. ASHTON VALVE CO. et al.

(Circuit Court, D. Massachusetts. May 7, 1897.)

PATENTS—INTERPRETATION—STEAM SAFETY VALVES.

The Richardson patent of January 19, 1869, for an improvement in steam safety valves, properly construed, requires that the aperture in the ground joint, caused by lifting the valve, shall always be greater than the aperture for the exit of steam to the open air.

This was a suit in equity by the Consolidated Safety-Valve Company against the Ashton Valve Company and others for alleged infringement of a patent for an improvement in steam safety valves.

Clark, Raymond & Coale and Frederic H. Betts, for complainant.
James E. Maynadier, for defendants.

COLT, Circuit Judge. This bill was filed May 6, 1885, and is based upon the Richardson patent of January 19, 1869, for an improvement in steam safety valves. As stated by complainant's counsel, the real question in this case is:

"Does the Richardson patent of 1866, or the Richardson patent of 1869, require that the aperture at the ground joint, caused by lifting the valve, should be always greater than the aperture from the pop chamber between the flange, n, and the rim, q, of the patent of 1869?"

Upon a careful examination of the Richardson patent of September 25, 1866, and the Richardson patent of 1869, in connection with the decision of the supreme court in Consolidated Safety-Valve Co. v. Crosby Steam-Gauge & Valve Co., 113 U. S. 157, 5 Sup. Ct. 513, I am of opinion that the proper construction of the patent in suit requires that the aperture at the ground joint, caused by lifting the valve, should always be greater than the aperture for the exit of steam into the open air. As the defendants' valve does not embody this construction, I must hold that there is no infringement, and that the bill should be dismissed, with costs. Bill dismissed, with costs.

HUNT v. ARCHIBALD et al.

(Circuit Court, D. Massachusetts. May 29, 1897.)

PATENTS—NOVELTY—FIRECRACKERS.

The Hunt patent, No. 547,921, for an improved firecracker, in which the fuse is held in place by a portion of the tube forced in and down to form ridges, extending towards the fuse, and forming a rosette with the fuse projecting from its center, is void for want of novelty, considering the prior state of the art.

This was a suit in equity by Edmund S. Hunt against Thomas Archibald and others for alleged infringement of a patent relating to firecrackers. On final hearing.

Maynadier & Mitchell, for complainant.
George O. G. Coale, for defendants.

COLT, Circuit Judge. This is a bill in equity, brought for the infringement of letters patent No. 547,921, granted to the complainant October 15, 1895, for an improved firecracker. The specification describes the invention as follows:

"My invention relates to closing the paper case or tube about the fuse or igniting device; and it consists in a firecracker in which the fuse is held in place by a portion of the tube forced in and down to form ridges, which extend toward the fuse, and cause the portion bent in to form a rosette, with the fuse projecting from its center, as will be plain from the drawings, which show a rosette formed by crimping in the inner portion of the tube, A, along six radial lines, a, these lines slanting upward, and meeting at their inner ends about the fuse, B."

The drawings show a tool for making a rosette, and the specification further declares that:

"My invention is the fuse held firmly by a rosette formed by forcing a portion of the tube inwardly and downwardly to form radial tapering grooves deepest at their outer ends."

Fig. 2 below is a perspective view of the Hunt firecracker with a portion cut away, and Fig. 5 is a perspective view of the tool or crimper for securing the fuse in place.

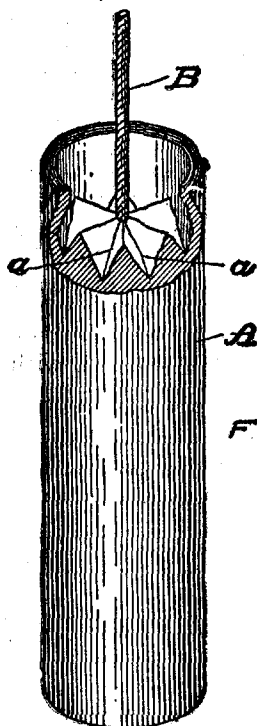


FIG. 2.

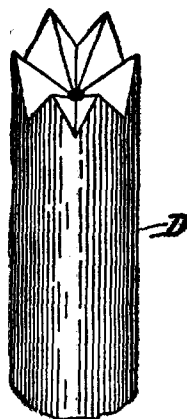


FIG. 5.

The claims are as follows:

"(1) Tube, A, and fuse, B, combined by means of the rosette formed of portions of the tube crimped in by radial tapering grooves, substantially as set forth. (2) Tube, A, with its outer portion cylindrical at and near the fuse end, but with its inner portion at that end forced in to form a rosette as described, combined with fuse, B, extending through and held by that rosette, substantially as and for the purposes specified."

The defendants contend that the patent is void for want of patentable novelty, and this is the most serious question in the case. In a prior patent granted to the complainant October 14, 1890, we find described the identical tool for crimping in portions of the tube of a firecracker in the form of a rosette with radial tapering grooves which is set out in the patent in suit, the only difference being that in the latter there is a central or axial hole in the tool for the insertion of the fuse. This earlier tool was designed to close the butt end of the cracker. The Masten firecracker patent of July 7, 1885, describes an anvil with a hole through its center to hold the fuse

during the operation of plugging. In this device a clay plug is used. In the old Brown cracker the fuse is retained in place by tamping or driving down the inner portion of the end of the tube; in other words, the fuse is held by a plug integral with the tube. We find, therefore, that at the date of the Hunt invention in suit, the rosette plug for closing the end of the tube was old; that a hole in the center of the tool to hold the fuse was old; and that the holding of the fuse by pressing down and around it the inner portion of the end of the tube was old. Assuming that Hunt had before him his prior tool for making a rosette plug, the old Brown cracker, in which the fuse was firmly held by crushing down the layers of paper composing the inner portion of the tube, and the Masten anvil, with a central or axial hole, it does not seem to me that there was any invention in the combination of the tube, fuse, and rosette plug, which constitutes the patent in suit; or, to state the proposition in another form, there is no invention in the application of the old Hunt rosette plug to the fuse end of a firecracker. Indeed, Hunt himself says that he made the first crackers like that described in the patent in suit with his old tool. His testimony on this point is:

"I used the same tool that I used previously in making the cracker before. I placed the case over the mandrel; then I put my fuse in, and drove the choking tool down upon it, and found that that closed the end of the case. The tool that I used for this occasion was a solid tool; a tool that I had."

In view of the prior state of the art, the patent in suit is held to be void for want of patentable novelty. Bill dismissed, with costs.

GREEN v. CITY OF LYNN.

(Circuit Court, D. Massachusetts. April 28, 1897.)

1. PATENTS—INFRINGEMENT SUITS ON DIFFERENT PATENTS.

The joinder in one suit of claims for infringement of two patents relating to the same subject-matter is in the interest of the public, as well as of private litigants, and should not be discouraged by too stringent rules as to costs or otherwise.

2. COSTS IN PATENT SUITS—APPORTIONMENT.

Where two patents relating to the same subject-matter were sued on in the same suit, and a decree was entered for complainant on one of them, and for defendant in respect to the other, the costs disbursed in regard to the patent adjudged against the complainant were not, under the circumstances, adjudged in favor of either party.

This was a suit in equity by Nelson W. Green against the city of Lynn for alleged infringement of two patents. The cause was heard upon complainant's claim in respect to the taxation of costs.

Harvey N. Pratt, for complainant.

Fish, Richardson & Storrow and Guy Cunningham, for defendant.

PUTNAM, Circuit Judge. The complainant brought a bill in equity for alleged infringements of two patents relating to the same subject-matter, and therefore very properly included in the same suit. A consolidation of this character within reasonable limits is

for the interest of the public, as well as of private litigants, and should not be discouraged by too stringent rules as to costs or otherwise. One patent was sustained, but the other contained three claims, of which two were found invalid, by reason of not covering a patentable invention, and the third was not infringed. The final decree, so far as this patent is concerned, was against the complainant. The complainant disburshed, for the taking and printing of proofs with reference to the patent on which the judgment of the court was against him, \$544.50, and he now claims that this sum should be taxed in his costs against the respondent. That, under circumstances of this character, costs may be equitably apportioned, is too well settled to require any special observations. Numerous cases illustrating the practical application of this equitable discretion in patent suits will be found in the notes to Rob. Pat. § 1162. Some of the decisions there cited, and elsewhere found, seem to us too severe, as against complainants; and, moreover, where the amounts are small, or the issues much complicated, there may not be sufficient involved, or the apportionment may not be capable of being made with sufficient clearness, to appeal to the equity powers of the court. Yet some practical method of preventing substantial injustice can always be found. On the one hand, the advantages to come from the consolidation of several claims, made in good faith, which we have already spoken of, and the analogy of the common law, where a plaintiff who recovers only a portion of his demands is ordinarily entitled to all his costs, are not to be overlooked; while, on the other hand, the apparent injustice of saddling respondents with substantial costs of issues which are easily distinguished and severed, and which they have successfully defended, and the necessity of warning complainants in equity that considerable additions to the record which prove unnecessary may be at their own risk, demand the exercise of a sound discretion with reference to questions like that now before us. We do not think that there are any such exigencies as require us to award the respondent costs on account of the issues raised with reference to the patent which was adjudged against the complainant; but the amount which the complainant claims in that behalf is so substantial, and is so easily severable from the rest of the cause, that we think it would be inequitable to allow it in his behalf, under the circumstances of the case.

The respondent urges on us the statutory provisions with reference to costs in suits where claims are found invalid which have not been disclaimed; but, as the complainant is entitled to recover costs generally, these provisions do not apply, unless possibly by analogy. Our conclusion gives them full effect in that aspect. It is ordered that the clerk disallow the amount of \$544.50, claimed in complainant's bill of costs.

LAMB et al. v. STEVENS.

(Circuit Court, D. Massachusetts. May 21, 1897.)

PATENTS—VALIDITY AND INFRINGEMENT—EYE SHIELDS.

The Lamb patent, No. 540,746, for an improvement in eye shields, whereby the device is made to cover, protect, and practically inclose a considerable portion of the face adjacent to the eyes, without obstructing the vision in any direction, discloses a patentable, though somewhat narrow, invention.

This was a suit in equity by Benjamin F. Lamb and others against Edward G. Stevens for alleged infringement of a patent for an improvement in eye shields or guards.

Lange & Roberts, for complainants.

Louis W. Southgate, for defendant.

COLT, Circuit Judge. This suit is brought for the infringement of letters patent No. 540,746, issued June 11, 1895, to the complainant Benjamin F. Lamb, for an improvement in an eye shield or guard. The claims relied upon are numbered 1, 2, 12, 13, and 15.

The specification says:

"My invention relates especially to a flexible nonheat conducting eye shield, which is particularly adapted for use as protection from the weather, and by mechanics in various occupations as a guard against sparks, dust, or other flying substance, and is designed as an improvement on the device shown in my United States letters patent numbered 450,515, dated April 14, 1891. * * * My device is particularly applicable for use in driving, as a protection against rain, snow, and flying particles, and in such use perfect ventilation is absolutely essential. Extreme lightness and flexibility and enlarged lenses are also essential for such uses, none of which properties are possessed by devices heretofore made."

Adopting in part the description of Mr. Livermore, complainants' expert, the patented device is so constructed as to cover, protect, and practically inclose a considerable portion of the face adjacent to the eyes, without obstructing the vision in any direction. It is made flexible, so as to conform readily to the general curvature of the face. It is of light weight, and is held securely in place before the eyes, so as in no wise to incommode the wearer. It has two lenses or plates, constructed of mica or other similar flexible, transparent material. In order to enable the lenses to be securely held in proper position before the eyes, they are provided with a binding or frame extending around their edges, and serving to connect them together, and to afford a protection for their edges; and, in order that the lenses may be supported at a sufficient distance from the eyes to prevent contact with the eyelids, they are provided with a cushion or strip extending around their periphery, and projecting from the inner surface thereof. The cushion thus supports the lenses a short distance in front of the eyes, and at the same time closes the space between the face of the wearer and surface of the lenses sufficiently to afford protection to the eyes. This cushion has to be flexible in order to conform to the general curvature of the face, and it should also be soft, so as not to discomfort the wearer, and it should be of light weight. "Felt or other light, flexible material" is named in the patent as the material of which

the cushion is composed. In order to provide for sufficient ventilation, while at the same time affording sufficient protection, the felt cushion is provided with notches or perforations, which permit the circulation of air in the space between the face and the lenses.

The main defense in this case is anticipation, and the patent chiefly relied upon is the Genese patent, of March 18, 1884, which is substantially the same as the Lake English patent, No. 5,086, of the same date. The Genese patent is for a "flexible air-tight eye guard." The specification declares that the object of the invention "is to provide an eye guard for firemen and employes of metal working and chemical manufacturers, which shall be practically impervious to smoke, the fumes of acids, or to noxious vapors of all kinds, as well as an effectual protection against flying particles of metal, grit, or finely divided matter floating in the atmosphere." In the Genese device the lenses are held in a metallic frame, composed of thin plates of flexible material, such as lead or copper, and a rubber cushion extends around the periphery of the metal frame. The purpose of the Genese patent is to produce an air-tight cover for the eyes. It has neither the flexibility, lightness, nor the ventilation of the Lamb patent, nor was it designed for the same specific purpose; and, although the Lake specification describes a form of the Genese device in which air may be admitted into the space between the guard and the eyes, yet it is clear that this mode of ventilation is radically different from the notches and perforations of the Lamb patent.

While the range of invention in the Lamb patent is somewhat narrow, in view of what was old, yet, in my opinion, it was a patentable improvement over what previously existed. The device was new and useful, and its utility is shown by the large demand for this form of eye shield. Upon the question of infringement it is apparent that the defendant's eye shield is substantially identical with that described in the Lamb patent. A decree may be entered for the complainants.

MITCHELL v. EWART MANUF'G CO.

(Circuit Court of Appeals, Third Circuit. June 1, 1897.)

No. 17, March Term, 1897.

PATENTS—CONSTRUCTION OF CLAIMS—INFRINGEMENT—CHAIN CABLES.

The Dodge patent, No. 264,139, for an improvement in driving chains, consisting in inserting between the links of an ordinary chain cable metal blocks of such conformation as to seat the adjacent end portions of the enchaind links laterally in grooved channels, in planes transverse to each other on its exterior, so as to prevent twisting of the cable, is for a meritorious invention, and is entitled to a liberal construction; and its three claims are infringed by the Mitchell device, which, though different in appearance, and seemingly different in construction, yet appropriates the substance of the invention. 78 Fed. 485, affirmed.

Appeal from the Circuit Court of the United States for the Eastern District of Pennsylvania.

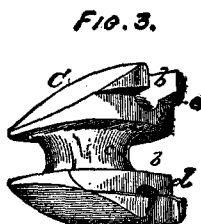
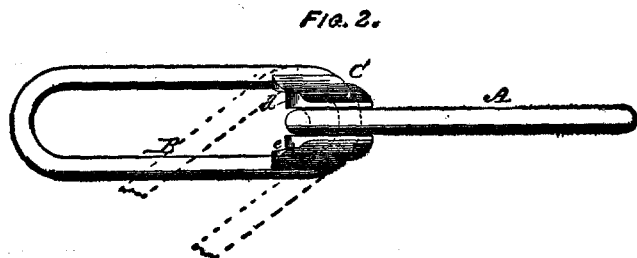
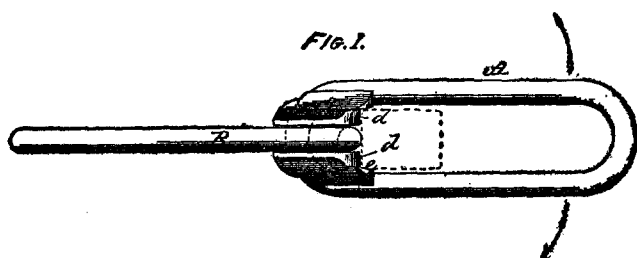
Francis T. Chambers, for appellant.

Charles Howson, for appellee.

Before ACHESON, Circuit Judge, and BUTLER and BUFFINGTON, District Judges.

BUFFINGTON, District Judge. The bill in this case was filed in the circuit court of the United States for the Eastern district of Pennsylvania by the Ewart Manufacturing Company against James H. Mitchell to enjoin the alleged infringement of the claims of letters patent No. 264,139, issued September 12, 1882, to James M. Dodge, for an improvement in chain cables. That court was of opinion Mitchell's device did so infringe, and decreed an injunction. 78 Fed. 485. The respondent appealed from such decree, and the case is before us for review.

In our judgment, the device shown by Dodge's patent was novel in character, disclosed an invention of very decided merit, and was a substantial advance over mechanical constructions theretofore used in the art to which it appertained, and the claims of the patent should have such a construction as will give the patentee the full benefit of the advance which he has contributed to the mechanical arts, and claimed. A brief reference to such patent will disclose the substantial character of the invention. It pertains to that large and growing branch of appliances for carrying material in hoists, elevators, and kindred devices by means of bins placed on drive chains which are engaged and impelled by teeth on moving sprocket wheels. The ordinary form of such drive chain may be illustrated in a general way—though not in detail—by the chains used on bicycles. By the peculiar conformation of such chains they are not liable to twist, and so, when used in connection with hoists, elevators, and the like, are desirable, since the bins or conveyors will preserve their horizontal position, and so retain their loads. Their construction, however, was relatively expensive. Chain cables were also used as drive chains, and, while desirable as being the simplest, strongest, and most inexpensive in construction, they were open to three serious objections: First, the wear of the links was all centered on a single bearing point at the link extremities; secondly, the ends and sides of the links were subjected to the wear of the sprocket teeth; and, lastly, the liability of the chain to twist. Such twisting overturned the bins, and misplaced the link relatively to interlocking with the sprocket teeth. These serious objections prevented the satisfactory use of linked chains for drive-chain purposes. They were all recognized in the patent in suit, and were designedly overcome by Dodge in a device, the simplicity and effectiveness of which are striking. He took the ordinary chain cable of commerce, with its simple construction, and, by the insertion of a new intermediate bearing, not only retained its flexibility, but imparted to it, when used as a drive chain, the nontorsional characteristics of the more cumbersome, expensive, but efficient type of the drive chain of the old art. This was done by employing a cast-metal block (preferably of malleable iron) of such conformation that it seated the adjacent end portions of the two enchainned links laterally in grooved channels, in planes transverse to each other on its exterior.



The result was an action of a possible scope akin to that of a universal joint so far as flexibility was concerned, but adapted for use in the more restricted sphere of a drive chain where flexibility in one direction alone was needed. This block secured the nontorsional limitation, afforded a pintle-like link bearing about equal in width to the space opening of the links, and allowed the sprocket tooth's engagement on the larger block surface instead of the link end and side. The use of such an intervening block, apart from the points we have mentioned, was desirable because it could be made of a material or of a quality of metal better adapted to withstand the wear and friction of the sprocket teeth than the material of chain cables, and also because the difference between its material and that of the link made the wear of the latter less than against a substance similar to itself, which was the case when the links bore on each other. As illustrating its use and function as a drive chain, the patentee says:

"The adjacent ends of the links are held, it will be seen, in a given relationship laterally with each other and with the interposed block, so that there cannot possibly occur to the cable (while under tension or in working condition) any of that twisting of the cable (or that oscillation of the links about an axial line coincident with a line running lengthwise through the center of the cable) which is inevitable in chain cables in which the links are articulated one

directly on the other, as usual prior to my invention, and the chain with its block is necessarily retained in a given and proper relationship with the peripheral devices of the wheel on which it is run. This perfect avoidance of any such twisting of the cable and retention of the working parts of the chain and wheel in proper relationship enable me to use the cable with perfect success for all sorts of elevator or conveyor purposes, since the chain is thus rendered capable of carrying and maintaining always in perfect line and proper position any buckets, flights, or attachments which may be applied to it. * * * The precise form of block shown, as well as that of the links illustrated, may, of course, be departed from without departing from my invention so long as the blocks and links are made and combined so as to effect the essential results explained."

Upon this device claims were allowed as follows:

"(1) In a chain cable, the combination, with the links of blocks interposed between the adjacent end portions of the links, the said blocks being adapted to afford bearing or working surfaces for the actions of the engaging devices of a chain wheel, substantially as set forth. (2) In combination with the links of a chain cable, blocks interposed between the adjacent ends of the links, and provided with grooves which afford pintle-like bearings for the said link ends, substantially as set forth. (3) In combination with two enchained links, a block having grooves arranged transversely to each other, and operating to prevent any twisting movement of said links relatively, substantially as set forth."

The device has gone into very extensive use.

We now turn to the alleged infringement of Mitchell. In it we find a chain of which the alternate links are of the ordinary forged semicircular end type. With these links are alternately enchained closed links with rectangular ends. They are of peculiar construction. Each end of the link is formed of a separate cast cross-bar having perforated ears at each end, which perforations increase in size at the exterior face so as to form seats, respectively, for nuts and hexagonal bolt heads. A central semicircular groove on the cross-bar seats the enchained forged link, and possesses the double function of forming with such link a pintle-like bearing and securing a nontorsional relation between them. At the same time the seating of the forged link in the groove removes such link from engagement and wear with the sprocket tooth, which bears wholly on the metal cross end. The links' sides are bars provided at one end with hexagonal heads and at the other with screw threads. These are passed through the end holes of the cross-bars, and secured by nuts, which latter, as well as the hexagonal heads, seat themselves as the chain is tightened in the corresponding depressions in the outer face of the cross-bars. This construction permits separation of the chain at any desired point, and readjustment, where wear on the bearings has lengthened the links, and carried them out of proper relation to the sprocket teeth. Does such structure embody the Dodge invention? A separation of it into its component elements, and an analysis of its function, will, to our mind, answer the question. Eliminating from present consideration the groove in the cross-bar of the rectangular links, respondent's structure is (without it) in substance and function a chain cable. It is a cable made of iron links, for the rectangular connections enchaining with and coupling the two forged links are none the less links because of their rectangular shape. It is a cable composed of alternate square and rounded

links. Considered with reference to use as a drive chain, it has the desirable capacity in such a use of articulation, but the fatal one of twisting. The first quality is preserved, and the second is prevented, by the use of what, in connection with the peculiar conformation of the chain used, is a substantial equivalent of the Dodge grooved block. It will be noted that in the ordinary drive chain, vertical articulation alone is necessary. In other words, in using a chain cable as a drive chain, the block might be soldered to or made integral with the end of the horizontal link, and a single vertical groove in engagement with the vertical link would produce the desired function of a drive chain. Such a construction the respondent's expert has, with a candor which does credit to his fairness, conceded would infringe the first and third claims of the patent. His language is:

"I understand the chain—'Complainant's Exhibit Modified Chain'—to be composed of enchainéd wrought iron links and interposed cast bearing blocks like the links and blocks of the Dodge chain, but with the difference that in this modified chain each block is rigidly secured in the end of one of the wrought-iron links by casting babbit metal between the block and the end of the link, so that the block is rigidly held with reference to one link, and the adjacent link can turn in the groove of the block; the chain being thus made flexible only on one plane. I understand that chain to be a modified cable chain, as each link of the chain is that of the cable chain, and the links are enchainéd with each other as they are in cable chains, because, if the blocks were removed from this modified chain, a complete cable chain would be left. In my opinion, this chain would be within the first claim of the patent, as it appears to comply with every requirement expressed in that claim. I do not think it would be within the second claim, because each block is only provided with one groove, which affords a pintle-like bearing for one of the link ends, while the chain, as I understand it, calls for blocks provided with grooves which afford pintle-like bearings for the link ends. The block in this modified chain has grooves which are arranged transversely to each other, and which hold the two enchainéd links between which the block is arranged at right angles to each other, and so prevent any twisting movement of the links relatively; and it seems to me, therefore, that the chain would comply with the requirement of the third claim, although one of the grooves has been rendered inoperative with respect to that function of the groove of the patent which consists in affording a pintle-like bearing for the link end which rests in the groove. I do not think that this difference, simply, should take the chain outside of the third claim of the patent."

While the respondent's device is different in appearance, of seemingly different construction, and manufactured in a different way, yet when we go beneath these surface variations, and measure it by the test of functional purpose and operation, we find it is in substance, purpose, and operation the same mechanism. Where the block is soldered to the horizontal link end, that link, as an articulating member, has ceased to exist, and simply serves as an additional band or brace to support the block. If the link was cut off, and the block braced and restrained from horizontal articulation by nuts screwed to the ends of the side bars of the link the same mechanical effect would be produced. It follows, therefore, that the nuts of the Mitchell device, in connection with the perforations of the vertically grooved end bar or block and the side bars of the link are, in a chain cable, used as a drive chain identical in functional purpose with the solid positive connection of a horizontal block and groove. Such being the case,—and we see no escape from the step

by step process of reasoning by which this conclusion is reached,—we think infringement is shown. While the appellant has avoided a mere servile copy of form, he has appropriated the substance of the Dodge invention. That in doing so he has rendered inoperative the function on one groove will not suffice to relieve him from the charge of infringement. Every element of the first claim is found in his structure. He uses the elements of the second, modified in form to suit the peculiar conformation of his rectangular links, but identical in functional effects, to secure the pintle-like bearings, and those of the third to gain the nontorsional relation between the links. He gets the same result, which Dodge first showed, by substantially the same means, and in substantially the same way. We are of opinion the court below reached a just and proper conclusion, and its decree should be affirmed.

NATIONAL FOLDING BOX & PAPER CO. v. STECHER LITHOGRAPHIC CO. et al.

(Circuit Court of Appeals, Second Circuit. May 26, 1897.)

1. PATENTS—INVENTION—PAPER-BOX MACHINES.

In a machine for forming paper-box blanks there is no invention in changing the counter-die by merely substituting a firm piece of paper having creases to receive the creasing rules of the die, on the face of the platen, for semi-soft sheets of paper packing, which were so yielding as to spread out and break, making rounded or uncertain creases in the blanks, and often tearing the material. 77 Fed. 828, affirmed.

2. SAME.

The Munson patent, No. 259,416, for improvements in the manufacture of paper boxes, is void for want of patentable invention over the prior Shelton patent, No. 183,423. 77 Fed. 828, affirmed.

This appeal is from a decree of the circuit court for the Northern district of New York which dismissed the appellant's bill in equity for an alleged infringement of letters patent No. 259,416, dated June 13, 1882, and issued to Edward B. Munson and Harvey S. Munson for an improvement in the manufacture of paper boxes.

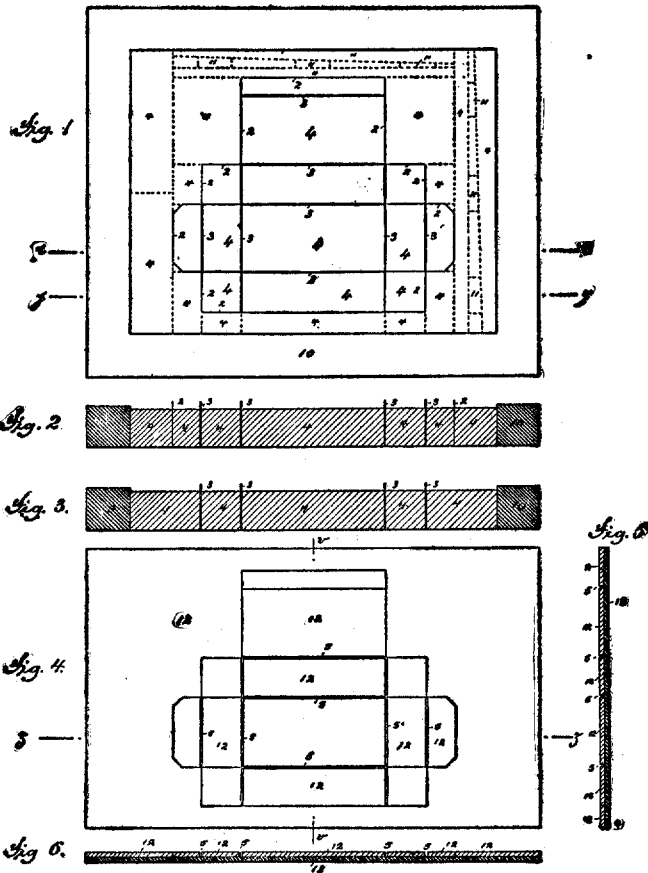
Walter D. Edmonds, for complainant.

Frederick F. Church, for defendants.

Before WALLACE, LACOMBE, and SHIPMAN, Circuit Judges.

SHIPMAN, Circuit Judge. The record in this case is a voluminous one, but the important points in issue are contained in a narrow compass. The flat sheets or "blanks" of paper or cardboard from which paper boxes are made are cut by dies upon the lines which form the boundary edges and lapping parts, and are indented or creased by dies upon the other lines upon which the folding or bending of the sides of the box are to be made. The difficulty which was practically experienced was the tendency of the creasing dies to be inaccurate, and not to create an even bend, or to weaken the material upon the folding lines. The improvement is described in the specification as follows:

The "lines of ultimate foldings are made by upsetting or embossing the material in such a manner as to avoid weakening the stock, while rendering it capable of bending without unduly straining or breaking in its body or upon its finished surface either in defining the lines or in folding the parts, and, further, avoids any disfigurement of the face surface of the finished article. The said apparatus consists of a single die, composed of such lengths and shapes of cutting-rules, 2, as are necessary to produce the form and direction of cuts desired, or to make the shape of blank required, with which are associated such lengths and shapes of embossing or blunt-edged rules, 3, as are required to produce the necessary lines of ultimate foldings. These cutting-rules, 2,



may be made of a height slightly in excess of that of the embossing-rules, and this is preferable. These rules, of various shapes and lengths, are all set up in a form corresponding to that of the blank to be produced, with proper separating and supporting blocks, 4, and the whole are locked in a frame or chase, 10, by wedges, as 11, in a manner similar to that in which printers' forms are made up. Such form or die is then fixed in a suitable press,—as a printing machine,—and the platen, co-operating with the bed or die carrier to make the impression, is furnished with a counter-die, Fig. 4, composed of a packing-sheet, 12, of paper or similar firm material that is fixed upon the face of the platen in such relation to the embossing-rules of the die as will provide recesses, 5, for the same to register with. This counter-die may be made up directly

upon the platen, but is preferably constructed upon a metal plate or sheet, 13, that is capable of introduction and removal from the platen, while only such narrow pieces of the packing-sheet, 12, as are necessary to form the sides or borders of the recesses, 5, need be provided, in which case the cutting-rules will cut directly upon the platen or plate, 13. It is preferable that the whole surface of the platen shall be covered by the packing-sheet, 12, in which the recesses, 5, are formed, either by cutting out a suitable channel or indenting it by repeated contact with the die, so that, while said recesses perform their functions, the cutting-rules will also pass through the packing, 12, and have direct contact with the platen or plate, 13, in accomplishing the cutting operation."

By this combination of blunt-edged embossing-rules with a female counter-die cut or indented by repeated contact with the embossing-die, in a sheet of paper or similar firm material upon the face of the platen, the patentees claimed that the tendency of the creasing dies to cause an inaccurate or injurious result at the point where the folding lines were to be made was overcome. The specification said that:

"In this manipulation the stock along the lines of folding will be upset or embossed by being stretched and forced into the recesses by the pressure of the embossing-rules, thus defining lines upon which the blank may be readily bent to form a box without rupturing or disfiguring the outer or face surface of the material, which embossed lines are stretched and upset in the direction which the paper necessarily takes in being folded, and to exactly the extent required to fold the same at an angle, by reason of the fact that the body of the blank bears upon the face of the packing, 12, which supports the material along the border edges of the recesses, while the portions of the blank or material that are embossed are forcibly stretched or pressed into the recesses, 5, by the embossing-rules, 3, while the cutting-rules cut the lines of severance by passing through the body of the blank."

The patent contained five claims, the first two of which were devoted to a supposed improvement which consisted in cutting-rules and embossing-rules which simultaneously cut and creased the blank, but it is admitted that this type of apparatus was old at the date of the Munson invention. The other three claims are as follows:

"(3) A counter-die for forming box-blanks, consisting of a metal or other hard base, and creasing or embossing channels the edges of which are raised above the plane of the hard base, substantially as described. (4) In the manufacture of paper-box blanks, a counter-die adapted to be removed from and adjusted upon the platen of a press, constructed of a sheet of metal or similar material affording a suitably hard cutting-base, to the face of which is secured a covering or packing of paper or equivalent material to receive the embossing-rules of the co-acting die, substantially as described. (5) In the manufacture of box-blanks, the combination, with a die consisting essentially of cutting and creasing rules, of a counter-die having a hard cutting-base and embossing channels above said base, whereby the material is simultaneously cut upon some lines, and upset or creased upon other lines, which latter are stretched or conformed so as to readily bend in the folding operation, all substantially as described."

In the testimony and upon the trial in the circuit court great stress was laid by the complainant upon the alleged fact that the improvement was a marked advance upon the previous art because it stretched, and did not crush, the fibers of the blank. It is therefore necessary to look at the state of the art of paper-box making immediately prior to the date of the invention, and ascertain the precise extent of the change described in the patent. The firm of Cornell & Shel-

ton, consisting of Thomas L. Cornell and Edward De F. Shelton, were paper-box manufacturers at Birmingham, Conn., from 1875 to about 1885 or 1886, and then became incorporated under the name of the Cornell & Shelton Company, and continued in the same business until August, 1891. Mr. Cornell is now the vice president of the complainant. Charles E. Hauxhurst was in charge of Cornell & Shelton's box-making department from December, 1875 to 1884, and is now in the employment of the complainant. Each of these gentlemen was examined as a witness for the complainant, and both were interested in the protection of its property. From 1877 to 1883, Cornell & Shelton made paper boxes by means of a die consisting of cutting-rules and creasing-rules which were associated in a printers' chase, and locked therein by means of printers' blocks and furniture. The platen of the press had three, four, or five sheets of manilla paper spread over its surface, and fastened by the bails of the press. Upon this bed the box blank was placed, and the creases were made by the pressure of the creasing-die as it came down upon and indented the blanks. This packing was too soft. The pressure upon it made a rounding recess, or caused it to spread out and break, and consequently the creasing would also be poor or perhaps would be torn, and 15 per cent. of the manufactured boxes were imperfect. The operation of the packing is thus stated by Mr. Hauxhurst: "On account of the packing being soft, lying loose, you might say, on the platen,—what I meant by that is not being glued to the platen,—it would back up, give way by the pressure upon the box blanks against the platen, would not hold to form a crease sufficient to crease a blank enough to hold or form a box." That this platen was "provided with a semi-soft or compressible material, so that the rules will indent or press into such material" appears both from a rejected application of Mr. Shelton, assignor to Cornell & Shelton, for a patent dated May 20, 1875, which came into the record upon the cross-examination of Mr. Cornell, and from Mr. Shelton's patent, No. 183,423, dated October 17, 1876, which was for forming the creased lines, and printing on the same lines simultaneously. In the summer of 1883 these witnesses were shown by a former employé the Munson method of manufacture. The difference consisted in covering the platen with heavy paper, gluing it to the plate, and cutting a groove in the paper, so that a channel was made for the creasing lines, and, when adopted, produced a more successful and less uncertain result. It substituted a firm piece of packing for the semi-soft packing, cut a channel through it, and securely fastened it, but, inasmuch as the Munson patent makes its channel by cutting, or by the old method of indentation, and fixes its packing-sheet upon the face of the platen in any way whatever, the only change from the Cornell & Shelton method which is specified in the Munson patent is that the packing-sheet is of paper or similar firm material. Was the change made by substituting a firm piece of paper for semi-soft sheets of paper packing a patentable one? The trial judge was of opinion that the Shelton patent was an anticipation, or, if not, that it left nothing which the Munsons could properly designate as an invention. We have compared the Shelton apparatus as described by

witnesses who are upon the complainant's official staff, and cannot discover that any patentable improvement was described in the Munson patent over the pre-existing Shelton apparatus, and would be of the same opinion if the Munson patent had instructed the public that the sheet of paper was to be glued or riveted to the platen. The changes were of that order of mechanical detail which is far removed from inventive skill.

After the decision of the circuit court had been announced, a new solicitor for the complainant was substituted, who thought that his client was entitled to the benefit of a disclaimer, and applied to the circuit court for a rehearing after it should have been filed. This motion was denied. The proposed disclaimer, which has not been filed, is contained in the record, and disclaims "the first and second claims, and in the remaining three claims any counter-dies in which there are not channels recessed out of 'firm' material, so as to 'support the blank along their border edges' (thus assisting stretching), whose channels are not at least three in number and rectangular, or angular, to each or some of each other (thus insuring pinning down and holding flat of the blank), and whose hard base does not operate both as a stopping and cutting base for the cutting rules (thus preventing crushing on fold line)." The proposed disclaimer is not properly in the case, for, as the allowance of the motion for a rehearing on condition that the disclaimer should be filed was a matter of discretion, its rejection is not a subject of appeal. *Roemer v. Bernheim*, 132 U. S. 103, 10 Sup. Ct. 12. An examination of the proposed disclaimer will, we think, disclose that a strong argument could be made in favor of the proposition that with the exception of the requirement that the channel should be recessed out of "firm" paper or other material, the limitations or the requirements of the disclaimer point to an invention which would require an amended specification or a supplemental description. *Hailes v. Stove Co.*, 123 U. S. 582, 8 Sup. Ct. 262. The decree of the circuit court is affirmed, with costs.

UNITED STATES V. CLOETE.

(Circuit Court of Appeals, Fifth Circuit. May 25, 1897.)

No. 568.

1. CUSTOMS DUTIES—RETURN OF CATTLE EXPORTED.

Paragraph 387 of the tariff act of August 27, 1894, permitting entry free of duty of "articles the growth, produce, and manufacture of the United States, when returned after having been exported, without having been advanced in value or improved in condition by any process of manufacture or other means," does not apply to cattle which are exported as young and immature animals, and returned long after fully matured and suitable for market.

2. SAME—INCREASE OF CATTLE TAKEN ACROSS BOUNDARY.

Paragraph 373 of the tariff act of August 27, 1894, providing that cattle driven across the boundary line into a foreign country for pasturage pur-

poses may, together with their increase, be brought back free of duty, does not apply to the increase of animals transported by railroad far into the interior of a foreign country for the stocking of a ranch.

Appeal from the Circuit Court of the United States for the Western District of Texas.

This was an appeal by A. J. Cloete from a decision of the board of general appraisers affirming the action of the collector of customs denying the claimant's right to enter certain cattle free of duty. The circuit court reversed the decision of the board, and the United States appealed.

Robt. U. Culberson, for the United States.
Winchester Kelso, for appellee.

Before PARDEE and McCORMICK, Circuit Judges, and NEWMAN, District Judge.

McCORMICK, Circuit Judge. We reverse the judgment of the circuit court in this case. The record shows that Cloete Bros. purchased in Texas, in the year 1887, three herds of cattle, and a fourth herd in the year 1889, and exported these cattle, immediately after the purchase thereof, out of the United States to their ranch in Mexico, distant 70 miles from Eagle Pass. Two of the herds exported in 1887 were shipped by rail; the number of each, or the aggregate number of both, is not given in the record. The third herd was driven on foot, and the fourth herd, exported in 1889, was shipped by rail. There were about 4,000 head in the third of these herds, and 2,500 head in the fourth. One of the export manifests, embracing part of this fourth herd exported in 1889, and being about one-half of the export shipment made in that year, embraced 235 female cattle 1 year old, 10 cows, and 1 calf. It also embraced 322 yearling steers, and 200 steers from 1 to 4 years old, and 517 steers 2 years old. All of these cattle were put in an inclosed pasture at Sabinas, in the state of Coahuila, Mexico. They have been kept separate, and have never been mixed or inbred with any other cattle. It was the intention of the exporters, Cloete Bros., to import into the United States the steers thus exported, when they were old enough for market, and to import the cows, and, we presume, the yearling heifers, when they were too old to breed, and from time to time to import into the United States of the increase of the female cattle the steers when they were old enough for market, and the heifers when they were too old to breed. In January, 1891, about 350 head were thus imported, and in November, 1894, about 1,500 head were thus imported from the Cloete ranch, at Sabinas, and were admitted into the United States free of duty. On April 3, 1895, Mr. A. J. Cloete imported from the Cloete ranch, and entered at the port of Eagle Pass, by entry No. 1,328, 111 cows and 429 beeves, and, by entry No. 1,329, 199 cows, 1041 beeves, and 52 bulls, which animals he declared, under oath before the United States consul at Piedras Negras, Mexico, were exported from the United States on or about the 1st of April, 1887, and that they were cattle of the raising of the United States, and had not been advanced in value or improved in condition by any pro-

cess of manufacture or other means, and that it was intended to re-ship the same to the port of Eagle Pass, Tex. He made oath upon his entry at Eagle Pass that the articles of merchandise therein were the growth and increase of the United States, and that they were truly exported and imported as therein expressed, and that they had not been advanced in condition or increased in value by any process of manufacture or other means. In the oath upon entry No. 1,329, he added, after the word "exported," the words "by the owner exclusively for grazing purposes." There is no other allegation or claim in either entry to the effect that the same were estrays, or that they had been driven across the boundary line for pasturage purposes. He claims free entry for 111 cows, 214 beeves or steers, included in entry No. 1,328, and 197 cows, 52 bulls, and 521 beeves or steers included in entry No. 1,329, as products the growth of the United States, under paragraph 387 of the tariff act of August 27, 1894. He also claims free entry, under paragraph 373 of the act, for 215 beeves, included in entry 1328, as the increase of domestic cattle which were born in the United States, and there purchased by Cloete Bros., and driven across the boundary of the United States into Mexico, for pasturage purposes, and alleges that the cattle of which these are the increase were so purchased and driven during the years 1887-1891. He also makes a similar claim to that of the last mentioned for 520 of the beeves or steers included in entry No. 1,329.

The language of paragraph 373 of section 2 of the act of August 27, 1894, is as follows:

"Any animal imported specially for breeding purposes shall be admitted free: provided, that no such animal shall be admitted free unless pure bred of a recognized breed, and duly registered in the book of record established for that breed, and the secretary of the treasury may prescribe such additional regulations as may be required for the strict enforcement of this provision. Cattle, horses, sheep, or other domestic animals which have strayed across the boundary line into any foreign country, or have been or may be driven across such boundary line by the owner for pasturage purposes, together with their increase, may be brought back to the United States free of duty under regulations to be prescribed by the secretary of the treasury."

The last provision of this paragraph 373 does not appear in previous acts.

So much of paragraph 387, permitting entry free of duty, as bears upon this case, is in the following language, to wit:

"Articles the growth, produce, and manufacture of the United States, when returned after having been exported, without having been advanced in value or improved in condition by any process of manufacture or other means."

This provision of paragraph 387 is substantially the same as has been in force since the passage of the act of March 3, 1883, and as the first provision of paragraph 493 of the act of October 1, 1890, was in force when the ruling of the treasury department referred to (No. 13,922) was made, on April 17, 1893. That ruling, as expressed in the letter of the assistant secretary, was to the effect that, where the value of animals has been increased by natural growth, it does not appear to militate against the privilege of free entry, inasmuch as such increase of value is not effected "by any process of manufac-

ture or other means." The case on which this ruling was made is shown by the letter to have been as follows: One M. W. Hill, of Plessis, N. Y., moved to Canada temporarily in 1891, taking his effects, among which was a colt, and, having completed his work in Canada, he returned the colt to Virginia, on which was assessed, at the port of entry, an import duty of \$30. The colt was only a few months old when taken to Canada, and was two years old when returned to Virginia. This ruling (and possibly similar rulings of the department, not accessible to us, but doubtless made in cases similar to the Hill Case) is relied upon in this case as the settled construction by the executive department of the provision in question.

The ruling of the general appraisers (No. 3,029), rendered April 1, 1895, on the last provision of paragraph 373, is to the effect that a fair construction of this paragraph indicates that it was the intention of congress to permit cattle to be driven across the boundary line, and to be brought back again, together with or accompanied by their young, but that it was not the intention to allow cattle the product of foreign farms and ranches to be imported free, because the stock is descended from animals which have been exported from the United States. Opinion by Lunt, General Appraiser, 1605 G. A. 3029. When this case was before the board of United States general appraisers on appeal by the claimant, that board, in rendering its decision against the claimant, used this language:

"We are further of the opinion that paragraph 387 cannot apply to cattle which are exported as young and immature animals, unfit for the market, and are returned long after, as animals fully matured, suitable for market. Indeed, it may well be doubted whether paragraph 387 applies to other than inanimate objects. In this case we are constrained to hold, upon the facts shown, that the animals claimed to be entitled to free entry, under paragraph 387, are not exempt from duty; and that the animals claimed to be entitled to free entry under paragraph 373 are not the increase of cattle which had been driven across the boundary line for grazing purposes now returned, together with their increase. The language of paragraph 373 indicates that the cattle therein provided for are such as are driven across the boundary for temporary pasturage, and the increase thereof incident to such temporary stay, when the young animals would follow the parents upon their return; and, in our opinion, it does not provide for animals transported by railroad far into the interior of a foreign country for the stocking of a ranch."

The case of *Morrill v. Jones*, 106 U. S. 466, 1 Sup. Ct. 423, arose under a provision of section 2505 of the Revised Statutes of the United States, which was taken from the act of February 8, 1875, and is in these words:

"Animals, alive, specially imported for breeding purposes from beyond the seas, shall be admitted free upon proof thereof satisfactory to the secretary of the treasury, and under such regulations as he may prescribe."

The regulations prescribed by the secretary of the treasury sought to confine the operation of the provision to animals of superior stock. The supreme court held that that object of the secretary could only be accomplished by an amendment to the law. This provision, with the omission of the word "alive" and the words "beyond the seas," was carried forward into the act of March 3, 1883, and was re-enacted in the act of October 1, 1890, with provisos to effect the object sought to have been attained by the regulations of the treasury.

It is manifest, from a review of all the authorities bearing on the subject, that there has been no settled interpretation by the treasury department of the terms of these provisions of the revenue laws upon which the claimant in this case can repose for the construction he seeks to put upon the provisions now in force. It does not appear from the record in this case that the claimant is or ever was a citizen or resident of the United States, and it does not appear that he has ever owned or held a ranch within the United States, near the border or remote from it, or that he has at any time been engaged in the breeding of cattle or other stock in this country. It does appear that he and those with whom he is engaged are conducting the business of breeding cattle in the interior of Mexico,—that is to say, 70 miles from the dividing line between the two countries,—for the purpose of importing them into the United States for market. It appears that, in the prosecution of their enterprise, they did, in the year 1887, purchase within the United States a large number of female cattle, and a large number of bulls, which they exported from the United States, and conveyed to their ranch in Mexico, for the purpose of breeding cattle. As said by the board of general appraisers, it is well known that cattle in the latitude of this ranch subsist by grazing; and it requires no argument or illustration to show from the undisputed facts in this case that these cattle were not exported or driven across the boundary line between the two countries for the purpose of pasturage. It is clear to us that the construction placed upon the act as applicable to this case by the board of United States general appraisers is the sound construction, and therefore the judgment of the circuit court is reversed, and the case is remanded, with direction to the circuit court to dismiss the claimant's action.

BROOKS et al. v. SACKS.

(Circuit Court of Appeals, First Circuit. June 10, 1897.)

No. 192.

1. PATENTS—PRIORITY OF INVENTION—EVIDENCE.

Where, in an infringement suit, a party attempts to carry back his invention so as to antedate an anticipating patent issued upon a prior application, the burden is upon him to prove priority to the satisfaction of the court, and by evidence which shall strongly outweigh that of the other party, if not beyond a reasonable doubt.

2. SAME—UNSUPPORTED RECOLLECTIONS OF WITNESSES.

Unsupported recollections of witnesses as to facts and dates fully six years prior to giving testimony are insufficient to establish priority of invention over an earlier patent, especially where such facts are of a kindred character to other facts, occurring at or near the same time with which they might easily be confused.

3. SAME—ANTICIPATION.

The Sacks and Richmond patent, No. 443,199, for an improvement in boot or shoe lasts, was anticipated by the Dusenbery patent, No. 430,732, for an improvement in pegging jacks.

Appeal from the Circuit Court of the United States for the District of Massachusetts.

This was a suit in equity by Louis Sacks against George Brooks, George K. Brooks, and Gardner C. Brooks, trading as Brooks & Co., for the alleged infringement of letters patent No. 443,199, issued December 23, 1890, to Louis Sacks and Henry Richmond for an alleged improvement in boot or shoe lasts. The circuit court entered a decree for an injunction and an account, and the defendants have appealed.

Benjamin F. Rex, for appellants.

William P. Preble, Jr., for appellee.

Before COLT and PUTNAM, Circuit Judges, and WEBB, District Judge.

PUTNAM, Circuit Judge. There is only one claim in this patent, and its pith is that the same last is made capable of being placed and held in a horizontal position or in an oblique one, at the option of the user, merely by reversing it. The essence of the device is a standard with a tenon at the upper end, one side of which tenon runs in a vertical line and the other side in an oblique line, and a last with a socket in it, which the tenon fits exactly. When the last is fitted to the tenon in one position, it lies horizontally, or substantially so, and, when placed in the reverse position on the tenon, it lies obliquely; and in each case, on account of the simplicity of construction, it is held firmly. The purpose sought by this reversibility is not set out in the patent, and is differently stated by the counsel on either side, but its advantages are obvious. Previous to this device and Dusenbery's device, to which we will hereafter especially refer, its purpose was accomplished by using two standards or two lasts. Numerous patents are proven for the purpose of showing anticipation; but, aside from Dusenbery's, the purpose and principle of the operation of each of them were so substantially different that we need not refer to them in detail. The principle of operation of the device in issue results from the application of a certain geometrical form, and is perfectly apparent to any geometrician; but whether or not, prior to the two patents to which we shall limit our discussion (that of the complainant below and that of Dusenbery), the principle had been applied in the arts to such an extent as to render unpatentable its application to any particular art, is not shown by the record, and cannot be determined by us as a matter of common knowledge; and we are therefore brought to the conclusion that either the patent sued on, or the other patent to which we will especially refer, was the first in which the principle in question was adapted to this art, and that its adaptation was not so clearly lacking in invention as to overcome the presumption arising from the issuing of the patent.

On the mere question of infringement there appears to be no difficulty. The essential question is that of anticipation by Dusenbery. The complainant's application was filed March 21, 1890, and his patent issued December 23, 1890. Dusenbery obtained a patent for a pegging jack, issued June 24, 1890, on an application filed

October 12, 1889. This patent shows the use of precisely the same principle as the complainant's device, and for the same purpose. Instead of using a tenon and a mortise, Dusenbery used a V-shaped notch, or, as he calls it, "a pair of fingers," each of which had the vertical and oblique lines, fitting into corresponding recesses on the opposite sides of the last. Of course, the mechanical changes involved in the use of a tenon and a socket in lieu of the double tenon and the double mortise, or vice versa, cover no statutory invention. It is true that under well-settled rules, inasmuch as the two patents were pending in the patent office at the same time, and both of them were granted, there is a *prima facie* presumption that each was properly granted. *Boyd v. Tool Co.*, 158 U. S. 260, 15 Sup. Ct. 837. Nevertheless, it is clear to us that both patents are for the same thing, so far as any inventive quality is concerned, and that only one of them can stand. Therefore we are brought to the question of priority as between the complainant below and Dusenbery.

It will be noticed that Dusenbery's application was first filed; so that it is settled law that the burden was thrown on the complainant below to prove priority in behalf of his patent to the satisfaction of the court, and by evidence which shall strongly outweigh that of the respondents below, if not beyond a reasonable doubt. *Manufacturing Co. v. Sprague*, 123 U. S. 249, 264, 8 Sup. Ct. 122; *Clark Thread Co. v. Willimantic Linen Co.*, 140 U. S. 481, 492, 11 Sup. Ct. 846; *Walk. Pat.* (3d Ed.) 70. The inherent dangers of oral proofs in this class of cases are explained in *The Barbed-Wire Patent*, 143 U. S. 275, 284, 285, 12 Sup. Ct. 443, 450, and in *Deering v. Harvester Works*, 155 U. S. 286, 300, 301, 15 Sup. Ct. 118. On an issue made directly between the two patents under section 4918 of the Revised Statutes, or otherwise, the complainant below would be required to prove earlier invention in his behalf beyond reasonable doubt. *Morgan v. Daniels*, 153 U. S. 120, 14 Sup. Ct. 772. And, as shown by the cases cited, the same would be the fact if he should be sued for infringement by the holder of the Dusenbery patent. It is inconvenient, and tends to the doing of injustice and the possibility of imposing double liability, to have different rules as to the practical amount of proof required on the same issue because it happens to be presented as between different parties. It is admitted that Dusenbery's invention was perfected as early as April 25, 1889. Therefore it rests on the complainant below to prove invention prior to the last-named date. Mr. Cox, who was the solicitor who obtained the complainant's patent, testified that he first saw this invention in December, 1888, and that some time about six months after this he investigated the state of the art at Washington, and subsequently secured the patent. He fails, however, to support this date by any collateral facts, unless by the matter of preparing the illustration to which we will refer. Cox had an interest in a designing and engraving business, and he testified that the complainant's device was brought to him for the purpose of making illustrations of it. He produced a bill, under

date of January 3, 1889, which he said covered woodcuts of the standard afterwards patented. What the woodcuts were, the bill does not show; neither is any woodcut produced, nor any illustration printed from it. Not only did Mr. Cox fail to produce any woodcut or any illustration, but the complainant also failed to do it. Indeed, the complainant did not even identify the entries in the bill. Thus, the matter was left to stand entirely on the unsupported recollection of Mr. Cox as to what the illustrations were. It is true that Mr. Cox's account is so continuous from the time when he first says he saw the device, that, as he had an interest in the matter from that time, his testimony would be very convincing, provided there was anything in the record by which it could be ascertained from any collateral events that he had not confused the date when he first saw it, or had not confused it with some other matter. The record shows another bill from him of "a lot of cuts" made by him, and delivered on March 20, 1890, the day before the date of complainant's application, and of "two cuts of shoe rests" delivered on April 21, 1890. These may well have included the device in controversy. Moreover, it appears that an engraving of the patented device was published by the patentees in 1890, "some time prior to the 23d day of December, 1890." In view of the fact that there are no other collateral events to fix the date, and the further fact that neither of the bills produced by Cox identifies the work done, it is not improbable that his attention was first called to this device in connection with the preparation of the engraving for the publication in 1890 in lieu of the earlier date; and, as the foundation on which his entire statement is built rests on this work of engraving, it follows that there is too much uncertainty at the very beginning to make it such that the court can accept it as sufficient for the purposes of an issue of priority. In our opinion, the evidence of all the other witnesses for the complainant below on this point has the same infirmities as that of Cox, but in a greater degree; so that the whole case, in this respect, depends on the unsupported recollections of witnesses as to facts and dates fully six years prior to giving testimony, and facts, moreover, of a kindred character to other facts occurring at or near the same time, with which they might be confused. Not only is this important as bearing on the weight of their testimony, but, under the circumstances of this case, the fact that the testimony is thus unsupported is an affirmative one against the complainant below of very great importance. He was challenged to produce any book showing sales of lasts prior to 1890, or any engraving such as was described by Cox. This he was unable to do, although Cox testified that, in the summer before the patent was applied for (that is, in the summer of 1889), Mr. Sacks told him "that the last was selling; that it was going to be a great thing, he thought"; and another witness for the complainant below testified that, to the best of his recollection, the standard in issue was put on the market extensively about the beginning of 1889. The complainant admitted in his evidence that he had no sample of any patterns of a last or

standard made according to the testimony of the witnesses to which we have referred, nor any sample of any such last made in 1888 or in 1889, nor any drawing or illustration of the period in dispute. He said, in a general way, that these things were all destroyed in the ordinary course of business. But, if they were produced to the extent maintained by the complainant, in accordance with the testimony of his witnesses to which we have referred, it would be extremely improbable that none of them remained. It seems very extraordinary that, if the dates in this matter were as claimed by the complainant and testified to by Cox, no entry on any book of account, no pattern, no sample, no purchaser, nor any bill of articles sold to any purchaser, was produced by the complainant in support thereof. It is incredible that the destruction as to which the complainant assumed to testify could have been of so wholesale a character, and could have reached out in so many directions, as to have covered all these.

On the whole, we must apply to this case the practical safeguards against the frequently mistaken memory of witnesses as to events of this character long since happening, which the courts are always insisting on with reference to the issue of anticipation. Doing this, it seems plain that the complainant below has come far short of proving his prior right as satisfactorily as required by the authorities and by the reason of the case. Indeed, in view of the absolute lack of illustrations, book entries, purchasers, bills, patterns, or castings of the early date in dispute, we are safe in saying that the preponderance of probabilities is against him. The decree of the circuit court is reversed, and the case is remanded to that court, with directions to dismiss the bill, with the costs both of this court and of the circuit court for the defendants below.

DAVIS PRESSED-STEEL CO. et al. v. MORRIS BOX-LID CO.

(Circuit Court of Appeals, Third Circuit. May 25, 1897.)

No. 6, March Term, 1897.

PATENTS—LIMITATION OF CLAIMS—INFRINGEMENT—CAR AXLE BOX LIDS.

The Morris patents, Nos. 379,712 and 423,795, for car axle box lids, stamped out of sheet steel, and having self-securing springs, are limited by the prior art, including especially the Kinzer patent, No. 211,854, to the combinations shown, in each of which an essential feature is the bearing of the spring on the outside of the lid and the fitting of the lid to the journal box before the function of the spring is rendered active. These patents are, therefore, not infringed by the Davis device, in which neither of these features appear. 78 Fed. 129, reversed.

Appeal from the Circuit Court of the United States for the District of Delaware.

This was a suit in equity by the Morris Box-Lid Company against the Davis Pressed-Steel Company and Nathan S. Davis for infringement of certain patents for car axle box lids. The circuit court ren-

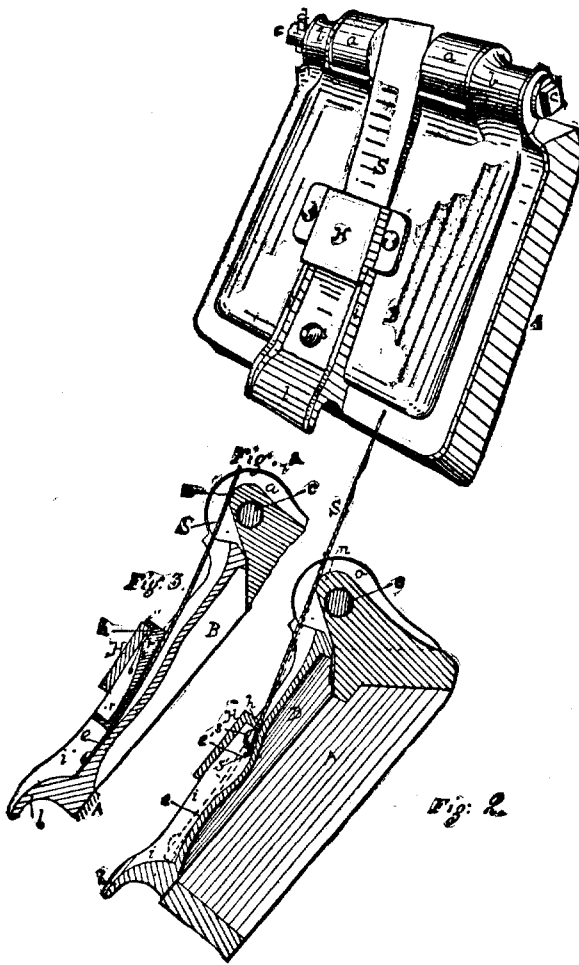
dered a final decree for complainant (78 Fed. 129), and defendants have appealed.

Francis T. Chambers, for appellants.

Otto R. Barnett and James H. Raymond, for appellee.

Before ACHESON and DALLAS, Circuit Judges, and BUFFINGTON, District Judge.

BUFFINGTON, District Judge. The Morris Box-Lid Company filed a bill in the circuit court of the United States for the district of Delaware praying an injunction against the Davis Pressed-Steel Company and Nathan S. Davis for infringement of three patents owned by it, viz. patent 211,854, granted February 4, 1879, to Jacob Kinzer; No. 379,712, granted March 20, 1888, to George W. Morris; and No. 423,795, March 18, 1890, to the same. These patents are for car axle box lids. After replication filed, complainant gave notice that its prima facie case would be made out without reference to the Kinzer patent, and that proceedings would be had for dismissal of the bill as respects it without prejudice. No such action was had, but thereafter the case was proceeded in with sole reference to the remaining patents. The court, adjudging claim 1 of the first Morris patent and claims 4 and 5 of the second were valid and infringed, decreed an injunction, and from such decree an appeal was taken, and is now before us. The case involves lids or coverings for boxes which are filled with waste saturated with lubricants, and incase the outer end of car axles. By the rapid motion of the railway cars on which they are fitted, and their proximity to the ground, such boxes are necessarily exposed to clouds of dust and flying dirt. The entrance of these foreign substances into the boxes is highly objectionable, as they injure the lubricants, cut the axles, and tend to produce hot boxes. Ordinarily, these lids were cast iron, and were kept in place by springs secured to them by rivets, but the strain upon such rivets was severe, and caused them to wear out soon. To repair a lid necessitated its removal from the box. As early as 1877, Morris, in his patent No. 192,524, had shown a sheet-steel lid, which wholly dispensed with rivets. It had two hinged extension pieces, which, with the box-hinged bar, formed a pintle joint, and between these extensions the lid took the form of a tongue or clamping spring, which rested on a bearing on the top of the journal box. In 1879, Jacob Kinzer, in his patent No. 211,854, already referred to as being owned by complainant, and originally one of alleged infringed patents in this bill, devised another method of dispensing with rivets. It consisted of a self-attaching spring. To this end he employed a cast-iron lid hinged to the box in the ordinary way. To hold it in place he used a flat steel spring with an inturned or right-angled lip at the lower end. The three bearing points of the spring were as follows: The first was where the upper end rested on the box above the hinge; the second was a lip dropped from the upper end edge of a loop or keeper riveted transversely on the outer side of the lid, and the third was a raised transverse section in a groove or chan-



nel which extended from the said loop to a lip or handle at the lower end of the lid. This channel, as its name implies, had edge flanges, which prevented the spring from escaping laterally, and at its lower end a cross-section depression, flanked at its lower end by a raised lip, which latter served the double purpose of a handle to raise the lid and a stop for the spring. The other side of the cross depression was formed by the raised projection referred to, which latter served the double purpose of a third bearing point for the spring, and also of a lock to keep it in place. To place the spring in functional position, it was driven from the upper end, and its lower end forced over the cross section, the top of which formed the third bearing. Further driving forced the angled end into the transverse depression already referred to. Here the lip or handle prevented its further movement downward, while its angled end engaging with, or, as the

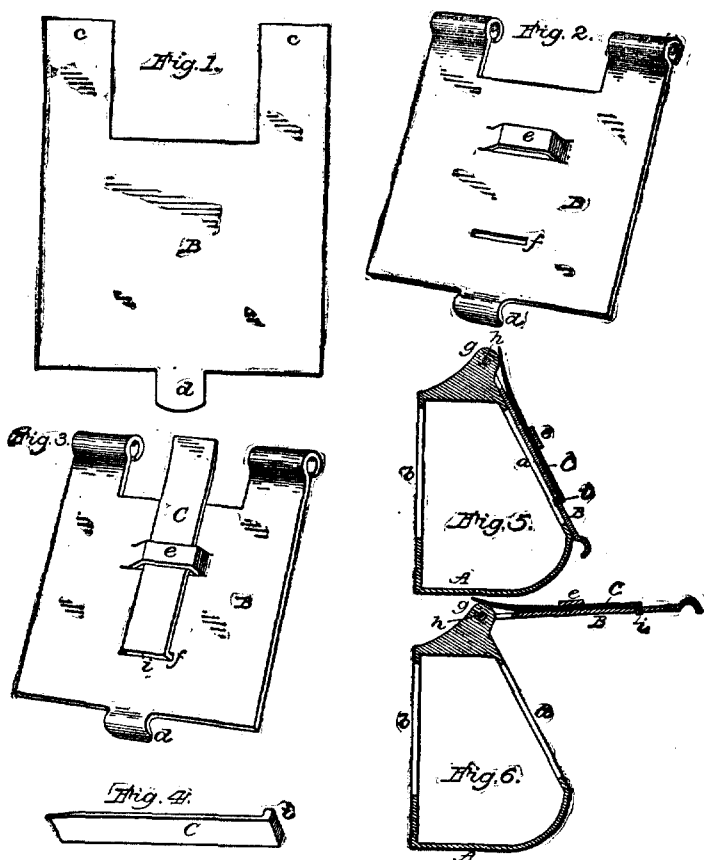
patent says, "locking against, the front receding side of the bearing, will prevent the spring from working endwise by jarring, so as to be freed from action." Kinzer's device was never commercially developed, as, indeed, was also the case with the device shown in the Morris 1888 patent in suit. Whether it could have been successfully manufactured and applied is problematical, but, apart from all other questions, the cost of construction, arising from the material used and the growing tendency to supplant cast iron with pressed steel, were in themselves sufficient to account for its nonuse. Still the teaching of the patent, its plain disclosure of the possibility—and practicability—of providing a box lid with a self-securing spring, and thus dispensing wholly with riveted springs, are facts of significant weight where a subsequent inventor claims as a pioneer to have first opened a road, rather than to have merely bettered and improved a pathway he found already existing.

We now turn to an examination of the Morris patent of 1888. The proofs show that Mr. Morris had been for many years engaged in the railway supply business, and, from an examination of the axle boxes in use, became convinced that something different was needed. He says:

"The journal box lids then used were being largely made of cast iron, were constantly broken and destroyed by the rough usage which they received from car inspectors; and because of their extreme weight,—running from seven to twelve pounds,—with a constant strain on the hinge bolt or pintle that secured the lid to the box, thereby frequently wearing the bolt so that it would break off, and allow the lid to drop by the roadside; and, even if this did not happen, the bolt would become so loose, because of this wear, as to allow dust and cinders to get under the lid and into the journal box."

In view of these facts he says: "I turned my attention to devising something more durable, practical, and economical (both as to weight and cost) in journal box lids." Before describing the Morris device, and measuring the advance therein shown, it may be well to quote the language of complainant's expert comparing the Kinzer and Morris devices. He says:

"The Kinzer box lid is also provided with a plate spring, which, as shown in Fig. 2, has a 'right-angled end.' The box lid has also a raised cross loop beneath or within which the spring is fitted. The lid, with this spring, is also combined with an axle box having a top bearing for said spring. These are the points of correspondence between the subject of claims of the first Morris patent and the structure shown in the Kinzer patent. The following are the differences: First, the Kinzer box lid is of cast iron, and is not 'stamped out of sheet steel' or other sheet metal; secondly, this cast-iron Kinzer box lid does not have a slot therein to receive the right-angled end of the spring, and said spring is not immovably held against longitudinal movement by any means. The Kinzer lid is, however, not destitute of means which are intended to hold the spring lengthwise in place as against certain forces, and what it has for this purpose are: First, the rising lip, *l*, which will securely hold the spring against downward movement (having reference to the position of the lid when closed); and, second, the slight curved elevation, *e*, below which the right-angled end of the spring projects, and which, according to the patent, is thought to be adequate to 'prevent the spring from working endwise by jarring, so as to be free from action.' * * * There being no slot or equivalent depression in the Kinzer box lid, the upper side wall of which positively holds the spring against endwise movement, there are, of course, no end walls of a slot for engagement with the ends of the lip on the spring for the purpose of



holding the lower end of the spring from lateral displacement. Other means are provided for this purpose in the Kinzer lid, consisting of the long, cast ribs, i, i, which laterally confine the spring from the loop, H, to the lower end of said spring."

If this summary of the differences is complete, it would seem that the grounds for assigning a pioneer place to the second patent are, to say the least, somewhat meager. The use of sheet steel in lids had already been shown, and a stamped or pressed steel one was the natural outgrowth of mechanical advance. As bearing on the teachings and disclosures of Morris' patent, it should be noted that there was, among other lids in general use prior thereto, a cast-iron lid with a central raised hood at its upper end. A spring was riveted to its lower side, extended upward through the hooded space, and was seated over the axle at the top of the box.

Whatever the possible scope of the principle or mode of application of Morris' method, it is certain he only conceived the idea of applying it in two general lines: First, where the lid was hinged before the function of the spring was rendered active; and, secondly, locat-

ing the spring on the outer face of the lid. This is clearly set forth in the patent:

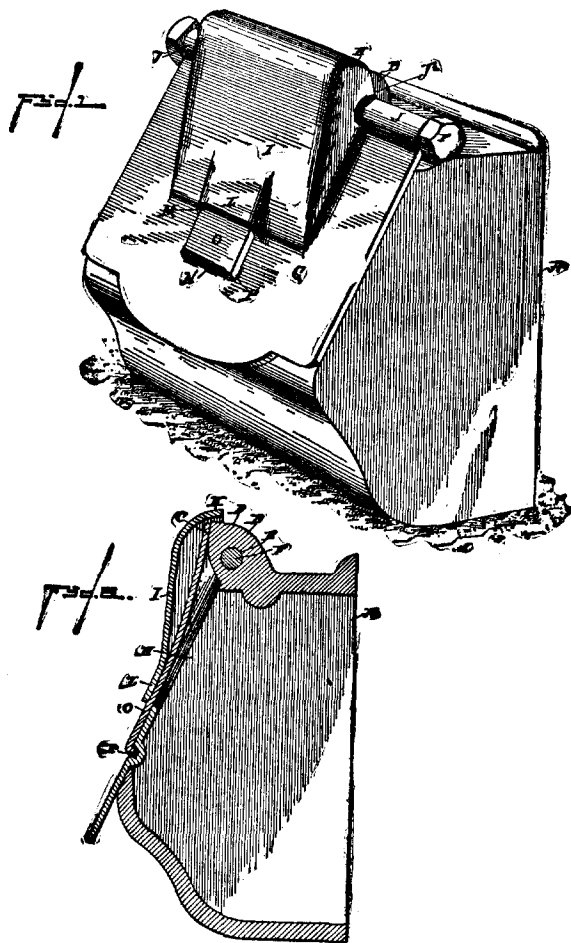
"The object of my improvement is to provide for holding the lid closed, and permitting it to be opened by the simplest construction and application of the spring thereto, so that the lid may be fitted to the pintle hinges and to the faces of the journal box before the function of the spring is rendered active, and by which I obtain a lighter and more durable cover, in which the particular improvement resides in the simple and effective provision for applying the spring to the outer face of the lid, as illustrated in the accompanying drawings."

In view of the statutory requirement that a patentee "shall particularly point out and distinctly claim the part, improvement, or combination which he claims as his invention or discovery," these statements are suggestive, where the claims are sought to be given a meaning which would cover other methods and combinations, which do not, and from the relation of their parts cannot, embody these two declared objects "in which," as the patentee says, "the particular improvement resides." Turning to such description, we find a thin sheet of steel or other suitable metal with corner projections to form pintle-hinge eyes, which latter were found in the 1877 patent,—“a loop, e, punched out so as to stand up from its outer face,” and a punched-out slot, both being in the middle line of the sheet. A narrow steel spring is used, with a flat upper end, and a right-angled projection, similar to Kinzer's, at the other, adapted to fit the slot. The spring is applied to the lid by slipping its plain end under the loop, and, after the lid is hinged, the spring is driven upward until the angled lip reaches and is forced by spring tension into the slot, where it seats itself. Meanwhile the upper end had passed over and bears upon the curved top part of the box over the hinge, and causes sufficient tension to press and hold the lid against the box face. By this self-securing spring device the use of rivets was dispensed with. Securing the loop by rivets instead of making it integral with the lid is suggestive as an alternative construction. Wherein does this device differ from Kinzer's? Clearly, it is a difference in detail. It was a new type, but it was not the first of a new species. To hold otherwise, to give a broad generic character to Morris' claim, is to work its destruction, for Kinzer would then anticipate. The state of the art is such that, to save Morris' claim, it must be limited substantially to the combination shown. He made use of the same securing loop as Kinzer; his spring is identical in form, bearing point, functional purpose, and effect. What was new was his slot and the lid material he used. Conceding that the change from the gradual inclined side of the Kinzer depression to the abrupt shoulder of the Morris slot involved invention, and as such is entitled to protection, yet the difference was not so radical as to stamp it as of a pioneer character.

We next inquire whether the claim in question, viz.: "An axle-box lid stamped out of sheet steel, with a raised cross loop and a cross slot stamped therein, and a plate spring having a right-angled end, and fitted within said loop and within said slot, combined with an axle box having a top bearing for said spring, substantially as set forth," is infringed by respondent's device. In the latter we have

a marked departure from that which Morris says was the object of his improvement. Instead of a device which could be fitted to the face of the journal box before the spring was made operative, we find Davis returned to the lines of the old method, which Morris condemned and sought to avoid, namely, where the spring was necessarily attached before the lid was fitted. So, also, instead of placing the spring on the outer, he put it wholly on the inner, side of the lid. Far from adopting, he avoided, the teachings of the Morris patent. His lid is of stamped steel of the type of the hooded cast iron which we have seen was in common use. He places his spring underneath the lid in the same position, and with the same functional action, as in that type, but dispenses with rivets. This is done by passing the outwardly right-angled end of the spring underneath a loop or stirrup riveted in front of a backing shoulder or projection. When the lid is clamped to the box, and tension obtained, the spring is self-secured. It is located on the lower side of the lid, and from the inherent nature of the device and the relation to each other of the elements employed, spring function cannot be secured after the lid is fitted,—methods utterly at variance with the expressed objects of the Morris patent. The invention disclosed to the public by that patent, the objects the inventor had in view, and the means he suggested for securing the desired ends, are all in accord with such construction of the claim as limits the cross loop to a place on the outside of the lid. Conceding the improvement was meritorious and patentable, yet, obviously, it was not of such a basic character as to block all further advance in the art by rendering tributary to its claims every subsequent device by which it was found possible to place a self-securing spring on an axle-box lid, for, as we have seen, he was not the first to do this himself. The Davis method shows an entirely different way of accomplishing the same general end. While his spring has three bearing points,—a point deemed of vital importance by the circuit court, but which, in our mind, is of no special moment, since all such springs must have three bearing points, and Kinzer had in substance shown these particular three before,—yet even these do not stand in the same relation to the other parts in combination in the Davis and Morris devices. The bearing function of the loop of the Morris device is not accomplished by the loop or stirrup of the Davis device, but by the interior shoulder of the hood; while the third bearing, which in the Morris is on the front shoulder of the slot, is in the Davis performed by the stirrup or loop instead. The latter has also the additional function of limiting the forward movement of the spring,—a function which the loop of Morris does not have, but the same is wholly performed by the slot. No such device, arrangement, or co-relation of parts as Davis' is disclosed in the Morris specifications. Its teachings are wholly away from, and not toward, the Davis type; and to subject the latter to its claims would, in our judgment, be to pervert the beneficent purpose of the patent law, which is to stimulate, not to retard, invention. We are clearly of opinion the court erred in decreeing infringement.

What we have said of the patent of 1888 applies in large part to the Morris patent of 1890, also in suit. Its teachings and trend were in the same general lines as its predecessor. We find the same form of spring in both, substantially the same bearing points, and the accomplishment of similar effect, viz. securing the "spring from the outside of the lid after the latter had been properly hinged in



place." The difference in detail consists in the use of a bulged or hooded lid, the form of which was old in cast iron but new in being made from pressed steel, and having a slot at its lower end, through which the spring entered. Apart from sheltering the upper end of the spring beneath it, the hood performed the same functional duty of a bearing point of the spring as the raised loop of the former patent. The seating of the spring still remained on the outside of the

lid. In view of the prior art, of which his own prior patent must be deemed a part (see *James v. Campbell*, 104 U. S. 382; *McCreary v. Canal Co.*, 141 U. S. 459, 12 Sup. Ct. 40), the claims in question must be confined to combinations substantially embodying the specific elements claimed. Among the elements of such claims we find a bulge having a slot at its end, and a flat spring inserted through the slot. These elements or combinations of parts are lacking in respondent's device. We are of opinion infringement has not been shown. The decree of the circuit court is therefore reversed, and that court is directed to dismiss the bill.

THE ALICE B. PHILLIPS.

THE SIRIUS.

FORD v. THE ALICE B. PHILLIPS.

(Circuit Court of Appeals, Third Circuit. June 2, 1897.)

1. COLLISION—LIGHTS—CREDIBILITY OF WITNESSES.

That witnesses who testify that the lights of their own vessel were burning brightly say they especially looked at them on the approach of the other vessel casts no suspicion on their testimony, it being natural that they should do so under the circumstances.

2. SAME—STEAMER AND SAIL.

A collision at night on the open sea, between a steamship and schooner, *held*, on the evidence and circumstances, not to have been due to any insufficiency or lack of lights on the schooner, as alleged in behalf of the steamer; and the steamer *held* in fault.

Appeal from the District Court of the United States for the Eastern District of Pennsylvania.

These were cross libels in rem to recover damages resulting from a collision between the schooner *Alice B. Phillips* and the steamship *Sirius*. The collision occurred between 1 and 2 o'clock on the morning of September 9, 1894, on the open sea, about 12 miles southward of Fenwick Island Lightship, and resulted in serious injury to the schooner. The night was dark, but neither foggy nor thick. The courses of the vessels, as they approached, were slightly crossing, but nearly head on. In the answer filed in behalf of the steamer, the schooner, among other things, was charged with changing her course; but this charge was abandoned at the hearing, and the claimant relied on an allegation that the schooner's port light was not burning. The circuit court found that this allegation was not proved, and accordingly sustained the libel of the schooner, and dismissed that of the steamer. The claimant of the steamer appealed.

John F. Lewis, for appellant.

Curtis Tilton and Henry R. Edmunds, for appellee.

Before ACHESON and DALLAS, Circuit Judges, and BUFFINGTON, District Judge.

DALLAS, Circuit Judge. The distinction urged upon our attention in the appellant's brief, between an inquiry as to whether the schooner's port light was burning at all and an inquiry as to whether it was so burning as to be properly visible, is one which does not appear to be material under the evidence. The testimony of those on board the schooner is harmonious, positive, and credible, and is distinctly to the effect, not only that the light in question was actually burning, but also that it was bright; and we cannot agree that, because it has been testified that some—perhaps all—of these witnesses especially looked at the light to observe its condition when the steamer was perceived to be approaching, we should regard their statements with suspicion. On the contrary, we think this was a perfectly natural thing for them to do under the circumstances, and that the fact that they did do it makes their testimony all the more certain and reliable. The officers and crew of the steamship tell, in the main, a different story. Unfortunately, this but accords with the common experience in such cases; but we think the weight of the evidence is decidedly with the appellee. There are several circumstances which plainly incline the scale to his side. The admission of Williams, the steamer's second officer, that he saw the schooner's light "about one and one half miles away," has not been successfully explained, and its effect cannot be evaded; and, perhaps, it may be due to some of the crew of the steamer who state that they looked, and did not see the light, to say that it seems to be more than possible that they were mistaken in supposing that they were in a situation to see it. The starboard light was unquestionably burning brightly, and, this being so, it is not at all likely that the corresponding light on the port side was either not in place or had been neglected. The port lantern itself has been produced. It was much damaged by the collision, but its condition when taken from the schooner indicated that it had been lighted. There was no oil upon it, and we think there probably would have been if, when the shock occurred, it had not been all consumed by fire communicated by a lighted wick. Standing alone, but little importance would be attached to this hypothesis; but, in connection with other matters which tend to support it, we have not thought it unworthy of notice.

The specifications which relate to the taxation of costs have not been argued, and the conclusion we have reached on the merits renders consideration of the motion to dismiss unnecessary. The decree is affirmed.

DUNCAN v. ASSOCIATED PRESS.

(Circuit Court, S. D. California. May 10, 1897.)

1. REMOVAL OF CAUSES—DIVERSE CITIZENSHIP.

The restrictions as to the residence of parties contained in section 1 of the act of August 13, 1888, do not apply to jurisdiction by removal; and a suit between citizens of different states, commenced in a state court, may be removed to a federal court, though neither party is a citizen or resident of the state where such suit is commenced.

2. SAME—TIME FOR REMOVAL.

The fact that a petition for the removal of a cause from a state to a federal court, which is filed before the time to answer expires, is accompanied or even preceded by a demurrer, does not in any way prejudice or affect the right of removal.

On Motion to Remand.

Blanton Duncan and D. Allen, for plaintiff.

Henry T. Gage and White & Monroe, for defendant.

WELLBORN, District Judge. This action, for the recovery of damages laid in the complaint at \$50,000, was brought originally in the superior court of Los Angeles county, Cal. Service of the summons was duly made in the city of San Francisco on the 27th day of June, 1896. On the 24th day of July next following, defendant filed in the state court a demurrer, and also a petition, with bond, for the removal of the suit into the federal court, which bond was approved and petition granted by said state court, and a certificate of the record duly filed in this court. The ground of removal, as set forth in the petition, is as follows, to wit:

"That your petitioner was at the time of the bringing of this suit, and still is, a corporation organized under the laws of the state of Illinois, and a citizen of the state of Illinois, and that said suit and the controversy in said suit is between citizens of different states; that your petitioner was at the time of the commencement of this suit, and still is, a citizen of the state of Illinois; and that plaintiff was at the time of the commencement of this suit, and still is, a citizen of the state of California."

Plaintiff now moves to remand the case to the state court upon the ground, as specified in the motion to remand and accompanying affidavits, that this court is without jurisdiction, because the plaintiff is, and was when the action was commenced, a citizen of the state of Kentucky, and had his residence in the city of Louisville, in said last-named state. Plaintiff urges as a further reason why the case should be remanded that a demurrer to the complaint was filed in the state court before the petition and bond for removal. At the hearing of the motion, evidence was offered by both parties as to the citizenship and residence of plaintiff; that is, whether such citizenship and residence were in California or Kentucky,—defendant insisting upon the former, and plaintiff upon the latter, state. In the view, however, which I now take of the law of the case, it is unnecessary to review this evidence; for plaintiff's residence does not affect the right of removal, and, while I think his citizenship has been shown to be in Kentucky, yet a finding either way on the issue of citizenship would sustain the material allegation of the petition for

removal, namely, "that said suit, and the controversy in said suit, is between citizens of different states," or, to express the situation in other language, the fact that defendant is a citizen and resident of Kentucky, if it be conceded, is no ground for remanding the case. Sections 1 and 2 of the act of congress of August 13, 1888 (1 Supp. Rev. St. U. S. pp. 611, 612), regulating the removal of cases from the state courts, are as follows:

"Section 1. That the circuit courts of the United States shall have original cognizance, concurrent with the courts of the several states, of all suits of a civil nature, at common law or in equity, where the matter in dispute exceeds, exclusive of interest and costs, the sum or value of two thousand dollars, and arising under the constitution or laws of the United States, or treaties made, or which shall be made, under their authority, or in which controversy the United States are plaintiffs or petitioners, or in which there shall be a controversy between citizens of different states, in which the matter in dispute exceeds, exclusive of interest and costs, the sum or value aforesaid. * * * But no person shall be arrested in one district for trial in another in any civil action before a circuit or district court; and no civil suit shall be brought before either of said courts against any person by any original process or proceeding in any other district than that whereof he is an inhabitant, but where the jurisdiction is founded only on the fact that the action is between citizens of different states, suit shall be brought only in the district of the residence of either the plaintiff or the defendant. * * *

"Sec. 2. That any suit of a civil nature, at law or in equity, arising under the constitution or laws of the United States, or treaties made, or which shall be made, under their authority, of which the circuit courts of the United States are given original jurisdiction by the preceding section, which may now be pending, or which may hereafter be brought, in any state court, may be removed by the defendant or defendants therein to the circuit court of the United States for the proper district. Any other suit of a civil nature, at law or in equity, of which the circuit courts of the United States are given jurisdiction by the preceding section, and which are now pending, or which may hereafter be brought, in any state court, may be removed into the circuit court of the United States for the proper district by the defendant or defendants therein, being nonresidents of that state. * * *

It is authoritatively settled that the provisions of section 1 in relation to the particular district in which a suit must be brought do not go to the question of jurisdiction, but only confer upon the defendant a personal privilege or exemption, which may be waived, and that the circuit courts of the United States have jurisdiction, the other requisites being present, whenever there is a controversy between citizens of different states. *Railroad Co. v. McBride*, 141 U. S. 127, 11 Sup. Ct. 982; *Ex parte Schollenberger*, 96 U. S. 369; *Trust Co. v. McGeorge*, 151 U. S. 129, 14 Sup. Ct. 286. In the case last cited the court says:

"But the defendant company did not choose to plead that provision of the statute, but entered a general appearance, and joined with the complainant in its prayer for the appointment of a receiver, and thus was brought within the ruling of this court, so frequently made, that the exemption from being sued out of the district of its domicile is a personal privilege, which may be waived, and which is waived by pleading to the merits."

The court then refers to a number of cases in which the doctrine it announced is approved, and proceeds as follows:

"The court below suggested that the present case is distinguishable from the others in which it was held that the right of exemption might be waived, in that neither the plaintiff nor the defendant resided in the district in which

the suit was brought; that is, the Mercantile Trust Company, the plaintiff, had its residence in New York, and the Virginia, Tennessee & Carolina Company, the defendant, was a corporation of New Jersey. But a similar state of facts existed in the case of *Shaw v. Mining Co.*, 145 U. S. 444, 12 Sup. Ct. 935, inasmuch as Shaw, the plaintiff, was a citizen of Massachusetts, and the mining company was a corporation of the state of Michigan, and the suit was brought in the circuit court for the Southern district of New York. Nor do we see any reason for a different conclusion as to the subject of waiver when the question arises where neither of the parties are residents of the district from that reached where the defendant only is such resident."

In a later case the supreme court of the United States, following the principle of the cases above cited, that the jurisdiction of the circuit courts, as defined in section 1, depends upon diverse citizenship, unaffected by the question of the residence of the parties, has expressly held that the provisions of section 2, authorizing removals in cases where the circuit courts of the United States are given jurisdiction by section 1, refer to the first part of section 1, which in terms confers jurisdiction, and not to the clause which prescribes the district in which the suit may be brought. *Railroad Co. v. Davidson*, 157 U. S. 201, 15 Sup. Ct. 563. Some years before the decision in the case of *Railroad Co. v. Davidson*, *supra*, the doctrine therein announced was suggested as probably the true construction of the sections in question in *Gavin v. Vance*, 33 Fed. 88, as follows:

"Moreover, the primary grant of jurisdiction contained in the first clause of the first section—to which it is possible the removal section refers, rather than to the more restricted clause relating to the locality of the suit—is of the most extensive character, and broad enough to give the court jurisdiction by removal of any suit between citizens of different states brought in a state court, although the locality might not be available for original jurisdiction of the federal court under the subsequent restrictive clauses of the first section. So that the restrictions of locality as to suits originally brought may not apply to the jurisdiction by removal at all. In other words, we must look alone to the restrictions of the removal section for the qualifications of that jurisdiction, and treat those relating to the locality of original suits as wholly inapplicable to the entirely different subject of jurisdiction by removal. Whether this be a proper construction, we need not say, but it is neither impossible nor improbable, nor yet an unreasonable construction."

In *Fales v. Railway Co.*, 32 Fed. 673, Judge Shiras, with great clearness and force, interprets the two sections thus:

"We must not confound the question of federal jurisdiction with that of the place of bringing suit. The first section of the act of 1887 was intended to define the classes of cases of which the United States circuit courts should have original cognizance concurrent with the courts of the several states, and also to define the place or places where such suits might be brought by original process. Two general grounds of federal jurisdiction are recognized in the statute, to wit, subject-matter and diverse citizenship. Cases arising under the constitution, laws, or treaties of the United States, or in which the title of land is involved, claimed under grants from different states, are cognizable in the United States courts by reason of the subject-matter, whereas controversies between citizens of different states, or between citizens of a state and aliens, are cognizable in the federal courts by reason of diverse citizenship. In addition to these general grounds of federal jurisdiction, the statute also includes cases wherein the United States are plaintiffs or petitioners. Having thus defined the classes of cases of which the United States circuit courts have jurisdiction, the section then proceeds to define the place or district within which such suits may be brought by original process; it being declared that no civil suit shall be brought against any person by any original process in any district other than that of which he is an inhabitant, but, where the juris-

diction is founded only on the fact that the action is between citizens of different states, suit shall be brought only in the district wherein plaintiff or defendant resides. The latter clause of the section cannot be ignored. It is the latest declaration of the legislative will, and, if irreconcilable with the preceding clause, it must be held to control. But it is not necessary to resort to purely technical rules in construing the statute. Force can be given to both clauses of the section by holding that the first one establishes the general rule that, in bringing suits by original process in the United States courts, the same must be brought in the district wherein the defendant resides; and the second clause provides an exception, to wit, that, where the jurisdiction is based solely on diverse citizenship, suit may be brought in the district of the residence of either plaintiff or defendant, but not elsewhere. Whatever may be the true construction of these clauses, they affect, not the question of federal cognizance, but solely the question of the place of bringing suit by original process in cases of federal cognizance. * * * The latter question has nothing to do with the right of removal. The question whether the action might have been brought by original process in any federal court was material, in order to determine whether it was a case of federal cognizance; but, that question being decided in favor of the federal jurisdiction, the question of the proper place or district in which the suit might have been brought by original process is wholly immaterial on the question of removal."

In *Kansas City & T. R. Co. v. Interstate Lumber Co.*, 37 Fed. 3, it is also held that:

"An action pending in a state court may be removed by the defendant to the federal court, though neither party is a resident of the district; the restriction as to the place of bringing suit being in the nature of a personal privilege, which defendant may waive."

Judge Brewer, delivering the opinion of the court, says:

"The same distinction between the general matter of jurisdiction and the particular court for suit and trial is recognized in *Fales v. Railway Co.*, 32 Fed. 673; *Gavin v. Vance*, 33 Fed. 84; *Loomis v. Coal Co.*, Id. 353. Turning to the second question, we find that the removable suits are those of which, by the first section, the federal courts are given jurisdiction. The language speaks of jurisdiction generally, and of courts in the plural. Any suit is removable of which any federal circuit court might take jurisdiction, and the mere fact that the defendant could have successfully objected to being sued in any one or more particular federal courts does not destroy the general jurisdiction of federal courts, or prevent its removal."

Again, in *Railroad Co. v. Meyers*, 10 C. C. A. 485, 62 Fed. 372, the same principle is stated as follows:

"The provision that no civil suit shall be brought in a circuit or district court of the United States against any person by any original process or proceeding in any other district than that whereof he is an inhabitant confers an exemption, in the nature of a personal privilege, that may be waived, and has no application where the defendant to a suit in the state court, who is a non-resident of the state, removes the cause into the federal court of that state."

In the case of *Stalker v. Car Co.*, 81 Fed. 989, removed into this court from one of the superior courts of the state on the ground that plaintiff was a British subject and defendant an Illinois corporation, Judge Ross denied a motion to remand, and in his opinion, filed May 1, 1895, uses the following language:

"The plaintiff, a British subject, commenced this suit in one of the superior courts of the state, against a corporation organized and existing under the laws of the state of Illinois, to recover damages in the sum of two thousand dollars for personal injuries. The defendant filed in the superior court a petition and bond for the removal of the cause to this court. The bond was approved,

and an order of transfer entered. * * * The plaintiff moved the court to remand the case to the state court upon the ground that it was improperly brought here. * * * The motion to remand must be denied, under the ruling of the supreme court made in the case of *Railroad Co. v. Davidson*, 15 Sup. Ct. 563, in which the court held that section 2 of the judiciary act of 1887, as amended by the act of 1888, refers to the first part of section 1 of the same act, by which jurisdiction is conferred on the circuit courts, and not to the clause thereof relating to the district in which suit may be brought, which restriction, as has been repeatedly held, is but a personal privilege of the defendant, and may be waived by him. The necessary result of this ruling is that this court would have had original jurisdiction of the present suit by virtue of the first section of the act of 1887, as corrected by that of 1888, subject to the exercise of the personal privilege conferred upon the defendant by the restrictive clause referred to. * * *

See, also, *Burck v. Taylor*, 39 Fed. 581, and *First Nat. Bank v. Merchants' Bank*, 37 Fed. 657.

The foregoing citations establish, beyond question, that the right of removal does not depend in any way upon the residence of the parties, or, in other words, that the restrictions as to residence do not apply to jurisdiction by removal; and such jurisdiction exists where the parties are citizens of different states, even though neither of them be a citizen of the state where the suit is pending. The cases of *Hurst v. Railroad Co.*, 93 U. S. 71, *Insurance Co. v. Francis*, 11 Wall. 210, and *Society v. Grove*, 101 U. S. 610, cited by plaintiff in support of his contention that to authorize a removal one of the parties must be a citizen of the state where suit is brought, are inapplicable here. Each of those cases was based upon the act of March 2, 1867 (14 Stat. 558), afterwards substantially embodied in Rev. St. § 639, subsec. 3, and also in the act of 1888 (1 Supp. Rev. St. 612), which expressly provided that "when a suit is between a citizen of the state in which it is brought and a citizen of another state it may be so removed on the petition of the latter," etc. It is only necessary to say that this provision is entirely different from that on which rests defendant's right of removal in the case at bar. *Shaw v. Mining Co.*, 145 U. S. 444, 12 Sup. Ct. 935, and *Denton v. International Co.*, 36 Fed. 3, quoted from at length by the plaintiff, do not antagonize the views which I have expressed as to the restrictions of residence; for in each of those cases the defendant, within due time, asserted its privilege to be sued in a district other than the one where the suit was brought. In the former case, to avoid any mistake as to the scope of the opinion, the court expressly says:

"The Quincy Mining Company, a corporation of Michigan, having appeared specially for the purpose of taking the objection that it could not be sued in the Southern district of New York by a citizen of another state, there can be no question of waiver, such as has been recognized where a defendant has appeared generally in a suit between citizens of different states brought in the wrong district."

Conceding, therefore, that plaintiff is a citizen of Kentucky, there is still the diverse citizenship necessary to federal jurisdiction, because defendant is a citizen of Illinois. As already stated, then, it is immaterial to the decision of the pending motion whether plaintiff or defendant be right in their respective contentions as to the former's citizenship and residence; for in either event the controversy which

the suit involves is between citizens of different states, and therefore the right of removal exists.

The other ground upon which it is sought to remand the suit, namely, that a demurrer was filed in the state court prior to the petition and bond for removal, I think untenable. The express provision of the aforesaid act of congress of August 13, 1888, is that the petition for removal may be filed "at the time, or any time before the defendant is required by the laws of the state or the rules of the state court in which such suit is brought to answer or plead to the declaration or complaint of the plaintiff." 1 Supp. Rev. St. p. 613. By the laws of California, the defendant is required to appear and answer the complaint within 30 days, where the summons is served outside of the county in which the action is brought. Code Civ. Proc. Cal. § 407. In the present case, summons was served in San Francisco on the 27th day of June, 1896, and the petition for removal was filed on the 24th day of July, 1896. The fact that the petition was accompanied, or even preceded, by a demurrer, does not prejudice or in any way affect the right of removal. Motion to remand is denied.

INTERNATIONAL BRIDGE & TRAMWAY CO. et al. v. HOLLAND TRUST CO.

(Circuit Court of Appeals, Fifth Circuit. May 18, 1897.)

No. 559.

FEDERAL COURTS — JURISDICTION — FORECLOSURES — PROPERTY IN FOREIGN COUNTRY.

In foreclosing a mortgage on a bridge connecting a state of the Union with a foreign country, a federal court of equity in such state has jurisdiction to foreclose the entire lien, including that covering the franchises and property lying in such foreign country. *Muller v. Dows*, 94 U. S. 444, followed.

Appeal from the Circuit Court of the United States for the Western District of Texas.

This was a suit in equity by the Holland Trust Company, a corporation organized under the laws of New York, against the International Bridge & Tramway Company and others, to foreclose a mortgage upon a toll bridge across the Rio Grande river between the city of Laredo, Tex., and the city of Nuevo Laredo, in the republic of Mexico, and upon the approaches thereto, and all of the bridge company's premises, property, franchises, etc. The International Bridge Company was chartered by the state of Texas, and had a concession and contract from the government of Mexico, and a grant from the congress of the United States, together with the necessary county and municipal permits and ordinances. After a hearing of the cause on the merits, the circuit court entered a decree foreclosing the mortgage as to all the property, franchises, etc., of the mortgagor company. From this decree the defendants have appealed, assigning for error that the court had no jurisdiction to foreclose the lien of the mortgage upon that part of the property, rights, and franchises of the company lying within the republic of Mexico.

Oscar Bergstrom, for appellants.

Winchester Kelso and Geo. M. Van Housen, for appellee.

Before PARDEE and McCORMICK, Circuit Judges, and NEWMAN, District Judge.

PER CURIAM. The assignment of error in this case is not well taken. *Muller v. Dows*, 94 U. S. 444. The decree appealed from is affirmed.

AMERICAN STRAWBOARD CO. v. INDIANAPOLIS WATER CO.

(Circuit Court of Appeals, Seventh Circuit. February 9, 1894.)

APPEAL—INJUNCTION—SUPERSEDEAS.

In general a circuit court of appeals will not, pending an appeal, suspend an injunction, previous to the hearing on the merits, after the trial judge has refused to grant a supersedeas.

Appeal from the Circuit Court of the United States for the District of Indiana.

Edwin Walker and John W. Kern, for appellant.

Albert Baker and James L. High, for appellee.

Before JENKINS, Circuit Judge, and GROSSCUP and SEAMAN, District Judges.

JENKINS, Circuit Judge. The appellee, a corporation organized for the purpose of supplying the city of Indianapolis with water, filed its bill in the court below to restrain the defendant (appellant here) from polluting the waters of the White river, its source of supply. A decree passed in favor of the complainant, perpetually enjoining the pollution of the stream, as charged. The opinion of the court may be found in 57 Fed. 1000. The appellant brings that decree here for review. In advance of the hearing, the appellant moves the court for an order suspending, during the appeal, the operation of the injunction directed by the final decree. A similar motion was presented to the court below, but was denied. We entertain no question of the inherent power of this court to grant a supersedeas in case of appeal from a final decree. In *Leonard v. Land Co.*, 115 U. S. 465, 6 Sup. Ct. 127, such power in the appellate court is recognized and asserted as beyond question. It was there stated, however, that that court, finding that indulgence of the power would frequently involve an examination of the whole case, and necessarily take much time of the court, adopted its present equity rule 93, which provides as follows:

"When an appeal from a final decree in an equity suit granting or dissolving an injunction, is allowed by a justice or judge who took part in the decision of the cause, he may in his discretion, at the time of such allowance, make an order suspending or modifying an injunction during the pendency of the appeal, upon such terms, as to bond or otherwise, as he may consider proper for the security of the rights of the opposite party."

It is thus apparent that the supreme court, while asserting its power, deemed it advisable to rest the discretion to suspend the operation of a writ of injunction pending appeal from final decree with the trial judge, and established the rule that in general the appellate court would not, pending the appeal and in advance of a decision by that

court upon the merits, interfere with the discretion lodged with the trial judge. This conclusion is bottomed on manifest grounds of propriety. In most cases it would be impossible for the appellate court properly to act in the premises without a careful review of the case upon the merits, which could not fitly be had upon the hearing of a motion. This cause presents a signal instance of the impropriety of considering the merits of the case, necessary to a proper review of the discretion of the trial judge. The cause is not ripe for hearing. The record is not yet printed, and, we are informed, consists of over 3,000 pages of testimony. The district judge was familiar with the evidence. He deemed it his duty to refuse the supersedeas. Without thorough examination of the record, we should be loath to say, and it would be improper to declare, that the discretion exercised by him had been abused.

It is claimed that the opinion of the court below demonstrates that the alleged pollution of the waters of the White river, of which complaint is made, was manifested in the year 1891, which was a year of severe and protracted drought, and was not specially observable in 1892, when the waters of the river were unusually high, during the month of June of which year there was a great flood. We understand the opinion to declare that the pollution of the water alleged to have been caused by the appellant was at all times observable, but to a much greater extent in the year 1891, and that such pollution, in large degree, resulted from the operation of the appellant's factory. The opinion states that the factory discharged daily into the river from its works 3,000,000 gallons of water, which had been used in the factory; that some 80 tons of straw, 27 tons of lime, and 5 gallons of muriatic acid were also daily used, all of which were so used with and operated upon by the water drawn from and discharged into the river; and that some 60 tons of refuse matter were discharged daily with the water into the stream. Whether or not this refuse matter would pollute the water at a distance of 35 miles below the point of discharge was a mooted question upon the trial, determined by the court below adversely to the present appellant. The degree of pollution is doubtless contingent upon the stage of water in the river, and upon the season of the year. And therefore it is claimed that during the present and ensuing winter and spring months this court should permit the appellant to operate its factory upon the suggestion that the appeal can be disposed of before the summer months, and before further pollution of the water to any appreciable degree might be apprehended. If the pollution of the water used for drinking purposes by the people of a large city is contingent upon the stage of water in the river, the court ought not to take it for granted that until the hearing and decision of the case the waters of the river will continue at so high a stage as to preclude the danger of pollution. We should not be asked, in advance of a hearing upon the merits, to assume such responsibility, in departure from the practice established by the supreme court, and in behalf of one adjudged to be the cause of the pollution, and especially when the trial judge, upon review of the evidence, has deemed it improper to grant a supersedeas. The frequent terms of this court give ample opportunity for hearing of appeals, and, if counsel are dili-

gent to speed the cause, we perceive no reason why a hearing cannot be had within the next three months. Since, therefore, the cause may be thus speedily disposed of, we deem it improper to depart from the rule adopted by the supreme court, or to enter into any investigation of the evidence in the case in review of the discretion exercised by the court below in refusing a supersedeas. So to do would establish an undesirable precedent. Until the hearing we must indulge the presumption, always accorded to the decrees of courts, that the judgment is correct. The motion will be overruled.

M. A. FURBUSH & SON MACH. CO. et al. v. LIBERTY WOOLEN MILLS et al.

(Circuit Court, W. D. Virginia. August 27, 1896.)

1. STATUTORY LIENS—EMPLOYEES' WAGES—PRIOR INCUMBRANCES.

The prior lien, given by section 2485 of the Code of Virginia to the employés of transportation companies and mining and manufacturing companies, on all the real and personal property of such companies, and over which no mortgage, deed of trust, etc., can take precedence, attaches only to the interest in its property, acquired by the company which employed the claimants, and takes precedence only over mortgages, etc., made by it; and where such company has purchased property already subject to incumbrances made by the former owner, or has given a purchase-money mortgage, such incumbrances are not displaced by the employés' liens.

2. PAYMENT—WHAT CONSTITUTES—MORTGAGES.

The L. Co., part of whose property was mortgaged to F. & Sons, and which had issued \$10,000 mortgage bonds, \$4,400 of which were sold for value, and the remaining \$5,600 were deposited as collateral for a note, sold its property to M. and others for a sum in cash, which, under the contract of sale, might be used, as far as it would go, to pay the debts of the L. Co. M. and his associates took up the note secured by \$5,600 of bonds, and used the bonds, under an agreement with F. & Sons, as a payment on their mortgage. *Held*, that this transaction did not constitute a payment of the \$5,600 bonds, nor extinguish them, nor postpone their lien under the mortgage to that of the remaining \$4,400 of bonds.

On Exceptions to the Master's Report.

S. V. Southall, for complainants.

M. P. Burks, for defendants.

PAUL, District Judge. The Liberty Woolen Mills, a company incorporated under the laws of the state of Virginia, and a citizen of the state of Virginia, and having its principal office at Bedford City (formerly Liberty), within the Western district of Virginia, purchased of M. A. Furbush & Son, citizens of Philadelphia, in the state of Pennsylvania, certain machinery, fixtures, and supplies, for which the said company was indebted to said M. A. Furbush & Son in the sum of \$14,813.77, as of the — day of June, 1884. To secure the payment of this debt, the company executed a deed of trust on all the said machinery, fixtures, and supplies which it had purchased of M. A. Furbush & Son, in which deed it was provided that the title to the said machinery, etc., should remain in said M. A. Furbush & Son until all the purchase price thereof, interest, and insurance premiums had

been fully paid. Appended to the deed is a list of the machinery, etc., referred to. This deed of trust was duly recorded in accordance with the registry laws of Virginia, and bears date the 25th day of June, 1884. On the 1st day of June, 1885, the company executed coupon bonds to the amount of \$10,000; and to secure the payment of the same, and of the coupons thereto attached, executed a mortgage on all its property, including its real estate situate in the town of Liberty (now Bedford City), the same being a lot of land containing 1.23 acres, together with the mill building, engine house, and all other improvements thereon, and machinery, tools, implements, furniture, and fixtures therein situated, acquired and to be acquired; also all personal property of said company of every kind and description, particularly all material for the product of said mills, whether raw wool or wool in the course of being manufactured, and all manufactured goods now in stock or hereafter produced. S. Griffin and M. P. Burks were made trustees in this deed, and the same was duly recorded, in accordance with the registry laws of Virginia, on June 11, 1885. Of the \$10,000 of coupon bonds so executed and secured, \$4,400 were issued to and taken by, and are now held by, the First National Bank of Bedford City, and the residue, to wit, \$5,600, were hypothecated by the company with the People's National Bank of Lynchburg, to secure a loan. On April 4, 1889, the debt of the company to M. A. Furbush & Son had been reduced to \$11,059.52, of which \$9,878.99 was principal. On April 11, 1889, the stockholders of the company sold all the property, real and personal (the finished goods and office furniture excepted), to W. H. McGhee, T. D. Berry, S. M. Bolling, S. Griffin, and J. L. Campbell, for the sum of \$17,000; these purchasers buying with notice of the debt, amounting to \$11,059.52, due to M. A. Furbush & Son, and the lien on the machinery, etc., for its security, and of the \$10,000 coupon bond mortgage on the entire property of the company; but it was agreed that, "of course, the purchasers have the privilege of using the purchase money, as far as it will go, in settling said mortgages." On the next day, to wit, on April 12, 1889, after the said purchase, an agreement was entered into between the said five purchasers and M. A. Furbush & Son, by which it was agreed that the \$5,600 of the company's coupon bonds which had been hypothecated with the People's National Bank of Lynchburg, and which were then in the possession of the said bank as collateral for a loan of \$——, should be redeemed by the said five purchasers, and turned over to M. A. Furbush & Son, and that M. A. Furbush & Son should receive said bonds, and credit the amount of the same, as of the day received, as a cash payment upon the debt due them. This was done as agreed, and the debt due M. A. Furbush & Son was thereby diminished by the amount of the said coupon bonds, leaving the amount of said debt, secured as aforesaid, \$5,459.52. It was further agreed that the said five purchasers should execute their four bonds, payable to the company, for an amount equal to the residue of said debt due M. A. Furbush & Son, said bonds to be each in an equal amount, and payable, with interest, in four annual installments, and that said four bonds should be assigned by the company to M. A. Furbush & Son as collateral and additional security for the balance of their said debt left due after credit-

ing the said \$5,600 of the company's coupon bonds as a cash payment upon said debt. This was not done, however, but in lieu of it the said five purchasers, in an addendum to said agreement, guarantied to M. A. Furbush & Son the payment (as installed) of the said balance of the debt due them by the company. On the 1st day of August following (1889) the said five purchasers turned over their purchase of the entire property and franchises of the Liberty Woolen Mills to the Liberty Woolen Manufacturing Company, a corporation organized under the laws of the state of Virginia, and the deed, recorded August 7, 1889, was made directly from the Liberty Woolen Mills to the Liberty Woolen Manufacturing Company, the said five purchasers joining in said deed. On the 1st day of January, 1884, M. A. Furbush, C. A. Furbush, Charles H. Knowlton, and John Cromie associated themselves into a company, under the laws of the state of New Jersey, designated as M. A. Furbush & Son Machine Company; and it is stated in the bill, and proven by the deposition of Edwin C. Grice, the said agreement of April 12, 1889, between M. A. Furbush & Son and the said five purchasers of the property of the Liberty Woolen Mills, was made by said firm of M. A. Furbush & Son in trust for and for the sole and exclusive benefit of the said corporation, the M. A. Furbush & Son Machine Company, and that said corporation is also the owner and holder of the said \$5,600 of the coupon bonds of the said Liberty Woolen Mills which were redeemed from the People's National Bank of Lynchburg by the said five purchasers, and turned over to M. A. Furbush & Son. The defendants file exceptions to the master's report on three distinct grounds, which the court will consider in the order in which they are presented.

1. All of the defendants except because the debt of the complainants for \$4,201.97 is stated as the second lien on all of the property, whereas, in fact, it is a specific lien only on such of the property as was sold by complainants M. A. Furbush & Son to the Liberty Woolen Mills, and is not a lien on any of the real estate or other property of the defendants, or any of them. The complainants have a specific lien for said sum of \$4,201.97 on the machinery, fixtures, and supplies sold by M. A. Furbush & Son to the Liberty Woolen Mills, as shown by the mortgage of June 25, 1884, but they have no lien for said sum on any other property of the defendants. This exception will be sustained.

2. Building Liberty Perpetual Building & Loan Company, a creditor of the Liberty Woolen Manufacturing Company, excepts "because the commissioner has failed to state its debt proven in this cause as a lien on the property sought to be subjected in the bill. It should be stated as the lien next after the taxes on all the real and personal estate in the bill and proceedings mentioned." It further excepts "because the \$5,600 of bonds held by the complainant is stated as part of the \$10,000 mortgage in the bill and proceedings mentioned. These bonds, if liens at all, are subsequent to the lien of this company. The bonds were acquired by the complainants long after the passage of the Code of 1887, which gave the complainants full knowledge of the right of the laborers to claim liens on the property superior and paramount to deeds of trust, mortgages, etc. In any view that could be taken of

the case, the debt of this defendant, if not a prior lien to the mortgage for \$10,000, is a lien superior to any lien put on the property since the 1st day of May, 1888, under section 2485 of the Code." This exceptant, the Liberty Perpetual Building & Loan Company, is the holder of certain labor claims assigned to it by persons to whom the Liberty Woolen Manufacturing Company was indebted for work and labor done for said company. It is sought to give this debt priority over every lien reported by the master except the lien for \$440 for taxes against the property. This priority, it is claimed, exists by reason of a provision of Code Va. 1887, § 2485, which is as follows:

"Sec. 2485. Lien of Employés, etc., of Transportation Companies, etc., on Franchises and Property of Company. All conductors, brakemen, engine drivers, firemen, captains, stewards, pilots, depot or office agents, storekeepers, mechanics, or laborers, and all persons furnishing necessary supplies to the operation of any railway, canal, or other transportation company, or of any mining or manufacturing company chartered under or by the laws of this state, or doing business within its limits, shall have a prior lien on the franchise, gross earnings, and on all the real and personal property of said company which is used in operating the same to the extent of the moneys due them by said company for such wages or supplies; and no mortgage, deed of trust, sale, hypothecation, or conveyance, executed since the twenty-first day of March, eighteen hundred and seventy-seven, shall defeat or take precedence over said lien: provided, that if any person entitled to a lien, as well under section twenty-four hundred and seventy-five as under this section, shall perfect his lien given by either section, he shall not be entitled to the benefit of the other."

This provision of the Code, were it the original, would, in the opinion of the court, be clearly null and void, because of its retroactive character, and its consequent impairment of the obligation of contracts. It is in conflict with section 10 of article 1 of the constitution of the United States. A very able and elaborate argument has been made by counsel for the assignee of these labor claims, to show that, though the provision of the Code (section 2485) might be null and void, yet the original act of the legislature, which is substantially the same as this provision of the Code, was passed March 21, 1877, and amended by act of April 2, 1879, and is valid. This court has passed upon the constitutionality of this act as to the wages due employés by manufacturing companies in *Fidelity Insurance & Safe-Deposit Co. v. Shenandoah Iron Co.*, 42 Fed. 376. The court, after carefully considering the argument submitted in this case, finds no reason to change the view held by it in that decision. But a discussion of these questions seems scarcely necessary when we consider between what parties the contract was made out of which these claims grew, and against what property they are sought to be enforced, and out of what fund their payment is asked. This is a suit to foreclose two mortgages executed by the Liberty Woolen Mills, one dated on the 25th of June, 1884, and the other dated on the 1st day of June, 1885. In the year 1889 the mortgagor, the Liberty Woolen Mills, through its president and directors, sold the property at public auction, subject to these two mortgages, at the price of \$17,000, with the privilege to the purchasers of using the purchase money, as far as it would go, in settling the mortgages. This was the consideration in the contract of sale between the vendor and vendees. The object of the sale was to realize a sufficient

sum to pay off the indebtedness of the Liberty Woolen Mills. The purchase of the property by the vendees, with these mortgages on it, with the privilege of applying the said sum of \$17,000, as far as it would go, to their payment, constituted, in equity, a vendor's lien on the property sold by the Liberty Woolen Mills to McGhee and four others. While the property was thus held by these five purchasers, and before they had relieved it of the incumbrances on it by complying with their contract of purchase, another corporation, the Liberty Woolen Manufacturing Company, was formed, and McGhee and the other vendees sold the property to this new corporation on the same terms, the Liberty Woolen Mills and the five purchasers executing a deed jointly to the new purchaser, the Liberty Woolen Manufacturing Company. This new company, in the course of its business, made contracts for labor and failed to pay the wages of its employes. These employes, by pursuing the provisions of the statute, secured liens for their wages on the property of the Liberty Woolen Manufacturing Company, which liens the statute (section 2485) provides shall be a prior lien on the franchise, gross earnings, and on all the real and personal property of said company which is used in operating the same, to the extent of the money due them by said company for such wages; "and no mortgage, deed of trust, sale, hypothecation, or conveyance, executed since the twenty-first day of March, eighteen hundred and seventy-seven, shall defeat or take precedence over said lien." The Liberty Woolen Manufacturing Company, which is the corporation for which the labor in this case was performed, has not executed on its property any mortgage, deed of trust, sale, hypothecation, or conveyance. Should it execute a mortgage or other conveyance, nothing would pass by it except the interest the company might have in the property after satisfying the incumbrances thereon. The interest it has in the property conveyed to it is what it took by purchase,—an equity of redemption. This interest is subject to the labor liens. The legislature has said that claims for wages shall be a prior lien on the franchise, gross earnings, and on all the real and personal property of said company. The real and personal property of the Liberty Woolen Manufacturing Company consists of the interest it acquired by the conveyance of the 1st day of August, 1889, from the Liberty Woolen Mills and its vendees, McGhee and others, to the Liberty Woolen Manufacturing Company.

The contention here is that, no matter when or by whom a mortgage or deed of trust is executed on property held by a manufacturing company, such mortgage or deed of trust can be invaded by the statutory lien for wages, made subsequent thereto, and the creditor deprived of a security taken from an entirely different company from that contracting for the labor, and against which the labor claim is asserted. This was not the intention of the legislature. The destruction of property rights here contended for was not contemplated by the passage of the law for the protection of laborers. In this state it is frequently the case, where a party sells land, instead of reserving a lien in the deed of conveyance, to secure the deferred payments of purchase money, he makes a conveyance with-

out such reservation, but contemporaneously takes from the purchaser a deed of trust on the property as security for the payment of the purchase money. If the purchaser of a tract of land should be a manufacturing company, and execute a deed of trust to secure the payment of the purchase money, according to the contention of counsel for the claimants of the labor liens in this case, the deed of trust so given would be subordinate to the security taken by the vendor for the payment of the purchase money for the land which he had sold to the manufacturing company. The simple statement of this proposition, it seems to the court, is a complete refutation of its correctness. Such gross wrong, in the deprivation of one man of his property in order to pay the debts of another, is contrary to every rule of right and justice known to the laws of this commonwealth, and cannot receive the sanction of this court. The exception will be overruled.

It is contended on the part of the First National Bank of Bedford City that the master erred in reporting as a lien \$10,000, the amount of the coupon bonds issued by the Liberty Woolen Mills and secured by the mortgage of the 1st day of June, 1885. It is claimed that he should have reported \$4,400 of bonds held by the First National Bank of Bedford City as constituting a lien under the mortgage on the whole plant of the Liberty Woolen Manufacturing Company, and that, if the \$5,600 of coupon bonds held by the Furbush & Son Machine Company constitute a lien at all under said mortgage, it is a lien subordinate to that of the First National Bank of Bedford City for \$4,400. The evidence shows that, at the time McGhee and others purchased the property of the Liberty Woolen Mills, \$5,600 of the coupon bonds issued by this company, and secured by the mortgage of June 1, 1885, were held by the People's National Bank of Lynchburg, as collateral security for the payment of a debt due said bank by the Liberty Woolen Mills. It was stated in the argument that the five purchasers of the property, McGhee and others, or some of them, were indorsers on the note held by the bank for which the \$5,600 of coupon bonds were deposited as collateral security. A witness, T. D. Berry, one of the five purchasers of the property, says they were deposited as a pledge to secure the payment of a debt due the bank. The five purchasers, McGhee and others, made an agreement April 12, 1889, with Furbush & Son that the said five purchasers would redeem the \$5,600 of coupon bonds held by the People's National Bank of Lynchburg, and turn the same over to M. A. Furbush & Son, who were to credit the same as cash on their debt of \$11,059.52, secured by the mortgage executed by the Liberty Woolen Mills, June 25, 1884. The Liberty Woolen Mills concurred in this agreement. The bonds were redeemed by the five purchasers paying the debt for which they were held by the bank as collateral security, and were delivered to M. A. Furbush & Son. The contention on the part of the First National Bank of Bedford City is that the five purchasers of the property of the Liberty Woolen Mills became, as between the Liberty Woolen Mills and themselves, primary debtors, and as between the holders of the coupon bonds and themselves they became sureties,

and that, when they redeemed these coupon bonds by paying off the debt for which the said bonds were held as collateral security, they were in the hands of those who were bound for their payment, and were therefore extinguished. The court cannot see that at the time these coupon bonds were redeemed by McGhee and the other purchasers they were bound for their payment, either as principals or sureties. Suppose the debt for which they were held as collateral security had not been paid off, and the bank had sold them as collateral security, can it be pretended that the purchaser of the coupon bonds could have proceeded against these five purchasers, either as primary or principal debtors, or as sureties? They could not have been held as either. If they were sureties for the debt due the bank by the Liberty Woolen Mills, which was not a lien upon the property, and they paid off the debt, they were entitled by subrogation to the collateral security held by the bank. The doctrine is thus stated in Pomeroy's Equity Jurisprudence (volume 3, § 1419):

"The surety who has paid or satisfied the principal's debt or obligation is entitled to be subrogated to, and to have the benefit of, all securities which may at any time have been put into the creditor's hands by the principal debtor, or which the creditor may have obtained from the principal debtor. By the fact of payment, the surety becomes an equitable assignee of all such securities, and is entitled to have them assigned and delivered up to him by the creditor, in order that he may enforce them for his own reimbursement and exoneration."

If McGhee and others, who paid off the debt due to the bank by the Liberty Woolen Mills, were not sureties thereon, then they were purchasers for value of the coupon bonds held as collateral security by the bank, and had a right to dispose of the same. This they did by paying off \$5,600 of the mortgage held by Furbush & Son, and have received credit for this amount on the \$17,000 of purchase money which they agreed to pay the Liberty Woolen Mills. The coupon bonds for \$5,600, and the coupon bonds for \$4,400, secured by the mortgage, occupy the same position as liens, and are properly so reported by the master.

3. "The defendants Griffin, Berry, McGhee, Bolling, and Campbell except because the commissioner has stated that there is a personal liability upon them, or any or either of them. The original purchase price of the property was \$17,000, and whenever this amount is paid, either by the purchasers or by the sale of their property, there could, in the nature of things, be left no further liability on them. It is shown (on page 16 of the report) that \$10,640.27 of this amount has been paid, and it is admitted that the property is liable for the residue, and is amply good for it. When this residue is paid there will be nothing due by the purchasers to the Liberty Woolen Mills, and it was error in the commissioner to state a possible liability for a deficiency which will never exist, as part of the assets of the Liberty Woolen Manufacturing Company." These defendants, Griffin and others, are properly credited by the master with the sum of \$10,640.27 as the amount paid by them of the purchase money of \$17,000. If, upon a sale of the property, the amount realized from such sale be not sufficient to pay off the liens which incumbered the

property at the time these purchasers purchased it, subject to these liens, then there will be a liability on the part of these purchasers to the Liberty Woolen Mills to an amount not exceeding the purchase price of \$17,000, less the said amount of \$10,640.27, which they have paid on account of said purchase price. The third exception is overruled.

The court cannot, at this time, fix the amount of the personal liability, if any, of the five purchasers of the property from the Liberty Woolen Mills, because it does not know what amount may be realized from the sale of the property. A decree will be entered directing the sale of the property, and the application of the proceeds to the payment of the liens as reported by the master, except so far as the said report is modified by the views of the court as herein stated.

SYKES v. HOLLOWAY et al.

(Circuit Court, D. Kentucky. May 8, 1897.)

1. NATIONAL BANKS—LIABILITY OF STOCKHOLDERS—FRAUDULENT TRANSFER OF STOCK.

The burden is on the receiver of a national bank to show that a transfer of stock was made by the transferror for the fraudulent purpose of avoiding liability as a stockholder; and evidence showing that the husband of the transferror had knowledge of the embarrassed condition of the bank before the transfer was made, and that she had admitted that she never transacted any business without the advice of her husband, is not sufficient for that purpose, as against the positive statement of the transferror that no one ever suggested to her to transfer the stock for the purpose of relieving herself from liability, or suggested to her that the bank was in a failing condition, and that she made the transfer to her daughter as an advancement.

2. SAME—GIFT OF STOCK TO IRRESPONSIBLE PERSON.

Under Rev. St. U. S. § 5151, making shareholders in a national bank liable for the debts of the association, and section 5139, providing for the transfer of shares, with a provision that the transferee shall "succeed to all the rights and liabilities of the prior stockholders of such shares; and no change shall be made in the articles of the association by which the rights, remedies, and securities of the existing creditors of the association shall be impaired,"—a transfer of stock, though without consideration and to an irresponsible person, cannot be set aside by the receiver if made in good faith without knowledge of the failing condition of the bank.

Saunders & Thomas, for complainant.

Garvin Bell, for defendants.

BARR, District Judge. This is a suit brought by the receiver of the First National Bank of Starkville to set aside and cancel the transfer of 30 shares of stock in said bank which were owned by Annie W. Holloway, the wife of James M. Holloway, and transferred by her to her daughter Lettie Holloway on the 18th of May, 1893; the bank having suspended on the 14th of the following July, and the complainant appointed receiver in August, 1893. The facts are briefly these: The defendant Annie W. Holloway purchased in October, 1889, at a premium, 30 shares of stock in the First National Bank of Starkville. At that time E. L. Tarry was cashier of said bank,

and continued cashier for some time. Subsequently he became vice president, and was at the time of the purchase of the stock, and continuously until the time of the failure of the bank, the chief executive officer of said bank, and was the son-in-law of the defendant Annie W. Holloway and James M. Holloway, and the brother-in-law of the defendant Lettie Holloway. This bank had originally a capital of \$50,000, which was afterwards (about 1889) increased to \$60,000. The defendant Annie W. Holloway and James M. Holloway went on a visit to Mr. Tarry and wife at Starkville in February, and remained with them about six weeks in the months of February and March, 1893. Mrs. Holloway took with her her certificate of stock in said bank, with the intention of disposing of it. She did not, however, so far as the evidence goes, either dispose of it or attempt to dispose of it, and the reason given by her was that Dr. Holloway was too unwell while there to advise her in regard to the matter. It appears from the testimony that this bank was in fact in an embarrassed condition at that time, and gradually losing the confidence of the local public, and that there was no market for the stock, but it does not affirmatively appear that Mrs. Holloway or Dr. Holloway had any information of this fact. Dr. Holloway himself is shown to have been confined to the house all the time while in Starkville, having gone there for the purpose of rest, and was much of the time confined to his bed. The bank becoming very much in need of money, about the last of April or the 1st of May, 1893, Mr. Tarry, the vice president, came to Louisville for the purpose of making some arrangement with Theodore Harris, the president of the Louisville Banking Company, by which he could get accommodation to tide over the embarrassment. He met Dr. Holloway when he came to Louisville, and explained to him the needs of the bank, and the fact that the bank would be compelled to suspend unless he could make some arrangement for accommodation with the Louisville Banking Company. After this conversation with Dr. Holloway, he saw Theodore Harris, the president of the Louisville Banking Company, and, upon terms not clearly shown, he obtained from him a promise to accommodate him and carry him through his troubles. The fact that Harris had made the promise was communicated to Dr. Holloway, who, according to the statement of the witness, was much relieved thereby. After Tarry's return home, Mrs. Holloway's stock was transferred to her daughter Miss Lettie Holloway. The particulars of this transfer are not shown in the record, but presumably this certificate was sent from Louisville with instructions to make the transfer, which was done. The allegations of the bill are that the transfer was made on the 8th of May. The record, however, shows that the actual transfer was made on the 18th of May, 1893. The bank continued its business until the 14th of July, 1893, when it suspended, and shortly after it was taken possession of by a receiver appointed to wind it up. Afterwards there was an assessment made by the comptroller of 70 per cent. on all of the stockholders; and the purpose of the bill is to cancel this transfer of Mrs. Holloway to her daughter, and recover from her the assessment of \$70 per share on the stock. Miss Lettie Holloway was at the time about 23 years of age, living

with her father and mother, and was a young lady without any pecuniary responsibility. Mrs. Holloway, besides this stock, had other property,—how much is not definitely shown in the record,—and had other children, to whom she had given property, after their marriages, in sums more than the par of this stock.

The defendants, by joint answer, have made an issue upon the question of whether or not the First National Bank of Starkville was insolvent at the time of the transfer, and whether or not it was insolvent at the time of the suspension, in July, 1893. They have also made an issue as to whether or not Mrs. Holloway had knowledge of the insolvency of the bank at the time of the transfer, or such information as would lead her to inquire and know the real condition of the bank. The evidence upon the question of the insolvency of this bank is very voluminous, but we conclude that the bank was in fact insolvent at the time of the transfer of the stock, in May, 1893, as well as in July, 1893, when it suspended, and had been for six months prior thereto, and that the debts which it owed in July, 1893, were substantially the same debts as existed on the 18th of May, 1893. On the subject of Mrs. Holloway's knowledge or information on the condition of the bank in May, 1893, beyond her own statement the evidence is very meager. She has given her deposition, on which there were no cross interrogatories, and in the fourth interrogatory this question is asked her:

"Did you know or believe at the time you made the transfer of the thirty shares of stock in the First National Bank of Starkville, Miss., to your daughter Lettie, in May, 1893,—being the transfer referred to in the complainant's bill,—that said bank was insolvent, or in a failing condition? Answer. I did not know at the time the transfer was made of the 30 shares of stock, in May, 1893, that said bank was either insolvent or in a failing condition."

And in answer to interrogatory 5, which is:

"Had anybody ever told or suggested to you, before said transfer, that said bank was insolvent or in a failing condition, or had any one, before said transfer, suggested to you that you should transfer the stock to escape liability as a stockholder? Answer. I never had a word with any one on the subject. Nobody told me the bank was insolvent or in a failing condition, or suggested it, and nobody suggested that I should transfer the stock to escape liability as a stockholder."

Neither the depositions of Dr. Holloway nor of his daughter Lettie (now Mrs. Higgins) have been taken. Mrs. Holloway in this deposition stated, as did the other defendants in their answer, that this transfer was made to her daughter as an advancement, as her daughter was then engaged to be married, and that the advancements made to her other children were more than the par of this stock. It, however, appears that the advancements made to the other children were made after their marriages, and it also appears that Miss Lettie Holloway did not marry until October, 1895.

Thus, we have the positive denial of Mrs. Holloway, under oath, on the one side, with the facts shown that Dr. Holloway, her husband, had knowledge of the embarrassed condition of the bank a few days before the transfer of this stock, and the further evidence that she said to E. L. Tarry that she "never done anything [in regard to business] without the advice of her husband." But this evidence

is not sufficient to overcome the positive statement of Mrs. Holloway that no one ever suggested to her to transfer the stock for the purpose of relieving herself from liability, and that no one suggested to her that the bank was insolvent or in a failing condition, and the further statement of the answer, and her own statement in her deposition, that this transfer was made as an advancement to her daughter. The complainant is seeking to have this transfer canceled upon the ground that the transfer was fraudulent, and the burden of showing that fact is upon him. If this transfer is fraudulent, it must rest upon the other facts, which are not controverted, besides being clearly shown, that Miss Holloway was at the time a young lady living at the home of her father and mother, entirely dependent upon them, without any means whatever, and without, as far as the record shows, any immediate prospect of means; having this stock transferred to her as a gift, and hence without valuable consideration. It is argued that this stock was an advancement, and as such would have been chargeable to Miss Holloway, as between her and her brothers and sisters, in the event of the death of her mother. Whether or not it would have been an advancement depended entirely upon the will of Mrs. Holloway, as it would only have been charged to Miss Lettie Holloway as an advancement, as to property undisposed of by her mother, in the event she died intestate, or, if testate, as to the property undisposed of, and then only at its value as of the time of the transfer. Ky. St. § 1407. We must therefore assume that the transfer of this stock was a gift, and not for a valuable consideration. The inquiry is whether or not, under the statute, Mrs. Holloway's transfer should be declared invalid. Her liability, if any, must depend upon the statute. The national banking act provides that:

"Shareholders of every national banking association shall be held individually responsible, equally and ratably, and not one for another, for all contracts, debts, and engagements of such association, to the extent of the amount of their stock therein, at the par value thereof, in addition to the amount invested in such shares." Rev. St. U. S. § 5151.

And section 5139 provides:

"That the capital stock of each association shall be divided into shares of \$100 each, and be deemed personal property, and transferable on the books of the association in such manner as may be prescribed in the by-laws or articles of association. Every person becoming a shareholder by such transfer shall, in proportion to his shares, succeed to all the rights and liabilities of the prior holder of such shares; and no change shall be made in the articles of the association by which the rights, remedies, or security of the existing creditors of the association shall be impaired."

These sections were originally a part of the same enactment, and should be construed together. We must presume from the evidence in this record that this transfer was made, not for a valuable, but for a good, consideration, only, and that it was in fact an out and out transfer, made without knowledge or notice of the embarrassed condition of the bank; yet it was made by a mother, who could respond to her liability as a stockholder, to a daughter, who could not then respond in any degree to that liability. It therefore, to that extent, impaired the security of the existing creditors of the bank; and the

inquiry is whether that fact, which was known to Mrs. Holloway, is sufficient to cause the setting aside and cancellation of said transfer. It will be observed that the language of section 5139 is not that no transfer shall be made by which the rights, remedies, and securities of the existing creditors of the association shall be impaired, but that no change shall be made in the articles of the association, etc., which must have reference to the by-laws under which the transfers were permitted to be made. We therefore must look at the decisions under this act, and see whether or not they require a valuable consideration for a transfer, and that the transferee, under such circumstances, shall be as solvent as the transferor. I find in the decisions some broad expressions which would seem to sustain the contention of the complainant, but I have been unable to find any case in which the question of the pecuniary condition of the transferee is a material element on the question of sustaining the transfer. It is a most material matter where the inquiry is whether or not the transfer is a bona fide, out and out transfer, or a mere sham; but, as far as we have examined the cases, none of them go to the effect that if the transfer, though without a valuable consideration, was bona fide, and the transferor had no knowledge of the embarrassed condition of the bank, and no information which would have given him or her such notice, such transfer is invalid or fraudulent. Thus, it is said by the supreme court in the case of *Bank v. Case*, 99 U. S. 631:

"While it is true that shareholders of the stock of a corporation generally have a right to transfer their shares, and thus disconnect themselves from the corporation, and from any responsibility on account of it, it is equally true that there are some limits to this right. A transfer for the mere purpose of avoiding his liability to the company or its creditors is fraudulent and void, and he remains still liable. The English cases, it is admitted, give effect to such transfers, if they are made, as it is called, 'out and out'; that is completely, so as to divest the transferor of all interest in the stock. But even in them it is held that if the transfer is merely colorable, or, as sometimes coarsely denominated, a sham,—if in fact the transferee is a mere tool or nominee of the transferor, so that, as between themselves, there has been no real transfer, 'but in the event of the company becoming prosperous the transferor would become interested in the profits,—the transfer will be held for naught, and the transferor will be put upon the list of contributories.' *Williams' Case*, L. R. 9 Eq. 225, note, where the transfer was, as in the present case, made to a clerk of the transferor, without consideration; *Payne's Case*, Id. 223; *Kintrea's Case*, 5 Ch. App. 95. See, also, *Lindl. Partn.* (2d Ed.) p. 1352; *Chinnock's Case*, 1 Johns. Eng. Ch. 714; *Hyam's Case*, 1 De Gex, F. & J. 75; *Budd's Case*, 3 De Gex, F. & J. 296. The American doctrine is even more stringent. Mr. Thompson states it thus (and he is supported by the adjudicated cases): 'A transfer of shares in a failing corporation, made by the transferor, with the purpose of escaping his liability as a shareholder, to a person who from any cause is incapable of responding in respect to such liability, is void as to the creditors of the company and as to other shareholders, although, as between the transferor and transferee, it was out and out.' *Nathan v. Whitlock*, 9 Paige, 152; *McClaren v. Franciscus*, 43 Mo. 452; *Marcy v. Clark*, 17 Mass. 329; *Johnson v. Laffin* (by Dillon, J.) 6 Cent. Law J. 131, Fed. Cas. No. 7,393."

In that case, however, the question was simply whether or not the holder of collateral security, who had the stock transferred to it, and subsequently to a clerk in its bank, without consideration, was liable under the national banking act; and it was held that, the transfer

having been made to the bank, the subsequent transfer to the clerk was colorable merely. This statement of the supreme court, as quoted, is as strong a statement as I have seen; but it will be observed that it is a material element that the transfer was made in a failing corporation for the purpose of escaping his liability as a shareholder, and that the purpose is coupled with the want of capacity of the transferee to respond to his liability. So in *Bowden v. Johnson*, 107 U. S. 261, 2 Sup. Ct. 254, the court say:

"But it was held by this court in *Bank v. Case*, 99 U. S. 628, that a transfer on the books of the bank is not in all cases enough to extinguish liability. The court in that case defined as one limit of the right to transfer that the transfer must be out and out, or one really transferring the ownership, as between the parties to it. But there is nothing in the statute excluding, as another limit, that the transfer must not be to a person known to be irresponsible, and collusively made with the intent of escaping liability and defeating the rights given by statute to creditors. Mrs. Valentine might be liable as a shareholder succeeding to the liabilities of Johnson, because she has voluntarily assumed that position; but that is no reason why Johnson should not, at the election of the creditors, still be treated as a shareholder,—he having, to escape liability, perpetrated a fraud on the statute."

In that case the court held that Johnson had knowledge of the failing condition of the company, and that Mrs. Valentine, who lived in his house, had not paid a consideration for the alleged transfer, and that she was without means to respond to her liability, and hence that it was not a bona fide transaction, but made by Johnson with a view to escape his liability as a shareholder. It will be observed in this case, as in the other, that the knowledge or notice by the transferor of the failing condition of the bank was considered as a material element in making out the fraud.

In the case of *Foster v. Lincoln*, reported in 74 Fed. 382, which is referred to by counsel for the complainant as decisive of this case, Lincoln was president of a national bank at Lyndon, Vt., and held 25 shares of stock in the First National Bank of Deming, N. M., and the bank of which he was president also held 50 shares in the same bank. On September 15, 1891, a telegram came to the Lyndon Bank urgently calling for \$5,000 to be sent by telegraph in aid of the Deming Bank of New Mexico. This came to the knowledge of Mr. Lincoln, president of the First National Bank of Lyndon, and was considered by him and others. On September 21st he transferred his stock in the Deming Bank, in equal parts, to his five children, one of whom was married, two of whom were minors, and all of whom were irresponsible for assessments on it. He testified that he contemplated giving them property, for which they began to ask, and he said to them, "I have \$5,000 in New Mexico bank stock. I will give you \$1,000 each;" and the transfer was made without other consideration. The New Mexico bank, according to the testimony of the cashier, had never been solvent, and was badly insolvent, with liabilities of about \$150,000 to depositors and other banks at that time, and on February 3, 1892, failed. The suit was brought by the receiver to recover an assessment of 82 per cent. against Lincoln. Wheeler, District Judge, says:

"The defendant, Benjamin F. Lincoln, appears to have been under liability to the creditors of the bank when this transfer was made. These statutes

seem to intend that this liability should not be impaired by transfer, and especially should it not be by a transfer merely voluntary. As a bank man, he must have known of this liability, and he had warning of the straits of the bank by the telegram six days before the transfer. In these circumstances, he must have made the transfer in contemplation of this liability, although he did not know what it would amount to, and hoped, and perhaps expected, it would not amount to anything. Had the transfer been made on adequate consideration for such shares, in a solvent bank, to a purchaser without the warning he had, the sale would probably be voidable, at the instance of the purchaser, for the deceit. The transfer should be so now, at the instance of the creditors represented by the receiver. *Bowden v. Johnson*, 107 U. S. 251, 2 Sup. Ct. 246."

It will be observed in this case that the fact of his knowledge of the condition of the bank, and the warning of the straits in which it was by the telegram immediately before the transfer, is made a material element in making out the liability.

In the recent case of *Stuart v. Hayden*, 18 C. C. A. 621, 72 Fed. 406, referred to by counsel, and decided by the court of appeals of the Eighth circuit in considering the question of the liability of a stockholder who had transferred his stock in a national bank, the court say:

"In order to determine whether or not this receiver was entitled to enforce this liability, the court below was required to answer two questions, and two questions only. They were: (1) Did Stuart make this transfer of his stock to Gruetter & Joers on December 22, 1892, with knowledge, or with such notice as would, if pursued with reasonable diligence, have given him knowledge, that the bank was insolvent, or its failure impending, and for the purpose of escaping his individual liability on the stock? And (2) did the transfer cause any damage to the creditors of the bank?"

It sustained the lower court in finding affirmatively on both of these inquiries, and held the transferror liable for the assessment. The damage which was caused to the creditors of the bank was the insolvency of the transferee; but it will be seen that the knowledge or notice of the transferror was held an indispensable element in making out the liability. It seems to us that upon principle the pecuniary condition of the transferee of stock in a national bank at the time of the transfer, while material upon the inquiry of whether or not the transfer is bona fide or colorable, cannot be a decisive element on the question of liability of the transferror, where the transfer has been made out and out without knowledge or notice of the failing condition of the bank. Such a test of liability of a transferror of stock would materially destroy the transferability of such stock, and would be an impracticable test to apply; and even though it be conceded, as in this case, that the consideration for the transfer was a good, but not a valuable, one, that fact should not be sufficient to set aside and make fraudulent the transfer. It seems to us clear that the ownership of this stock passed from the defendant Annie W. Holloway to her daughter Lettie Holloway, as between them, as perfectly as if a full, valuable consideration had been given. Our attention has been called to the recent case of *Pauly v. Trust Co.*, which has been published, since the submission of this cause, in 165 U. S. 606, 17 Sup. Ct. 465, in which the supreme court has held, where a party has stock in a national bank, and transfers it as collateral security to another, who had the transfer made in express terms as

pledgee, that in fact the relations which existed between the original stockholder and the holder of the collateral security were simply those of borrower and lender of money, and, as this relationship was shown upon the certificate of stock and upon the books of the national bank, the pledgee was not liable for an assessment against the stock made by the comptroller. The court indicated in this opinion that the original holder (the borrower of the money), being the true owner, would be liable to the assessment, and in the opinion explained somewhat the broad language used in the case of *Bank v. Case*, 99 U. S. 628. We see nothing in this opinion which militates against the view we have taken, but it rather sustains it. We therefore conclude that the complainant's bill must be dismissed, with costs, and it is so ordered.

FIDELITY INSURANCE, TRUST & SAFE-DEPOSIT CO. v. ROANOKE IRON CO.

(Circuit Court, W. D. Virginia. September 8, 1896.)

1. STATUTORY LIENS—SUPPLIES TO IRON COMPANY—PROPERTY SUBJECT TO.

The R. Iron Co. made a contract with C. Bros., brokers, for the sale of the iron produced at its mills, under which the iron was shipped to C. Bros. on bills of lading in their name, was stored by them, and sold by them, at their discretion, they advancing a stipulated proportion of the market price to the R. Iron Co., and accounting for the proceeds when the iron was sold, no control over the sales being reserved to the iron company. *Held*, that iron so delivered to C. Bros. was not a part of the personal property of the iron company, so as to be subject to the liens of creditors furnishing supplies to the iron company after its delivery, under section 2485 of the Code of Virginia.

2. SAME—CONTRACT LIENS—PERSONAL PROPERTY.

The R. Iron Co., in order to secure the P. Warehouse Co. for advances of money, gave to it, from time to time, written instruments stipulating that the warehouse company should have a first lien on certain specified quantities of iron. All the iron manufactured by the iron company was stored in yards leased by the warehouse company, and kept in its possession. All sales made by the iron company were filled by taking iron from these yards, but, if the amount on hand ever fell below the amount stated as security for the loans, it was at once made good, and an amount greater than that so held as security was usually kept on hand. *Held*, that though no specific iron was set apart to the warehouse company, as it was in possession of the whole, the transaction constituted a valid pledge of the amounts of iron stated as security for the loans, but subject to the lien of persons furnishing supplies to the iron company by virtue of section 2485 of the Code of Virginia.

3. SAME—CARRIER'S CHARGES.

A claim of a common carrier, for freight on the transportation of goods, is not within the provisions of section 2485 of the Code of Virginia, giving to persons furnishing supplies to a mining or manufacturing company a lien on its personal property.

4. CORPORATIONS—RECEIVERS—JUDGMENT LIENS.

When a receiver has been appointed to take charge of the assets of an insolvent corporation, judgments thereafter obtained are not liens on its real estate.

5. PLEDGE—SALE OF COLLATERAL—RECEIVERS.

The holder of collateral security for a loan made to a corporation has a right to sell the same, notwithstanding a receiver of the corporation has been appointed before a default on the debt.

6. SAME—PURCHASE BY PLEDGEE.

The holder of collateral security for a debt, who is given, by the terms of the pledge, full power and authority, on failure of the debtor to pay, to sell the collateral at public or private sale, and without advertising or giving the pledgor any notice or making any demand for payment, may buy such collateral, at a sale conducted in good faith, and thereby acquires a good title.

7. STATUTORY LIENS—SUPPLIES TO IRON COMPANIES—NOTICE.

The 90 days within which notice must be filed, in order to secure the lien provided by section 2485 of the Code of Virginia for supplies furnished to a mining or manufacturing company, begins to run, in the case of supplies furnished under one contract, and delivered from day to day, from the date of the last delivery; and the lien applies to the whole series of connected items forming a running account, and not only to the deliveries within 90 days before the filing of the notice.

8. SAME—NATURE OF SUPPLIES.

Claims for the price of goods furnished to an iron manufacturing company to supply the stock of a commissary store, maintained by such company for the use of its employes, are not entitled to the lien provided by section 2485 of the Code of Virginia for those who furnish to a mining or manufacturing company supplies necessary to its operation.

9. SAME—AFFIDAVIT—SUFFICIENCY OF VERIFICATION.

An affidavit made and filed for the purpose of securing a lien under section 2485 of the Code of Virginia, which is verified in another state, but lacks the authentication of the magistrate's signature, required by section 174 of the Code, is not a nullity; but the claimant of the lien may show that the oath was properly administered, and the omission of the authentication may be supplied.

10. SAME—TIME OF FILING—EXTENSION.

An order of reference to a master, to ascertain claims against an insolvent corporation, suspends the running of the 90 days' limitation for filing claims to liens, under section 2485 of the Code of Virginia.

11. SAME—RIGHT TO LIEN—MANAGER'S SALARY.

Claims for salary by the manager and the secretary and treasurer of a corporation are not labor claims, within the provisions of the Code of Virginia giving such claims a priority.

12. SAME—LIEN FOR LABOR—NOTICE.

Notice under the Virginia statute of a claim to a lien for labor, under a contract to be performed at so much per day, may be filed within 90 days after the completion of the contract; and such a claim will not be severed, and only so much allowed as falls within 90 days before the notice.

This cause was, by a former decree, referred to a master commissioner, to take an account, and report upon the rights of the plaintiff company, trustees, and of the holders of the bonds issued under a deed of trust or mortgage made by the defendant, the Roanoke Iron Company, dated June 9, 1891, an account of all the debts and liabilities of said company, the liens on the property of said company, and the priorities of such liens; also, an account of all the assets and property, real and personal, of every kind, and all interests in property belonging to said defendant company.

To the report of the master, made in pursuance of the decree of reference, a number of exceptions have been filed by different creditors of the defendant corporation, and these present the questions to be considered. For convenience, the court will consider them in numerical order, relative to their importance.

Richard C. Dale, for complainant.

Seward, Guthrie, Morawets & Steele, for Crocker Bros.

John Douglass Brown and Scott & Staples, for Philadelphia Warehouse Co.

Griffin & Glasgow, for Mill Creek Coal & Coke Co.

Blair & Blair, for New York & V. Mining & Mineral Co.

Watts, Robertson & Robertson, Lucien Cocke, and Thos. W. Miller, for certain supply lien creditors.

Before SIMONTON, Circuit Judge, and PAUL, District Judge.

SIMONTON, Circuit Judge. 1. The first question brought to our attention is that between Crocker Bros. and the receiver. Crocker Bros. is a firm of brokers in New York, dealing principally in iron. They were sole agents for the sale of the product of the Roanoke Iron Company. Their agency began in 1889. The course of business was this: Crocker Bros. would make contracts for the sale of the iron product of the company, and send orders therefor to Roanoke. The company would fill the orders, shipping the iron direct to the purchaser. This iron never came into the actual possession of Crocker Bros. Crocker Bros. guarantied all their sales, and each month furnished an account current. If the iron company wanted money from the sales at any time, Crocker Bros. furnished it, whether they had made collections on the sales or not. As they were del credere agents, this was reasonable. Until 1893 the business was prosperous, and sales of iron were readily made. But in 1893 business became slack. There was depression all over the country, and the iron company had to borrow money to meet current expenses for labor, supplies, etc. They had sundry interviews with Crocker Bros., and verbal and written communications in 1893. On August 2, 1893, Crocker Bros. wrote to the Roanoke Iron Company as follows:

"We beg to recapitulate terms of agreement decided upon in our various conversations and letters, as follows, viz.: We are to continue as the sole and exclusive agents of your company for the sale of the entire product of your furnaces and mills, collecting the proceeds, and remitting to you in due course. In the conduct of the business, we will advance if and when desired against iron shipped and properly put into our legal possession to the extent of three-fourths ($\frac{3}{4}$) of the market value of such iron, freight and any expenses to be considered as part of said $\frac{3}{4}$ advance, and margins to be kept on such basis."

The letter then goes into detail as to rendering account sales and accounts current, the rate of interest, the remuneration of the agents. The duration of the agreement is fixed at five years, and thenceforward indefinitely, unless six months' notice in writing be given of its discontinuance. The Roanoke Iron Company to have the right to modify remuneration and the services of the agents by giving ninety days' notice, in these particulars only; none other is mentioned. The commission may be reduced from 4 per cent. to $2\frac{1}{2}$ per cent. on gross sales, covering only, however, commission for selling, without guaranty of sales, and without any obligation to make advances. In reply, the Roanoke Iron Company approve all the terms but the duration of the contract, which they propose to limit to one year, and after that subject to the six-months notice. This was accepted. Up to that time, as has been seen, Crocker Bros. had no possession, actual or constructive, of the product of the iron

company. They made contracts of sale, which the company filled by shipment from their works in Virginia. Henceforward, when Crocker Bros. made advances, iron upon which the advances were made was shipped on the Norfolk & Western Railroad by the iron company, on bill of lading in the name of Crocker Bros., and by their direction, was sent to them at Lambert's Point, Va., where it was stored in the name of Crocker Bros., and marked. Afterwards the place of shipment was changed to a lot in Roanoke, under the complete control of Crocker Bros., and there the iron was in like manner stored and marked. There were 4,000 tons of iron at Lambert's Point, and some 2,000 tons in Roanoke,—some 6,000 tons in all. Certain creditors of the company for supplies claim that this iron is subject to a lien they have under the statute of Virginia, and have insisted that the receiver should take possession of it for this purpose. On this point the receiver asks instructions. All of this iron held by Crocker Bros. was in their possession before the supplies were furnished for which the lien is claimed, except, perhaps, 144 tons.

The supply creditors base their claim upon section 2485 of the Code of Virginia. That section provides:

"All persons furnishing supplies to a mining or manufacturing company necessary to the operation of the same shall have a prior lien upon the personal property of such company, other than that forming a part of its plant, to the extent of the money due them for such supplies. And also a lien upon all the estate, real and personal, of such company (plant not excepted), which said last lien, however, upon all such real and personal estate, shall be subject and inferior to any lien by deed of trust, mortgage, hypothecation, sale, or conveyance made and executed and duly admitted to record prior to the date at which such supplies are furnished."

The question then is: Is this iron in the possession of Crocker Bros. a part of the personal property of the Roanoke Iron Company? It is evident, both from the reason of the thing and from the words of the statute, that no lien can be acquired by any person furnishing supplies until he has furnished the supplies, and then the lien can only attach on the property at that time and thereafter the property of the company. If, therefore, this iron ceased to be the property of the Roanoke Iron Company before the supplies were furnished, clearly there is no lien. This iron was transferred from the possession of the Roanoke Iron Company, and delivered to Crocker Bros., with a bill of lading, which was a muniment of title. Means v. Bank, 146 U. S. 627, 13 Sup. Ct. 186. Thenceforward the iron passed to them. Under the terms of the contract appearing in the letter quoted above, no provision was made for the return of the iron in specie, in whole or in part, to the iron company. It was to be held by Crocker Bros., to be sold by them, to be kept in their actual possession, and so ready for delivery. The first proceeds of sale were to go to their advances; then all charges were to be deducted; and, after an account for these was made up, then the iron company had a right to the net balance, if any. Even were this the ordinary case of a consignment to a factor, selling under a *del credere* commission, the title to the iron would have passed to Crocker Bros., and out of the iron company. In Jones on Liens the law is stated:

"An agent acting under del credere commission has a lien for his advances and commissions. A bill of sale by his principal to him of the goods in his possession is in effect a foreclosure of his lien on them." A bill of sale works, constructively, delivery of personal property. It is the delivery which passes the title to personal property. In the present instance there was an actual manual delivery of the personalty, accompanied by a bill of lading,—a muniment of title. But this is not the ordinary transaction between a factor and his customer. Goods ordinarily are sent to a factor for the purpose of sale. That is the sole purpose for which they are sent, and the reason for his possession and control of them. If, pending the negotiations for or the offer of a purchase, he lay out any money for the principal, he can reimburse himself from the proceeds of the sale when made. Such advances, however, are only incidental to the sale, which is the primary purpose and object of his agency. But, as he only has control of the goods to sell them, he has only a qualified property in them, sufficient to protect him in his possession while carrying out the purpose of his agency. But he is not the owner of the goods. Jones, Liens, § 474. He is still the agent of, and under the orders of, his principal, and can be controlled by him. But in the present case the iron was delivered to Crocker Bros. for the purpose of obtaining a loan of money. It was delivered with every formality for the passage of the legal, as well as the beneficial, title to Crocker Bros. True, sales of it were to follow, not, however, under the direction of and for the benefit of the Roanoke Iron Company, but under the control and direction of, and to reimburse, Crocker Bros. Over these sales no control whatever was reserved to the iron company. There is some ambiguity in the contract upon the question whether Crocker Bros. could look to any other means of reimbursement than these sales. What of the property, then, was left in the Roanoke Iron Company? It had the right to an account from Crocker Bros., and on such account a demand for the balance of money appearing due thereon, the balance, a result after reimbursing the loans and payment of the expenses. That is the only interest the iron company had in the transaction.

Now, when we speak of a lien on personal property, we mean something which can be enforced by keeping in possession, or which can be reduced into possession. It must be property visible and tangible, capable of being reduced into possession. But in the present case, when advances for supplies were made, the iron had ceased, as such, to be the property of the Roanoke Iron Company. All that was left of it was an equity to call Crocker Bros. to an account. There is no such thing as a legal lien on an equity. When there is no legal right, there is no legal remedy. *Badlam v. Tucker*, 1 Pick. 389; *Scott v. Scholey*, 8 East, 483. When the iron is disposed of, Crocker Bros. must account with the receiver for the net balance which remains, and it will be applied by him to the payment of creditors, according to their legal or statutory priorities. Meanwhile, the possession of Crocker Bros. cannot be disturbed.

2. The Philadelphia Warehouse Company presents a claim which said warehouse company alleges is a lien on several thousand tons

of pig iron and muck bar, of the product of the defendant company. The facts of this case are these: The Roanoke Iron Company made contracts for the loan of money with the Philadelphia Warehouse Company. The nature and character of each loan are clearly stated in the able report of the standing master. One example gives the case of all. On March 14, 1893, the warehouse company lent to the iron company \$5,000, less the discount, payable July 12, 1893. On the same date the iron company made a written paper, in the nature of an invoice consignment contract, in which, after an itemized account or invoice of 715 tons of pig iron deposited with and confided to the care and management of the warehouse company by the iron company, the merchandise belonging to the iron company, and the money having been advanced by the warehouse company to the iron company upon the security of the merchandise, it was then stipulated that the warehouse company, for this advance, was to have a lien prior to all other claims on this merchandise, and, in case the \$5,000 was not paid, the warehouse company was to have the right to sell the same, and receive the net proceeds, to be applied to the payment in full of the amount due. This loan was extended from time to time, and, when the pig iron fell in value, a new invoice was made for a larger number of tons of iron, the old invoice being canceled. This contract was evidenced by promissory notes. At each renewal the old note was canceled. There were several loans of this character, all secured in the same way, renewed from time to time, each renewal and the security governed by the same practice. The amount of \$60,000 and upward were loaned, and the security is 7,881 tons of pig iron and 857 tons of muck bar. All of this iron is now on premises held by the warehouse company under lease, being a part of a larger quantity of iron on the same premises, the warehouse company having no property of any kind in the surplus. When these loans began, and during the subsequent negotiations and creation of the rest of the loans, the following plan was adopted: The iron was bulky and heavy, and very expensive in handling. The warehouse company therefore leased parcels of land from the iron company next to the cast house of the iron company, and on this the iron was stored; the warehouse company having an agent specially designated in charge of their iron, and signs being put up on the premises on which appeared "Storage Yard Philadelphia Warehouse Company." The agent of the warehouse company, custodian of this leased land, was R. P. Patterson, at the time of his appointment manager also of the iron company's yards. He was appointed March 14, 1893, the date of the first loan, and resigned 15th of January, 1895. He was succeeded by John M. Langton, who was at the time and afterwards the foreman of the yards of the iron company. All of the iron made by the iron company was stored on these leased premises. All sales effected by the iron company in due course of business were filled by taking the iron from time to time as needed from the iron so stored, care being taken that the iron on the leased premises should not fall below the amount stated to be the security on these loans. Occasionally, notwithstanding this care, there would be such an output of shipment that the amount of iron in the yard

fell below this amount, sometimes to the extent of 200 tons. This, however, was corrected as soon as possible. But no specific iron was set apart out of the mass for the warehouse company. All of the iron of the iron company was on the premises of the warehouse company, and in that mass it was understood between the two companies that a certain number of tons, less than the whole, was pledged to the warehouse company. The controversy is between the parties who furnished supplies to the iron company and the warehouse company. Have the former a lien prior to the latter?

The first question is, was this arrangement between the iron company and the warehouse company a valid pledge? Two things are essential to constitute a pledge: First, possession by the pledgee; second, that the property pledged be under the power and control of the creditor. "The difference," says Bradley, J., in *Casey v. Cavaroc*, 96 U. S. 477, "between a mortgage and a pledge is that title is transferred by the former, and possession by the latter. Indeed, possession may be considered as of the very essence of a pledge; and, if possession be once given up, the pledge, as such, is extinguished." See, also, *Christian v. Railroad Co.*, 133 U. S. 243, 10 Sup. Ct. 260. In *Easton v. Bank*, 127 U. S. 532, 8 Sup. Ct. 1297, it is thus stated: "When personal property is pledged, the pledgee acquires the legal title and the possession. In some cases, it is true, it may remain in the apparent possession of the pledgor, but, if so, it can only be when the pledgor holds as agent for the pledgee." One step further: The pledgee may deliver the personalty pledged again to the pledgor. If he do this for a temporary purpose only, the goods to be redelivered, or if they be put into the hands of the pledgor for sale as agent for the pledgee, or if the pledge be of choses in action for collection by the pledgor for the use of the pledgee, this will not defeat the pledge. But the delivery back by the pledgee or with his consent, without more, terminates the pledge. *Casey v. Cavaroc*, 96 U. S. 478.

In the case at bar, all the iron, output of the iron company, was delivered upon land in the possession of and held by the pledgee. The leases reserved only a right of way over the lands to the iron company and its agents, making this provision specially: "Provided it (the iron company) at no time interferes with the pig iron or other material stored thereon, without first receiving written authority from the party of the second part [the warehouse company] for the removal or other disposition of said material." In a certain amount of this iron the warehouse company had a qualified right. It had, however, possession of the whole, and, although it did permit the iron company from time to time to sell from this whole parts of the iron, still this was done by its permission, and evidently with the understanding that the amount of iron necessary to secure the warehouse company should remain in its possession, for, when that amount was encroached upon, it was immediately made good. In this feature the case at bar resembles *Macomber v. Parker*, 14 Pick. 497, a case quoted, commented on, and approved in *Casey v. Cavaroc*, *supra*. In that case, and in this, the possession of the whole of the goods, a part of which was pledged, was in the pledgee, who per-

mitted the pledgor to dispose of a part of the whole. The supreme court of Massachusetts held that this did not defeat the idea of a pledge, or invalidate the pledge. It will be observed that this is not an attempt to pledge a part of a thing in bulk without separation from that of which it constitutes a part, as in *Golder v. Ogden*, 53 Am. Dec. 618, or in the cords of bark used as illustration by Jones, *Pledges*, p. 21, § 26, and *Collins v. Buck*, 63 Me. 459, the goods in bulk remaining in the possession of the pledgor. But the case is like *Weld v. Cutler*, 2 Gray, 195, where a mortgage of a part of a pile was held good, although unseparated, because the whole pile was delivered into the possession of the mortgagee. Looking at the question, is this a valid pledge? And, applying the test, was there delivery to the pledgee? The fact that the whole of the iron, a part only of which was pledged, was delivered to the pledgee, shows that, the whole having been delivered, the part also must have been delivered, and the question must be answered in the affirmative.

The next question is, is this lien of the pledgee prior to that of the supply creditors? As has been seen, the warehouse company holds the iron in pledge. The distinctive character of the pledge is that it does not transfer title, but transfers possession. *Bradley, J.*, in *Casey v. Cavaroc*, *supra*. It is a bailment of personal property, as security for some deed or engagement. *Story, Bailm.* § 286. The general property remains in the pledgor, with a qualified property in the pledgee, giving the pledgee every right which can secure the possession. It is, in the strictest sense, a common-law lien. *Peck v. Jenness*, 7 How. 620. The supply creditors claim under the statute law of Virginia. The law now of force in Virginia is the act approved February 15, 1892 (Acts 1891-92, p. 362, c. 224, amending the Code of Virginia adopted in 1887). This Code of Virginia is a statute speaking from its date, and has all the formalities of an act. By this act, supply creditors have a prior lien on all the personal property of the corporation, except that forming a part of the plant, and a lien upon all the real and personal property of the corporation, whether part of the plant or not, subject and inferior to any lien by deed of trust, mortgage, hypothecation, sale, or conveyance, executed and recorded prior to the date on which supplies were furnished. The language of the statute is obscure. The history of the legislation throws some light on it. On March 21, 1877, an act was passed entitled "An act to secure the payment of wages or salaries to certain employes of railway, canal, steamboat, and other corporations." The terms of this act sought to give to all employes, and to all persons furnishing supplies to transportation companies, a prior lien on the franchises, gross earnings, and on all the real estate and personal property used in operating the corporation, over any mortgage, deed of trust, sale, conveyance, or hypothecation executed of said property after the date of that act. In 1879 an act was passed entitled "An act to amend and re-enact the first and second sections of an act approved March 21st, 1877, entitled 'An act,' etc. (as above). This act of 1879 amended the former act by including in it "any mining or manufacturing company chartered under or by the laws of this state, or doing business within its limits," and by adding a proviso that the liens of employes

and officials shall be prior to all other liens. Both of these acts, so far as they related to supply creditors, were held unconstitutional, the title of the act betraying no purpose as to them. *Fidelity Ins., Trust & Safe-Deposit Co. v. Shenandoah Val. R. Co.*, 86 Va. 1, 9 S. E. 759. Then came the Code of 1887, re-enacting the act of 1879 (section 2485). Next we have the act of February 15, 1892, entitled "An act to amend and re-enact sections 2485 and 2486 of the Code of Virginia, in relation to the lien of employes, &c., of transportation, mining, and manufacturing companies on franchises and property of said companies, and how the same may be perfected and enforced." This act retains the provision in favor of employes, giving them a prior lien on franchises, gross earnings, and all the real and personal property of the corporation, notwithstanding any prior instrument creating a lien, and gives to persons furnishing supplies a modified security, that is, a prior lien on all personal property not used in the plant, and a lien on all the property, real and personal,—subject, however, to liens created by deeds or instruments in writing properly recorded prior to the date of the supplies furnished; that is to say, upon all the personal property of the company not used in the plant, they have a prior lien; on all the real estate, whether used in the plant or not, and apparently on all the personal property used in the plant, a lien inferior to a lien by deed of trust, mortgage, etc. This iron held by the warehouse company was the property of the iron company not used in its plant, a bailment in the hands of the warehouse company, upon which it had a lien. The act of the legislature of Virginia of force when the contract was made, and held to be valid in *Virginia Development Co. v. Crozer Iron Co.*, 90 Va. 126, 17 S. E. 806, declares that the claims of persons furnishing supplies have a prior lien on all the personal property of a corporation not a part of its plant. This act entered into and was a part of the contract made by the warehouse company, and it received the bailment subject to the provisions of the act. This case seems to come within the words of the statute, and the conclusion cannot be avoided that the supply creditors have a lien on this iron prior to that of the warehouse company. Stress is laid upon the use of the word "prior" in characterizing this lien, the comparative, and not the superlative, degree. But, as between two liens or in a class of liens, the one superior to the others very properly can be said to be prior.

PAUL, District Judge. 3. The Norfolk & Western Railroad Company files a large claim against the defendant company as freight charges for transporting ores, coal, and other supplies purchased by the defendant company. The railroad company claims a lien under a provision of the Code of Virginia (section 2485), as amended by an act of the general assembly (chapter 224, p. 362, Acts 1891-92), giving to persons furnishing supplies to a mining or manufacturing company necessary to the operation of the same a prior lien upon the personal property of such company, other than that forming a part of its plant, etc. It is very clear to the court that freight charges by a railroad company against a manufacturing company are not within either the letter or spirit of the statute. The object of the statute

was to create a lien in favor of persons furnishing supplies in order that they might be protected against loss, where they have contributed material necessary to the operation of the manufacturing company. It gave them a statutory security for the debts due them for supplies. At common law, creditors had no lien on the property of a manufacturing company for the purchase price of materials furnished, and we see the reason for the enactment by the legislature of a supply lien law. But no such reason existed for securing a railroad company for the payment of its freight charges. Railroad companies are common carriers, and, as such, have a lien for the freight on the materials which they carry. *Seventh Nat. Bank v. Shenandoah Iron Co.*, 35 Fed. 436. The railroad company in this case had that lien, and could only lose it by parting with the possession of the supplies it carried, without requiring the payment of its freights. The evidence shows that the Norfolk & Western Railroad Company exercised this right of lien on several occasions, by refusing to allow the materials to be unloaded from its cars until the freight had been paid, or its payment satisfactorily arranged. This exception will be overruled.

The Norfolk & Western Railroad Company also excepts to the report of the master on the ground that he fails to report as a lien a judgment for \$31,943.27, obtained by said railroad company against the Roanoke Iron Company, at the April term, 1895, of the hustings court of the city of Roanoke, Va. The receiver in this cause was appointed on the 26th day of January, 1895. It is well settled that, when a receiver has been appointed to take charge of the assets of an insolvent corporation, judgments thereafter obtained are not liens on the real estate of the corporation.

4. The Mill Creek Coal & Coke Company excepts to the report of the master, on the ground that he reports that said Mill Creek Coal & Coke Company is not entitled to 10 mortgage bonds of the Roanoke Iron Company, of \$1,000 each, which were sold as collateral security, and purchased by said Mill Creek Coal & Coke Company. As to these bonds, the master reports as follows:

"At the time the receiver of the Roanoke Iron Company was appointed in this cause, five of its temporary 6 per cent. mortgage bonds, of \$1,000 each, were held by the First National Bank of Roanoke, Va., and five were held by the Fidelity Loan & Trust Company of Roanoke, Va. (ten in all), as collateral security for the payment of the two negotiable notes of \$3,000 each, both dated December 29, 1894, and payable at thirty days,—one at said First National Bank, and the other at said Fidelity Loan & Trust Company, of Roanoke, Va., made by the Roanoke Iron Company to Joseph H. Sands and the Mill Creek Coal & Coke Company, and indorsed by said Sands and the Mill Creek Coal & Coke Company. On the 31st day of January, 1895, at the request of the holders of the two notes, respectively, of \$3,000 each, namely, the First National Bank of Roanoke and the Fidelity Loan & Trust Company of Roanoke, Va., the same were duly protested for nonpayment. It seems that the two notes of \$3,000 each were paid by the Mill Creek Coal & Coke Company, and the same were duly assigned by the First National Bank and the Fidelity Loan & Trust Company to the Mill Creek Coal & Coke Company. These assignments of the two notes carried with them the ten bonds, of \$1,000 each, of the Roanoke Iron Company, which had been pledged as collateral security; and on the 19th day of February, 1895, the 10 bonds so placed as collateral were sold at public auction in the city of Roanoke, Va., in accordance with the provisions of the two collateral notes of \$3,000 each. At this sale the Mill Creek Coal & Coke Company

became the purchasers of said ten (10) bonds, at the price of \$6,042.32, or \$3,021.16 for the five bonds theretofore held by the First National Bank, and \$3,021.16 for the five bonds theretofore held by the Fidelity Loan & Trust Company. By virtue of this sale and purchase, the Mill Creek Coal & Coke Company became the owners of the said ten bonds of the Roanoke Iron Company, of \$1,000 each; and it has proved and is claiming the same in this cause to the full value thereof."

The master holds in his report that, by the appointment of the receiver in this cause, the relation of the Roanoke Iron Company to this transaction and to all its contracts was changed; that its title to its property and all its means with which to meet this and other obligations passed from it to the receiver; that an order of reference had been entered in this cause when the 10 bonds were put up and sold at public auction. The court does not think this position is correct. It is contrary to the doctrine laid down in *Jerome v. McCarter*, 94 U. S. 734, which was a case in which a receiver had been appointed. There certain mortgage bonds had been pledged as collateral security for loans, and the court held that the pledgees had a clear right to use them, either by sale or by collateral, until the full amount of the debt due from the mortgagors is satisfied. Exception sustained.

Frederick Gwinner, a holder of 12 of the mortgage bonds, also excepts to the report, because the master fails to report that said Gwinner is the owner of said bonds. Touching the history of these bonds, the following facts are admitted: Frederick Gwinner held 12 bonds of the Roanoke Iron Company, of the denomination of \$1,000 each, payable to bearer, as collateral security for a note made by the Roanoke Iron Company, payable to him, dated 29th April, 1895, for \$5,000. On the 11th day of January, 1895, the note aforesaid, for \$5,000, being due and payable, Frederick Gwinner had the collateral sold at the stock call of the Pittsburg Stock & Oil Exchange, at which sale they were bought by George B. Hill & Co., who, in the purchase of said bonds at said sale, were acting, in their purchase aforesaid, as brokers and agents for said Frederick Gwinner, and purchased said bonds for said Frederick Gwinner. Following is the note:

"\$5,000.

Roanoke, Va., April 29th, 1893.

"On demand, ——— days after date, for value received, the Roanoke Iron Company promises to pay to Frederick Gwinner, at the First National Bank of Roanoke, Va., five thousand dollars, homestead and all other exemptions waived; having deposited with said Frederick Gwinner, as collateral security for the payment of this note, twelve temporary six per cent. bonds of the Roanoke Iron Company, of the denomination of one thousand dollars each, with such additional collaterals as may from time to time be required by Frederick Gwinner, and which additional collaterals they hereby promise to give at any time on demand. If these additional collaterals be not so given when demanded, then this note to be due; and rebate of interest taken shall be allowed on payment prior to maturity. And the Roanoke Iron Company hereby gives to said Frederick Gwinner full power and authority to sell and assign and deliver the whole or any part of said collaterals, or any substitute therefor, or any additions thereto, at public or private sale, at option of said Frederick Gwinner on the nonperformance of the above promises, all or any of them, or at any time thereafter, and without advertising or giving to the Roanoke Iron Company any notice, or making any demand of payment."

The contention of counsel for exceptants is that Gwinner, being the pledgee of these bonds as collateral security for the payment of the note for \$5,000, executed to him by the Roanoke Iron Company, could not become the purchaser thereof at a sale of the same. It is undoubtedly true that where a pledgee, without authority sells negotiable collateral paper, he cannot become the purchaser. *Colebrooke*, Collat. Sec. § 126. But this doctrine does not apply in a case like this, where the pledgee is given full power and authority, on the failure of the debtor to meet the obligation for which the collateral is given, to sell the collateral at public or private sale, and without advertising or giving to the pledgor any notice or making any demand for payment. The sale of the collaterals was made at the suggestion of the secretary of the Roanoke Iron Company, the pledgor. Gwinner himself did not attempt to make the sale, but it was made publicly, at the stock call of the Pittsburg Stock & Oil Exchange, and the bonds were purchased by Hill & Co., brokers, as agents of Gwinner. As far as the evidence shows, these collateral bonds constituted the only security he had for the payment of the \$5,000 debt due him, and, as appears by the proceedings in this cause, they were of uncertain value. It would be imposing great hardship and injustice upon the pledgee, under the circumstances in this case, to say that while acting under the authority given him by the pledgor, and in good faith, he shall be required to stand by, and see the only security he has for the payment of his debt perhaps sacrificed, and he not permitted to protect his interests in the only way he can, by becoming a purchaser himself. The exception will be sustained, and, in the decree to be entered, Gwinner will be recognized as the owner of the bonds.

5. The New York & Virginia Mining & Mineral Company excepts to the master's report, on the ground that the master has allowed on its claim only the sum of \$4,065.29 of its lien claim for supplies furnished the Roanoke Iron Company, duly filed in the clerk's office of the hustings court of Roanoke city, amounting to \$6,060.94. The master reports as a supply lien only so much of said account as falls within the period of 90 days before the filing of the claim in the clerk's office. The claimant, the mining company, contends that its claim was an open, running account, from the 9th day of May, to the 6th day of December, 1894, the whole of which should be embraced in its lien secured by filing the account. That its account cannot be severed by the application to each item of the statutory period of 90 days, and excluding all of the account which did not accrue within 90 days prior to filing the lien. Of this account, running from May 9, 1894, to December 6, 1894, the master allows only so much thereof as includes ore furnished between the 18th day of October, 1894, and the 16th day of January, 1895, and excludes all of the account for ore furnished from May 9 to October 18, 1894. The statute provides that the person furnishing supplies shall have a lien if, within 90 days after such supplies are furnished, a memorandum of lien is filed. In this case the supplies were furnished under one contract, the deliveries being from day to day. The items are so connected as to form one transaction. It was a

running account, and the limitation of 90 days must commence at the date of the last delivery of ore. *Central Trust Co. v. Chicago, K. & T. Ry. Co.*, 54 Fed. 598; *Chit. Cont.* 911; *Add. Cont.* 1205.

6. The Roanoke Grocery & Milling Company and a number of others claim to be supply lien creditors of the defendant company, and file exceptions to the master's report, on the ground that he has failed to report these claims as constituting liens for supplies furnished. The evidence shows that the Roanoke Iron Company had connected with its iron business, and conducted by the same iron company, a commissary store, to which it frequently gave to its employes, in payment, in part or in whole, of their wages, orders for such goods and supplies as they desired to purchase for their individual use, or for the use of their families; that other persons than employes of the company, if they desired to do so, could and did purchase goods at this commissary store; and that the said Roanoke Iron Company took out a merchant's license under the tax laws of the state of Virginia for the privilege of conducting this store. Counsel for the exceptants insists that the goods sold to the defendant company, for the purpose of supplying this store, are necessary to the operation of the business of the iron company. This claim is asserted under a provision of the Virginia statute which provides that "all persons furnishing supplies to a mining or manufacturing company necessary to the operation of the same shall have a prior lien upon the personal property of such company other than that forming part of its plant for the money due them for such supplies." The language of the statute is "supplies necessary to the operation of the company." It includes such things as contribute directly to carrying on the work in which the company is engaged. The statute does not contemplate that the dry goods and groceries of every kind necessary to carry on a separate, distinct, and licensed mercantile establishment shall be considered supplies necessary to the business of making iron. Such a contention might possibly be sustained in case of a mining or manufacturing company operating in some isolated locality, remote from a town or other place where such supplies can be obtained as are necessary to the existence and comfort of its employes and their families. But no reason of the kind exists in this case, where the company is located within the corporate limits of a flourishing business city, where supplies of every kind are readily accessible to the employes of the company. The connection of the commissary store with many kinds of private corporations is well understood. Its purpose is to enable the corporation to speculate in the wages it contracts to pay its employes, by selling them goods, not at prime cost, but at a profit. Not unfrequently the profits made in this way by the company are greater than those realized from the business in which it is engaged. All of the exceptions to the master's report based on the ground that the goods sold the defendant company were for supplying its commissary store will be overruled.

7. The Mill Creek Coal & Coke Company file an exception to the master's report, on the ground that he failed to report as a supply lien a claim of \$15,059.06. The master reports that the affidavit to

the memorandum filed in the clerk's office of the hustings court of the city of Roanoke of this claim was made by C. D. Bray, the chief bookkeeper of said company, and was made in the state of West Virginia before D. F. Kellar, a notary public for Mercer county, in said state; but the affidavit is not verified, as required by section 174 of the Code of Virginia of 1887 where affidavits are made before officers of another state, and it does not constitute a lien against the property of the Roanoke Iron Company. The Virginia statute giving a lien of this character provides that, to be entitled to such lien, the claimant shall, within 90 days after such supplies are furnished, file, in the clerk's office of the county or corporation in which is located the chief office in this state of the company against which the claim is, a memorandum of the amount and consideration of his claim, verified by affidavit, which memorandum the clerk is required to record in the deed book. In this case the affidavit as to the correctness of the claim was made before a notary public in the state of West Virginia, and he certifies under his notarial seal that it was so made. Section 173 of the Code of Virginia provides that an oath of this character may be administered by or made before a justice, notary, or other designated officers. Section 174 of the Code provides that "an affidavit may also be made before any officer of another state or country authorized by its laws to administer an oath, and shall be duly authenticated" if it be subscribed by such officer, and there be annexed to it a certificate of the clerk or other officer of a court of record of such state or country, under an official seal verifying the genuineness of the signature of the first-mentioned officer, and that he has authority to administer an oath. In this case the certificate of the clerk or other officer of a court of record showing that the notary public had authority to administer an oath was not annexed to the affidavit, and the clerk admitted the memorandum to record without such certificate.

It is insisted by counsel who contest the allowance of this claim that the clerk had no authority to admit to record the memorandum of this lien, and that the same is a nullity. Counsel for the Mill Creek Coal & Coke Company contend: That the real question to be decided is, was the affidavit made before an officer authorized to administer an oath? That the question is one of fact, and that the claimant has a right to introduce evidence to show that the person by whom the oath was administered had authority to administer the same. It offers to show this by the certificate of the clerk of the county court of Mercer county, W. Va. The court thinks the claimant has a right to show that the oath was properly administered, and that the omission to have the clerk of the court to certify that the notary was authorized to administer the oath under the laws of West Virginia can be supplied. The contention of counsel for the Mill Creek Coal & Coke Company that this can be done is sustained by the following authorities: *Jackman v. Gloucester*, 143 Mass. 380, 9 N. E. 740; *Lawton v. Kiel*, 51 Barb. 30; *Finley v. West*, 51 Mo. App. 569; *Kruse v. Wilson*, 79 Ill. 233. Exception sustained.

The Mill Creek Coal & Coke Company, on the 14th day of January, 1896, filed this same claim, properly authenticated, in the

clerk's office of the hustings court of the city of Roanoke, and counsel contend that if the first claim was not filed so as to create a lien, and if it be a nullity as a lien, the second claim, being properly filed and recorded, is a lien against the property of the defendant company, and should be allowed among the lien debts. Counsel objecting to the allowance of this lien contend that it was not filed within the 90-days limitation prescribed by the statute. But counsel for the Mill Creek Coal & Coke Company claim that the order of reference to the master suspended the running of the statutory limitation of 90 days within which the memorandum must be filed in order to secure a lien. It was so held by this court in *Seventh Nat. Bank v. Shenandoah Iron Co.*, 35 Fed. 443. The same doctrine was held in the circuit court for the Eastern district of Virginia in *Newgass v. Railway Co.*, 72 Fed. 712. In this case it was held that the limitation ceased to run at the filing of the general creditors' bill, and the court says that this doctrine is settled beyond controversy for the federal courts by the case of *Richmond v. Irons*, 121 U. S. 29, 7 Sup. Ct. 788. In this case Mr. Justice Mathews discusses the question at considerable length, and with his usual ability. Also, under these decisions, the Mill Creek Coal & Coke Company is entitled to have its lien allowed.

There are a number of exceptions to the master's report, each involving small amounts, which the court will dispose of together:

(1) Exception by Dent & Jackson, because the master allows in his report a supply lien to them of only \$2,762.91, whereas they claim the lien should be \$2,867.88. This seems to be a running account for ores furnished to the defendant company, and, under the ruling of the court on the exceptions filed in this cause by the New York & Virginia Mining & Mineral Company, this exception should be sustained.

(2) Exception by R. P. Patterson, manager, and James E. Porter, secretary and treasurer, because the master failed to report their claims as labor claims, and entitled to priority as such. These claims were properly disallowed as labor claims by the master, these officers not being within the provisions of the statute giving labor claims a priority. *Seventh Nat. Bank v. Shenandoah Iron Co.*, 35 Fed. 436. Exceptions overruled.

(3) Exceptions by Edward Conway and others, because the master allowed less on their labor claims than was justly due them. These are all running accounts, and the 90-days limitation should be applied at the conclusion of the account. The provision of the statute is that the claim shall be filed within 90 days after service rendered. The court holds that, in case of a contract for labor to be performed at so much per day, the statute means by the term "after service rendered" the date when the contract is completed or terminated, and that it does not require, in case of a running contract of this kind, where the work is done from day to day, that the claim shall be severed, and only so much thereof allowed as a lien as falls within the period of 90 days prior to the recordation of the claim.

A decree will be prepared in accordance with these rulings of the court, confirming the master's report except as modified by the court's views.

UNITED STATES TRUST CO. v. WESTERN CONTRACT CO. ECHOLS et al. v. CENTRAL TRUST CO. OF NEW YORK. WESTERN CONTRACT CO. v. ECHOLS et al. BROWN et al. v. WESTERN CONTRACT CO.¹

(Circuit Court of Appeals, Sixth Circuit. May 24, 1897.)

Nos. 445-448.

1. RAILROADS—CONTROLLED LINES—ADVANCES.

When one railroad company assumes the management of another, all the earnings of both being deposited in a common fund, from which all the expenses of both are paid, book entries being made to show how much is received from and how much expended for the latter road, the former is not a supplier of materials or contractor with the latter, so as to be entitled to a lien upon the property of the latter for the amount expended for it, over and above the amount received from it, but any such excess is only an advance of money.

2. RAILROAD FORECLOSURES—INTERVENTIONS—PROCEDURE.

When an intervening petition is filed in a foreclosure suit, asserting a lien superior to that of the mortgage, it is not error, if the intervener is found to have no lien, to dismiss the petition without awarding him a money judgment.

3. RAILROADS—CONTROLLED LINES—GUARANTIES AND ADVANCES.

The W. Co., which held a large amount of the stock and bonds of the V. Ry. Co., entered into a contract with the C. Ry. Co. by which it was agreed that the W. Co. should deliver to the C. Co. 60 per cent. of the stock of the V. Co., which was at once to be deposited with a trustee to secure the performance of the agreement, and to be returned to the W. Co. on nonperformance; and the C. Co. agreed to guaranty for seven years the principal and interest of the V. Co. bonds. The W. Co. guarantied that the floating debt and Car Trust obligations of the V. Co. should not exceed certain sums, and provided for the payment of these debts by depositing with a trustee like sums in bonds, which might be sold by the C. Co., and used to pay the V. Co.'s debts or reimburse the C. Co. for any moneys advanced for that purpose. The stock and bonds were deposited, and the C. Co. continued to pay the interest on the V. Co. bonds, under its guaranty, for some years, but before the expiration of the seven years the C. Co. passed into the hands of receivers, and ceased paying, whereupon the W. Co. demanded and received back the stock of the V. Co. Subsequently the receivers of the C. Co. asserted a claim against the bonds deposited as security for the floating debt and Car Trust obligations of the V. Co., due at the time of the contract, for the amounts of the V. Co.'s earnings after the contract which had been applied to the payment of these debts. *Held* that, as the use of the earnings of the V. Co. to pay its old floating debt had increased the amount which the C. Co. had been obliged to pay under its guaranty of the interest on the bonds, it was equivalent to an advance by the C. Co. equal to the amount of earnings so applied for the payment of such debts, and, as such, secured by, and entitled to be paid out of, the proceeds of the bonds deposited by the W. Co.

4. SAME—SET-OFF OR COUNTERCLAIM.

Held, further, that if the W. Co. had a claim against the C. Co. for breach of its guaranty of the interest on the bonds, the fact that such claim would be in personam, while that of the C. Co. against the bonds was in rem, would not prevent the two claims being set off against each other in equity.

5. SAME—CANCELLATION OF GUARANTY CONTRACT.

Held, further, however, that the retaking by the W. Co. of the stock delivered by it and deposited to secure the agreement was a cancellation, as to the bonds held by it, of the C. Co.'s contract of guaranty, so far as the same remained still executory, and accordingly the W. Co. had no claim against the C. Co. for breach of its guaranty.

¹ Rehearing denied July 6, 1897.

6. SAME—LEASES—AGENCY.

Held, further, that a lessee from the C. Co. of its railroad system which had paid Car Trust obligations of the V. Co., did so not as a volunteer, but as the agent of the C. Co., and, having acquired the debt so arising in favor of the C. Co., was entitled also to the security attaching to it, and accordingly to be reimbursed out of the bonds deposited by the W. Co. to secure the car trust obligations of the V. Co.

7. SEPARATE APPEALS—WAIVER OF CITATIONS—APPEARANCES.

Four appeals were taken by different parties from the same decree. All parties to the suit, by a single instrument, waived citations on "all the appeals." The record was made up as on one appeal. *Held*, that all parties to the suit appeared as parties to all the appeals, though the appeal bond on one appeal ran to one party only.

Appeals from the Circuit Court of the United States for the District of Kentucky.

These are four appeals from a decree of the circuit court for the district of Kentucky adjudging the priority of the liens of the various appellants and the Central Trust Company, one of the appellees, upon the entire property of the Ohio Valley Railroad Company which was being foreclosed under a mortgage issued by it to the Central Trust Company to secure a large number of bonds, and also the priority of the liens on certain of these bonds deposited with the Columbia Finance & Trust Company under a contract made between the Western Contract Company, a party to these appeals, and the Chesapeake, Ohio & Southwestern Railway Company, represented in these appeals by St. John Boyle, its receiver. The Ohio Valley Railroad Company (hereafter called the "Valley Company") owned a railroad running originally from Evansville, Ind., through Henderson, Ky., to Preston, where it intersected the railroad of the Chesapeake, Ohio & Southwestern Railway Company. Subsequently the Ohio Valley Railroad was extended through Preston about 12 miles to Hopkinsville, a point on the Louisville & Nashville Railroad. This extension, which plays some part in the issues of the case, was known as the "Hopkinsville Extension." The Chesapeake, Ohio & Southwestern Company (hereafter called the "Chesapeake Company") owned and operated a line of railroad from Memphis to Louisville. The Western Contract Company (hereafter called the "Contract Company") was a construction company which built part of the Ohio Valley Railroad extending from Evansville to Preston, and became thereby the owner of a large majority of its stock and its bonds. In order to enable it to dispose of the bonds held by it, it entered into a contract with the Chesapeake Company by which, in consideration of receiving a majority of the stock in the Valley Company from the Contract Company, the Chesapeake Company agreed to guaranty all the bonds theretofore issued by the Valley Company. That contract, upon which turns all but one of the important questions in this case, was executed on the 6th of March, 1891, and was as follows:

"Agreement made and entered into the sixth day of March, 1891, by and between the Western Contract Company of Louisville, Kentucky, a corporation created, organized, and existing under the laws of the state of Kentucky, hereinafter called the 'Contract Company,' of the first part, and the Chesapeake, Ohio & Southwestern Railroad Company, a corporation created, organized, and existing under the laws of the states of Kentucky and Tennessee, hereinafter called the 'Railroad Company,' of the second part. Whereas, the Ohio Valley Railway Company is a corporation of the state of Kentucky having a capital stock of two million one hundred and sixty-two thousand six hundred dollars (\$2,162,600), and no more, and, in addition to its existing floating indebtedness and liabilities, being liable for the following, and no other, debts,—that is to say: (1) A bonded indebtedness to an amount not exceeding two million one hundred and sixty-two thousand and six hundred (\$2,162,600) with interest thereon from January 1, 1891, represented by its first mortgage five per cent. forty-year gold bonds, and its general consolidated and first mortgage five per cent. fifty-year gold bonds now outstanding; (2) Car Trust obligations to the amount of eighty-eight thousand eight hundred and five and

64/100 dollars (\$88,805.64); and (3) real-estate notes to the amount of fourteen thousand dollars (\$14,000), given in payment for real estate purchased in Henderson, Kentucky, to secure approaches to the Henderson bridge and for terminals. And whereas, the Contract Company is the holder of upwards of sixty per cent. of the capital stock of said Ohio Valley Railway Company, and is interested in and desirous of procuring a guaranty of the payment of the principal and interest of said general consolidated and first mortgage bonds of the Ohio Valley Railroad Company. And whereas, it has been agreed between the parties hereto as hereinafter expressed: Now, therefore, this agreement witnesseth that the parties hereto, in consideration of the premises and of the mutual undertakings, covenants, and agreements hereinafter contained, have undertaken, covenanted, and agreed, and do hereby undertake, covenant, and agree, to and with each other as follows; that is to say:

"First. The Contract Company on or before the first day of April, 1891, will deliver to the Railroad Company, party of the second part hereto (to be simultaneously deposited by the Railroad Company with a trustee as hereinafter provided), sixty per cent. of all outstanding capital stock of the Ohio Valley Railway Company (the same being full-paid stock), and will cause to be delivered to the Ohio Valley Railway Company the control of the charter of the Evansville Bridge Company, and will give to the Railroad Company a guaranty satisfactory to it, that all indebtedness and liabilities of said Ohio Valley Railway Company which have accrued or may accrue up to the time of the delivery and deposit of stock and bonds under this article of this agreement (including accrued, though unmatured, interest on all obligations and liabilities, and including all claims for right of way or compensation therefor, or land damages or damages for construction or operation of its railroad), excepting only the bonded indebtedness, not exceeding \$2,162,600, above referred to, and the interest from January 1, 1891, thereon, and the said real-estate notes for \$14,000 and unpaid interest thereon, and the face value of the said Car Trust obligations of said Ohio Valley Railway Company, shall not exceed the sum of thirty thousand dollars, and that any excess thereof above that sum shall be paid by the Contract Company, and will deposit with the trustee hereinafter named general consolidated and first mortgage five per cent. fifty-year bonds of the Ohio Valley Railway Company (forming part of the bonds above referred to) to the amount at their par value of the face value of such Car Trust obligations, which bonds, and the interest thereon, and the proceeds thereof are to be held as security for, and applied in discharge of, the amount due upon such Car Trust obligations, and will also deposit with said trustee thirty thousand dollars par value of such general consolidated and first mortgage five per cent. fifty-year bonds, which bonds and the interest thereon and the proceeds thereof are to be held as security for and applied in discharge of the indebtedness and liabilities of said Ohio Valley Railway Company other than the Car Trust obligations and real-estate notes above referred to. The said railroad company is to be entitled to sell and dispose of the general consolidated and first mortgage bonds of the Ohio Valley Railway Company so deposited as security for payment of such Car Trust obligations and such indebtedness and liabilities at such prices not less than 90 per cent. of their par value, and upon such terms as it may from time to time determine, the proceeds of such bonds, simultaneously with the delivery thereof by said trustee to the purchaser, to be deposited with the said trustee, but subject to be drawn against by the Ohio Valley Railway Company for payment of the amount from time to time due on such Car Trust obligations, or such indebtedness or liabilities, or for repayments of amounts paid on account of such Car Trust obligations or such indebtedness or liabilities.

"Second. Upon the performance on the part of the Contract Company of the obligations hereinbefore in article first hereof expressed, the said Railroad Company will, under and in pursuance of adequate statutory authority and of sufficient resolutions of the stockholders and directors, guaranty the payment of the principal and interest accruing subsequently to January 1, 1891, of the general consolidated and first mortgage fifty-year five per cent. gold bonds of the said Ohio Valley Railway Company to the amount at their par value of \$2,162,600, hereinbefore referred to, such guaranty to be indorsed on each bond in the following words and figures; that is to say: 'For valuable

consideration, the Chesapeake, Ohio & Southwestern Railroad Company hereby guaranties the punctual payment of the principal of and interest accruing subsequently to January 1, 1891, on the within bond. In witness whereof the said Chesapeake, Ohio & Southwestern Railroad Company has caused its corporate seal to be hereunto affixed and attested by its secretary, and these presents to be signed by its president or vice president, this ——— day of ———, 1891." And the said Railroad Company has undertaken and agreed, and hereby undertakes and agrees, that simultaneously with its receipt of said sixty per cent. of such stock of the Ohio Valley Railway Company it will deposit the same with the trustee hereinafter named as security for the fulfillment for the period of seven years from the execution of such guaranty of its obligations thereunder, subject to the provision that, in case during such period it shall fail to fulfill its obligations under such guaranty, upon demand made upon said Railroad Company at its office in the city of New York by the trustee of the mortgage securing such general consolidated and first mortgage bonds, said deposited stock shall, upon demand, sustained by the affidavit of the president or vice president of the trustee of such mortgage that such demand has been made upon said Railroad Company as hereinbefore required, be delivered by said trustee to said Contract Company; but that unless or until it shall so fail to fulfill its obligations such deposited stock shall stand on the books of the Ohio Valley Railway Company in the name of the said Chesapeake, Ohio & Southwestern Railroad Company, or the names of its appointees, and it and they shall be deemed the legal owners thereof, and be entitled to vote thereon, and exercise the rights and powers of stockholders in respect thereof. At the expiration of seven years from the execution of such guaranty, if the obligations of the Railroad Company during such period thereunder shall have been fulfilled, such deposited stock shall, by said trustee, be redelivered to said Railroad Company.

"Third. Earnings from traffic shall be apportioned between the Ohio Valley Railway and the Chesapeake, Ohio & Southwestern Railroad as if they were operated as separate roads, and substantially on the same basis as now in use, and the general expenses common to the operation of said lines shall be prorated on a mileage basis. The Ohio Valley Railway Company shall be maintained as a separate organization. All improvements and betterments shall be held as its separate property, and all rolling stock purchased for it shall be properly marked as its property.

"Fourth. The depository trustee under this agreement shall be the Columbia Finance & Trust Company of Louisville, Kentucky, or such other trust company as may be agreed upon by the parties hereto.

"Fifth. This contract is signed subject to the approval of the respective boards.

"In witness whereof the parties hereto have caused their respective corporate seals to be hereunto affixed and attested by their respective secretaries, and these presents to be signed by their respective presidents or vice presidents, the day and year first above written.

"[Signed]

Western Contract Company, by Samuel S. Brown.

"[Signed]

Chesapeake, Ohio & Southwestern Railroad Co.,

By C. P. Huntington, Pt."

The above was accompanied by a supplementary agreement as follows:

"Referring to contract between the Western Contract Company and the Chesapeake, Ohio & Southwestern Railroad Company, executed and exchanged to-day, it is understood that the Chesapeake, Ohio & Southwestern Railroad Company is to designate the president and four directors of the Ohio Valley Railway Company, and that Capt. S. S. Brown is to remain as vice president and director, and is to designate two other directors of the company.

"March 6, 1891.

"[Signed]

C. P. Huntington, Pt.

"[Signed]

Samuel S. Brown."

The stock was transferred in accordance with the contract and was deposited with the Columbia Finance & Trust Company, of Louisville. Dr. P. G. Kelsey was president of the Valley Company at the time of the execution of this contract. He remained its president until late in the summer or early in the fall

of 1891, and while he was president the earnings of the Valley Company were kept in a fund separate from that of the Chesapeake Company or its lessee. The Chesapeake Company had leased its road running from Memphis to Louisville to the Newport News & Mississippi Valley Company (hereafter called the "Newport News Company"), a corporation of Connecticut, organized to manage railroads for other companies. The lease by the Chesapeake Company to the Newport News Company provided a rental of \$5,000 a year to be paid by the Newport News Company to the Chesapeake Company for the purpose as stated in the lease of sustaining the organization of the Chesapeake Company. The lease provided that the Newport News Company should take charge of all the cash, accounts payable, and choses in action of the Chesapeake Company of whatever kind, and should operate its main road and all its branches; that out of the net earnings and income of the railroad the Newport News Company should pay the operating expenses, taxes, assessments, insurance, should keep the road and equipment in proper repair, and should apply the net earnings to the payment of the interest on certain bonds of the lessor company and its grantors. The lease provided that, if there was any balance left after such payments, and that balance should exceed the amount of 6 per cent. per annum par value of the capital stock of the lessor company, the lessee company might retain to itself for its own use this excess. The lease further provided that, if anything was left out of the income after the payment of interest on certain bonds, and there should be any sum owing from the party of the first part to the party of the second part "in respect to advances or payments made for any expenses of its business or affairs, or for or in respect of any other sums which may have been lawfully advanced by the lessee to or for the party of the first part," the party of the second part should be entitled to retain and pay to itself whatever might be owing to it from the party of the first part "for or in respect of any of the causes and matters or considerations aforesaid, including any interest which may be due and owing from the party of the first part to the party of the second part thereon." From November, 1891, until the 1st of July, 1893, the management and officers of the Chesapeake Company, the Newport News Company, and the Valley Company were practically the same. A good deal of money was expended in the repair of the Valley road. Both roads were really operated by the Newport News Company. Except for a short period, all the earnings of the Valley Company were deposited in the bank account of the Newport News Company, and all payments of every sort for and on account of the Valley Company were made out of this general bank account. Accounts were kept on books of the Valley Company, on books of the Newport News Company, and on books of the Chesapeake Company, but the only company which received earnings and disbursed expenditures was the Newport News Company. All repairs that were made upon the Valley Company were made by men who were on the pay roll of the Newport News Company. All the supplies and materials were furnished from the storehouse of the Newport News Company. But the salaries and wages of those engaged in making and superintending the repairs of the Valley Company were in part charged to the Valley Company and in part charged to the Newport News Company. The Newport News Company, acting as the agent of the Chesapeake Company, charged to the Chesapeake Company at various times its expenditures on account of the Valley Company, and, on the other hand, credited the Chesapeake Company with the receipts of the earnings from the Valley Company, together with the receipts from bonds issued by the Valley Company and from subsidies voted to the Valley Company by various counties through which its line was extended. The account of the Newport News Company with the Valley Company, and on the books both of the Newport News Company and of the Chesapeake Company, was an account current in which items of debit and credit were regularly entered, and a balance struck on the 30th of June of each year, and that balance carried forward into the next year upon the proper side of the ledger. Upon the 30th of June, 1893, the lease of the Newport News Company from the Chesapeake Company was canceled by the agreement of the two companies, and thereafter the Chesapeake Company took the place of the Newport News Company in its management of the Valley Company. It should be said that there was neither a lease nor any express running arrangement, parol or in writing, between the Valley

Company and the Newport News Company, nor between the Valley Company and the Chesapeake Company, but because the latter company owned a majority of the stock, and elected the board of directors and officers, the majority of whom were the same as those of the Newport News Company and of the Chesapeake Company, the management was the same, and the operations of the two roads were kept separate only by proper charges upon the books. In February, 1894, when both the Chesapeake Company and the Valley Company went into the hands of receivers, there was due, according to the books and accounts, from the Valley Company to the Chesapeake Company the sum of \$160,252.86. This indebtedness was made up by a charge against the Valley Company of interest upon the bonds of the Valley Company paid by the Chesapeake Company, amounting to \$216,200, and an expenditure for the construction of the Hopkinsville Extension of \$192,689.85. To pay this amount, the Chesapeake Company received from the sale of bonds of the Valley Company \$174,000, and from subscriptions \$133,009.80, leaving a balance due and unpaid of \$101,190.20, which represented the advances on account of the Valley Company by the Chesapeake Company for purposes other than the payment of operating expenses. In addition to this sum, the Chesapeake Company also paid out in operating expenses and repairs over and above the earnings received from the Valley Company the sum of \$59,062.66. It was contended in the circuit court by the receiver of the Chesapeake Company that he had the right so to arrange the account between the two companies as to apply all the payments made to those debits for which the company could not have a lien, and to leave as unpaid the expenses for operating the Valley Company, and the repairs, so as to give a lien prior to the mortgage debt upon the Ohio Valley Company's road, both in equity and under the following statute of Kentucky:

"Section 1. When the property or effects of any railroad company, or of any owner or operator of any rolling mill, foundry, or other manufacturing establishment, whether incorporated or not, shall be assigned for the benefit of creditors, or shall come into the hands of any executor, administrator, commissioner, receiver of a court, trustee, or assignee, for the benefit of creditors, or shall in anywise come to be distributed among creditors, whether by operation of law, or by the act of such company, owner or operator, the employes of such company, owner or operator in such business, and the persons who shall have supplied materials or supplies for the carrying on of such business, shall have a lien upon so much of such property and effects as may have been embarked in such business, and all the accessories connected therewith, including the interest of such company, owner or operator in the real estate used in carrying on such business.

"Sec. 2. The said lien shall be superior to the lien of any mortgage or other encumbrance heretofore or hereafter created, and shall be for the whole amount due such employes as such, or due for such materials or supplies: provided, that no president or other chief officer, nor any director or stockholder of any such company, shall be deemed an employé within the meaning of this act."

Gen. St. Ky. (Ed. 1888) c. 70, art. 3, p. 877.

This claim was set up in the intervening petition filed by the then receivers of the Chesapeake Company, to which the Trust Company, the trustee of the mortgage bondholders, was made a party. The intervening petition prayed for a money decree for the amount of the indebtedness against the Valley Company as well as the enforcement of a lien prior to the mortgage. Judge Barr, sitting at the circuit, held that the circumstances of the indebtedness were such that the Chesapeake Company acquired no lien upon the property of the Valley Company, and refused to allow a money decree for the amount shown to be due. From the decrees of the circuit court embodying these rulings, the now sole receiver, St. John Boyle, appeals.

The other questions in the case arose upon the construction of the contract of March 6, 1891. The receivers of the Chesapeake Company, by their intervening petition, made the Western Contract Company and the Valley Company parties, and the controversy as between the receivers and the Contract Company was over the 116 bonds which were deposited with the Columbia Finance & Trust Company in accordance with that contract; 30 of them to pay the floating debt of the Valley Company, and 86 of them to pay the Car

Trust obligations of the Valley Company. The claim of the receivers on this point was that about \$10,000 was expended in paying prior debts of the road contracted and owing April 1, 1891, and \$24,462 in paying Car Trust obligations, all out of the subsequent earnings of the Ohio Valley road; and that as these earnings, if not so diverted, would have been available to assist the Chesapeake Company in meeting the interest due on the Valley bonds, which the Chesapeake Company paid, the receivers of the latter company were entitled to have part of their debt thus contracted paid out of the bonds deposited by the Contract Company to pay the floating debt and Car Trust obligations of the Valley Company. The United States Trust Company, as the assignee in the trust deed of the Newport News Company, filed its intervening petition against the Contract Company seeking to appropriate the 86 bonds deposited under the contract of March 6, 1891, to repay the \$49,898.83 paid by the Newport News Company to take up additional Car Trust obligations of the Valley Company. These payments, it appears from the evidence, were never charged by the Newport News Company against the Chesapeake Company upon the books of either company, but they were made at the request and on account of the latter company. Another intervening petition was filed by Samuel S. Brown, Arthur Cary, Jordan Giles, P. G. Kelsey, and the Ohio Valley Coal & Mining Company, insisting that, if the receivers of the Chesapeake Company were entitled to appropriate the 30 bonds deposited under the contract of March 6, 1891, to meet the floating debt of the Valley Company, they, as owners of much of that debt, were also entitled to share in the proceeds of those bonds. The Contract Company filed answers to these intervening petitions in which it denied the right of any of the claimants to use the bonds deposited under the contract of March 6, 1891, for the purposes proposed. Against the receivers of the Chesapeake Company the Contract Company pleaded a set-off arising out of the failure of that company to fulfill its guaranty under the contract of March 6, 1891. It appears from the evidence that the Chesapeake Company fulfilled its guaranty of the bonds of the Valley Company upon all payments of interest due until the one of January 1, 1894, became due when it defaulted. Upon an intervening petition shortly thereafter filed by the Contract Company in the creditors' suit in which receivers were appointed for the Chesapeake Company, the Contract Company prayed for an order of the court requiring the receivers to consent and direct that the trustee under the contract of March 6, 1891, deliver back to the Contract Company the majority of the stock of the Valley Company in accordance therewith. The court granted the prayer of the petition, and directed the receivers to consent to the redelivering of the stock, and the trustee, the Columbia Finance & Trust Company, did deliver the same back to the Contract Company early in 1894. In order more definitely to fix the facts concerning payments made on the old debts of the Valley Company paid out of its earnings after April 1, 1891, and also by the Newport News and the Chesapeake Companies, the circuit court referred the case to a master for answers to certain questions. The report of the master upon these questions is as follows:

"This action has been referred to me as special commissioner to ascertain and report to the court:

"First. What is the amount of any debts due by the Ohio Valley Railway Company on April 1, 1891, which since that date have been discharged out of its earnings since that date, and what is the amount of any such debt which has been paid by the Newport News & Mississippi Valley Company for the benefit of the Chesapeake, Ohio & Southwestern Railroad Company.

"Second. What, if any, Car Trust notes of the Ohio Valley Railway Company, existing on the 1st of April, 1891, have since that time been paid out of its subsequently accruing earnings, or by the Chesapeake, Ohio & Southwestern Railroad Company, or by the Newport News & Mississippi Valley Company, or in any other way.

"Third. What debts are still outstanding which were owing by the Ohio Valley Railway Company April 1, 1891, and who owns and holds such debts.

"Fourth. What is the amount of the fund in the hands of the Columbia Finance & Trust Company, deposited by the Western Contract Company, either in bonds or in money.

"Fifth. What is the amount of bonds held by the Western Contract Company over and above the 116 bonds deposited by it with the Columbia Finance

& Trust Company, and what amount of interest is still due and unpaid on such bonds. * * *

"(1) Under the first clause of said order of reference, I find the following facts: The amount of debts due by the Ohio Valley Railway on April 1, 1891, was \$51,457.85. Of this amount the following have been paid:

Mechanical wages	\$ 802 57
Audited vouchers	2,561 94
L. & N. R. R. track rental.....	798 00
Bills payable, O. V. C. & M. Co.....	4,500 00
Individuals and companies.....	1,376 62

Total\$10,039 13

"It is contended on the one side that all of these payments should have been made out of the company's resources other than its earnings. These alleged resources were as follows:

Resources.

U. S. P. O. dept.....	\$ 283 58
Accounts receivable	461 22
Company's agents	327 25
Evansville Bridge Co.....	10 25
Stone quarry	1,600 00
Sundry r'ds. for pro of claims paid.....	2,482 91
Jas. F. Clay.....	710 00
Unclaimed f't transportation chgs.....	35 28
Southern extension acct.....	12,452 37
	<hr/>
	\$18,362 86

"But it is claimed on the other hand that two items of said alleged resources, which constitute more than two-thirds of the whole amount, were not, and could not have been, applied to the payment of said debts. These two items were:

The stone quarry.....	\$ 1,600 00
The Southern extension acct.....	12,452 37

Total\$14,052 37

"As to the first item, Dr. Kelsey testifies that the Ohio Valley Company had, prior to April 1, 1891, purchased the stone quarry, and paid therefor the sum of \$1,600; that it was thought more economical to buy the quarry than to pay a royalty for rock to make ballast, as they had been doing theretofore. The company seems to have treated the quarry as so much ballast on hand, and for this reason included it among its resources, but the witnesses do not state there was any agreement that it should be invoiced in this way. Doubtless the net earnings of the road were increased to the extent that the company was relieved of the royalty it would have otherwise been compelled to pay for rock; but there is no testimony as to what the royalties would have been, nor as to how much of the quarry has been exhausted.

"As to the other item, 'The Southern Extension Acct.,' the following facts are established by the testimony: The Ohio Valley Company, contemplating an extension of its line south to Hopkinsville and Clarksville, had, prior to April 1, 1891, caused surveys, maps, profiles, etc., to be made and secured, and some contracts for right of way, at a cost of \$12,452.37, which had been entered on the books as an asset. Dr. Kelsey testifies that in making this contract with the C. O. & S. W., its representative, Mr. Huntington, was asked to allow this item to be placed on the same footing with material on hand, which was to be charged to the new organization at its invoice price. To this Mr. Huntington objected, saying they would not pay for these things until the subsidies which the company expected to receive for the extension were realized. Upon cross-examination the witness says no other agreement than this was ever made with Mr. Huntington. The witness does not state that any of the subsidies were ever collected. We submit to the court whether, under this

testimony, either of those two items was available for the payment of liabilities. If they were available, then the resources were sufficient to pay the liabilities that were canceled, amounting to \$10,039.13, and leave a surplus of \$8,323.73. But, if they were not available, then there remained only \$4,310.49 of the resources that could have been applied to the debts, leaving \$5,726.64 as the sum paid out of the earnings of the Ohio Valley Railway after April 1, 1891. I further find that the Newport News & Mississippi Valley paid of such debts the sum of \$2,937.70, of which the sum of \$1,089.08 was paid out of the assets of the Ohio Valley, leaving a balance of \$1,848.62 paid by the Newport News & Mississippi Valley for the benefit of the C., O. & S. W. I further find that the C., O. & S. W. paid of said debts the sum of \$77.99.

"(2) Under the second clause of said order I find that of the Car Trust notes of the Ohio Valley Railway Company existing on April 1, 1891, there have since that time been paid out of its subsequently accruing earnings the following sums:

Notes maturing on April 1, 1891.....	\$ 3,203 72
May	4,218 39
June	3,203 72
July	3,203 72
August	2,189 05
September	3,203 72
October	5,240 26

Making a total of.....\$24,462 58

"I further find that the Newport News & Mississippi Valley has paid Car Trust notes of the Ohio Valley Railway Company that existed on April 1, 1891, amounting to \$49,898.83.

"(3) Under the third clause of said order, I find that the following debts of the Ohio Valley Railway Company owing April 1, 1891, are still outstanding, and are owned and held by the following parties, viz.:

To Arthur Cary.....	\$ 4,500 00
To Jordan Giles.....	953 11
To P. G. Kelsey.....	3,438 13
To S. S. Brown, as owner of steamer Campbell.....	23,574 98
To Ohio Valley Coal & Mining Co.....	8,952 50

Making a total of.....\$41,418 72

"(4) Under the fourth clause of said order, I find that the account of the Columbia Finance & Trust Company for the bonds deposited with it by the Western Contract Co. stands as follows: Bonds on hand of the O. V. R. Co., numbered from 1,849 to 1,964, inclusive, being 116 bonds, of the face value of \$116,000. Five sets of coupons collected, amounting to \$14,500; out of which collections it has paid the following expenses:

Expressage on bonds, &c.....	\$ 101 10
Counsel fees in C., O. & S. W. case.....	50 00
Counsel fees in this case.....	100 00
	<hr/>
	\$ 251 10

Leaving cash balance on hand.....14,248 90

"(5) Under the fifth clause of said order, I find that the Western Contract Company holds 480 of the bonds of the Ohio Valley Company, amounting to \$480,000, without including 116 bonds deposited with the Columbia Finance & Trust Company, all of which are indorsed by the C., O. & S. W. according to its contract. Since the coupons which fell due July 1, 1893, no interest has been paid on these bonds."

The circuit court held that the Chesapeake Company and its successors, the receivers, would have been entitled to resort to the bonds deposited under the contract of March 6, 1891, to the extent, if any, to which earnings of the Valley Company after April 1, 1891, had been used to pay the floating indebtedness of the Valley Company, but that really there was no diversion of earnings

for this purpose because the old management of the Valley Company had on hand and delivered over to the Newport News Company, when, as agent for the Chesapeake Company, it assumed the management of the Valley Company, enough "quick" assets, easily reducible to money, to pay the entire floating indebtedness. The court further held that as to the \$24,462 of earnings diverted to pay Car Trust notes the Chesapeake Company and its receivers were entitled to apply in repayment thereof such number of the bonds deposited as, at 90 per cent. of their face value, would be required to satisfy and pay the amount thus diverted from the Valley Company, together with the interest paid on such bonds, and held in cash by the trustee. The court refused to allow the set-off claimed by the Contract Company for the default in the guaranty of interest by the Chesapeake Company on two grounds: First, that the set-off could not be granted in equity where the debt set off was a debt in personam and that against which it was to be set off was a debt in rem; and, second, that the taking back of the majority of stock, which was the general consideration for the guaranty, canceled and destroyed, as between the Contract Company and the Chesapeake Company, any obligation on the part of the latter to fulfill the guaranty. Upon the intervening petition of the United States Trust Company, the court held that in paying the Car Trust obligations the Newport News Company was a volunteer, and could not be subrogated to the rights of the Chesapeake Company under the contract of March 6, 1891, and, therefore, had no interest in the deposited bonds. With reference to the intervening petition of Brown and others, the court held that the contract of March 6, 1891, did not inure to their benefit, and that they could not take advantage of the bonds deposited thereunder. The decree appealed from embodied the rulings of the court above stated by appropriate findings and orders.

Humphrey & Davie, for Western Contract Co. and Ohio Valley Ry. Co.

Edward W. Sheldon and W. O. Harris, for United States Trust Co.

Helm & Bruce and Grubbs & Morancy, for receivers of C., O. & S. W. R. Co.

Before TAFT and LURTON, Circuit Judges, and SEVERENS, District Judge.

TAFT, Circuit Judge (after stating the facts as above). The decree of the circuit court in dismissing the intervening petition of the receivers of the Chesapeake Company, in so far as it sought a lien on either statutory or equitable grounds for their claim against the Valley Company prior to that of the mortgage bonds on the corpus of the Ohio Valley Railroad, was clearly right. The Chesapeake Company was not the supplier of materials or a contractor. By its agent and lessee, the Newport News Company, it assumed the operation of the railroad of the Valley Company. All the earnings of the Valley Company and of the Newport News Company were deposited in a common fund, which, for convenience, was designated as the bank account of the latter company. Out of this common fund wages were paid and supplies were purchased generally in the name of the Newport News Company, but really for the benefit of both. By proper charges upon the books, it was made to appear how much more money out of the common fund was devoted to the operation of the Valley road than was received from its operation, and the balance struck doubtless correctly showed the amount due from the Valley Company to the Chesapeake Company, but the balance shown was not really for supplies and labor furnished, but was for money advanced, and for that no lien exists either by the Kentucky stat-

ute, or on principles of equity. The case at bar is in this respect very much like that of *Morgan's L. & T. R. & S. S. Co. v. Texas Cent. Ry. Co.*, 137 U. S. 171, 11 Sup. Ct. 61. In that case the complainant was the assignee of a large claim of the Houston Company against the Texas Central Company, and the bill was filed to establish the priority of the claim as a lien on the railroad of the Texas Company over that of the two mortgages on the ground that the claim arose for supplies and labor furnished to the Texas Company. One paragraph of the opinion of the Chief Justice in delivering the judgment of the court shows clearly the likeness of the case to that at the bar, and the true ground for denying the lien sought. After referring to *Fosdick v. Schall*, 99 U. S. 235, and subsequent authorities upon the question of equitable liens for supplies, the chief justice said:

"In the light of these decisions, the inquiry before us is whether these bondholders are to be postponed in respect to the proceeds of the sale of the corpus of the property upon which their lien is first and paramount, to this claim of the Houston Company, upon the ground of the particular application of these moneys, or that they supplied a diversion by the officers of the Texas Company equitably binding as such upon the bondholders. Now, if these advances were made generally, as needed by the Texas Company, it matters not whether they were devoted to the payment of running expenses or not. The relation of debtor and creditor existed, and no equity could arise in favor of the creditor as against other creditors holding security prior in time, by reason of the voluntary application the debtor might make of the money borrowed. We repeat that, so far as appears, the money advanced to one road by the other was simply a loan. The account between the companies was a running account, and the balance was only a balance for cash advances made from time to time. Moneys received from the operation of the Texas road and moneys received from the Houston Company all went into a common fund, from which payments were made for expenses, taxes, and so on. It is also shown that the Texas Company and the Houston Company had the same fiscal agent in New York, who paid the coupons of both; that the management of the Texas Company was, during its entire existence, in the hands of the same officers and directors who managed the Houston Company; that these officers derived their compensation from the Houston Company; that all receipts from the Texas Company were first received by the Houston Company, and then transferred on the books to the treasurer of both companies as treasurer of the Texas Company; that whenever there was a deficit of funds on the part of the Texas Company, such deficit was made up by the Houston Company; and that the latter company received and disbursed everything. Under such circumstances it cannot be maintained, against the first mortgage bondholders, that a balance of such a running account of five years' duration represents money so applied to the current expenses of the road, or so diverted therefrom to the payment of interest on the bonds, as to carry with it a superior equity for repayment."

The case cannot be distinguished from the one at bar. The decree of the circuit court in this regard is affirmed.

We think that no error can be predicated on the failure of the circuit court to enter a decree for money in favor of the receivers of the Chesapeake Company against the Valley Company. The main action was the foreclosure of a mortgage, and the intervening petition of the receivers was allowed to be filed because it asserted a lien on the property of the railroad prior in right to that of the foreclosing mortgagee. If they had no lien, the receivers were entitled to no relief whatever. There is little or no analogy between this case and that in which a foreclosing mortgagee is allowed a judgment for the deficiency on his claim after the application to his debt of

the proceeds of the sale of the mortgaged property. In such a case, a court of equity acquires jurisdiction by reason of the necessity for the foreclosure proceedings, and the judgment for the deficiency is a mere incident, necessary to a complete adjustment of the rights of the parties. Until especially conferred by one of the equity rules, a federal court of equity had no power to enter judgment for a deficiency, even in case of a foreclosure. In the case at bar, there is found to be no lien at all, and there is, therefore, no deficiency of assets in the sense in which that term is understood in a foreclosure suit. If a decree had been rendered for money only, it would seem that the court's jurisdiction to render the decree could hardly have been sustained, because the right to a trial by jury upon such an issue would thus have been denied to the debtor company. Without deciding more, however, we hold that it was at least within the discretion of the circuit court, after finding that the receivers of the Chesapeake Company were not entitled to a lien for their claim, to decline to enter a decree for money only.

We come now to consider the second count of the intervening petition of these receivers. They thereby seek to subject certain of the mortgage bonds issued by the Valley Company, and included in the foreclosure proceeding which belong to the Contract Company, and are on deposit with the Columbia Finance & Trust Company, to the satisfaction of a claim made by the receivers against the Contract Company under the contract executed March, 1891, by and between that company and the Chesapeake Company. Had objection been made to the petition on the ground that it was multifarious, it might have presented some difficulty; but no such objection was made, and, as the court undoubtedly had jurisdiction of both causes of action stated in the petition, the defect in the petition, if any, was clearly waived, as the circuit court held. The claim of the receivers of the Chesapeake Company is based upon the alleged diversion of the subsequent earnings of the Ohio Valley road to pay its floating debts and its Car Trust obligations incurred prior to the making of the contract of March 6, 1891. The objections urged to this claim are: First, that payments out of the subsequent earnings of the Valley road to take up its prior debts could give the Chesapeake Company no right to reimbursement therefor; second, that no earnings were used to pay floating debts; and, third, that the whole claim is more than set off by the amount due from the Chesapeake Company on its defaulted guaranty of interest. By the contract of March 6, 1891, the Contract Company delivered to the Chesapeake Company 60 per cent. of the stock of the Valley Company, and guaranteed that the floating indebtedness of the Valley Company should not exceed \$30,000, and that the Car Trust debts should not exceed \$86,000, and provided for the payment of these debts by depositing with the Columbia Company as trustee bonds equal in par value to these respective amounts, and stipulated that the Chesapeake Company might sell the bonds at a price equal to and not less than 90 per cent. of par, and deposit the proceeds with the trustee, to be drawn against by the Valley Company for payment of the floating indebtedness of the Car Trust obligations, or for re-

payment of amounts paid on account of either the floating or the Car Trust debt. In consideration of this, the Chesapeake Company agreed to guaranty the payment, principal and interest, of the Valley Company's mortgage bonds, aggregating \$2,162,600; and further agreed to deposit, as security for the performance of this guaranty for seven years, the 60 per cent. of the capital stock of the Valley Company with the Columbia Company as trustee, and stipulated that in case of default on its guaranty during those seven years the trustee should, on demand, deliver back the stock to the Contract Company, but that until such default the Chesapeake Company should be deemed the owner of the stock; and that, if no default occurred during the seven years, then, at the expiration thereof, the stock should be redelivered by the trustee to the Railroad Company. By a third article it was provided that expenses should be prorated between the two railroads, the Valley and the Chesapeake, on a mileage basis, and that the earnings should be apportioned as if the roads were separate. The supplementary contract made provision for a representation of the minority stockholders in the board of directors of the Valley Company.

Looking at this contract in the light of the circumstances and the subsequent conduct of the parties, it is manifest that it was expected that the Chesapeake Company, or its agent and lessee, the Newport News Company, should operate the Valley road as a part of the Chesapeake, Ohio & Southwestern system; that by bookkeeping its earnings and expenses should be kept separate from those of the Chesapeake road, but that otherwise the roads should be treated as if one. It was evidently in the contemplation of the parties that the floating debt and the Car Trust notes might have to be taken up before the bonds were sold, and it was intended that the proceeds of the bonds when sold should replace the sums thus expended. This is clearly shown by the words "for repayments of amounts paid on account of such Car Trust obligations or such indebtedness or liabilities" used to specify the object to which the proceeds of the bonds were to be devoted. It was plainly intended that by the use of the bonds the indebtedness of the Valley Company should be paid, and that its future earnings should not be burdened with such an obligation. The primary advantage to the Chesapeake Company in this arrangement was that it rendered more probable the payment of the interest on the guaranty bonds, or some part of it, out of the earnings of the Valley road, and thus reduced the probable burden of the guaranty. The Chesapeake Company had in fact to pay a large part of the interest which was paid on the guaranteed mortgage bonds. Hence it follows that every dollar of the earnings of the Valley road after April 1, 1891, used to pay the old floating debt of the Car Trust notes increased the amount which the Chesapeake Company had to pay as interest upon the bonds. We fully concur with the circuit court, therefore, in the view that the diversion of the Ohio Valley earnings to pay the old debts of the company was equivalent to a direct advance of that amount out of the treasury of the Chesapeake Company, and that if, for such advances, the Chesapeake Company would be entitled to repayment out of the

proceeds of the bonds deposited under the contract of March 6, 1891, then it is equally entitled to reimbursement for a diversion of the earnings of the Valley road to the same purposes. And now, what is the amount of this diversion? It appears that of the floating debt, \$10,039.13, was paid by the Valley Company after April 1, 1891. It is said this was not paid out of the earnings of the Valley road, or by the Chesapeake Company, because there was on hand in possession of the Valley Company certain resources or "quick assets" amounting to \$18,362.62, which were properly applicable to the payment of the floating debt. Of these so-called resources the \$4,310 was really money in the hands of agents, and like accounts. It is not unreasonable to suppose that in treating and referring to the floating debt of the Valley Company the parties to the contract intended that such cash assets should be deducted from the gross amount, and that only the net results after the deduction should be regarded as the floating debt. At all events, as these assets were collected and expended, they may be presumed to have been applied to the old debts, and the diversion of the earnings was by so much less than the amount of the old debts paid. The remainder of the so-called resources, amounting to \$14,052.37, was made up of \$12,452.37, known as the "Southern extension account," which was the amount expended by the Valley Company in making maps and a survey for an extension of the Valley road, and \$1,600 paid for a quarry purchased to ballast the road. We are at a loss to see how such items could be used to reduce the liabilities provided for in the contract of March 6, 1891. The maps and surveys and the quarry were a part of the Valley Company's property as much as the rails or the stations of the road, and could not, we think, within the contemplation of the parties, figure on either side of the account in making a statement of the floating debt. We are constrained to differ with the court below in treating either the extension account or the quarry as a quick asset or resource to reduce the amount of floating debt paid out of earnings. The result is that earnings of the Valley Company were diverted to pay the old floating debt to the amount of \$5,726.64. It also appears from the master's report that through its agent, the Newport News Company, and by direct payment, the Chesapeake Company also advanced \$1,926.61 to pay off part of this floating debt. It also appears that out of the earnings of the Ohio Valley road Car Trust notes for \$24,462.58 were paid. By the terms of the contract, we think the Chesapeake Company was entitled to reimbursement from the proceeds of the bonds deposited to pay the floating and Car Trust debts, thus shown to be \$32,115.83. But the provision thus made for their payment contained a limitation, to wit, that the bonds could be sold at not less than 90 cents on the dollar. This requires, as the circuit court held, that only the number of bonds can be used in reimbursing the Chesapeake Company which would, at 90 per cent. of par, pay the debt. It appears that interest was collected by the trustee on the bonds held by him on deposit. We agree with the circuit court that those having a lien or claim upon the bonds may appropriate the interest on the bonds as an incident thereof.

It is vigorously pressed upon the court that as against this claim by the Chesapeake Company upon these bonds, the Contract Company, the owner of them, may set off the amount due from the Chesapeake Company to the Contract Company on its defaulted guaranty. The circuit court was of opinion that as the claim of the Contract Company against the Chesapeake Company was in personam, and the claim of the latter company against the bonds was in rem, there could be no set-off. In courts of the United States sitting in equity the most liberal rules prevail in the allowance of set-offs to avoid injustice and circuity of action. *Scott v. Armstrong*, 146 U. S. 507, 13 Sup. Ct. 148; *North Chicago Rolling Mill Co. v. St. Louis Ore & Steel Co.*, 152 U. S. 615, 14 Sup. Ct. 715. In the latter case the court says:

"Cross demands and counterclaims, whether arising out of the same or wholly disconnected transactions, and whether liquidated or unliquidated, may be enforced by way of set-off whenever the circumstances are such as to warrant the interference of equity to prevent wrong and injustice."

In *New Jersey* (*White v. Williams*, 3 N. J. Eq. 376; *Dudley v. Bergen*, 23 N. J. Eq. 401; *Dolman v. Cook*, 14 N. J. Eq. 68; *Bird v. Davis*, Id. 471) it is held that a foreclosure of a mortgage is a proceeding in rem, and that the mortgagor cannot, therefore, be permitted to set off in such an action a claim then due him from the mortgagee. This rule finds little or no support in other states, and we cannot understand the justice of it. If A. has a claim against B. which he is trying to enforce, we can understand why B. should not be permitted to set off against it a claim in rem in the nature of a lien or otherwise against property owned by A. for which A. is not personally liable. In such a case, there is no mutuality. B.'s only mode of enforcing his claim is by appropriation and sale of A.'s property, and it may be that B. will not thus realize enough to satisfy his claim. A., of course, cannot be held for the deficiency. B. cannot, therefore, be permitted to set off his lien claim as if A. owned it personally. But the reverse is not true. If B. is enforcing a lien against A.'s property, A. can remove the lien by paying to B. the amount secured by it. If so, why may he not be permitted to cancel the lien by forgiving B. the debt B. owes him; i. e. by setting it off? We are clearly of opinion that he may do so. Justice is thereby done, and circuity of action is avoided.

But, while we differ with the court below as to the law of set-off of claims, one in personam and one in rem, we concur in the conclusion reached by it upon the other ground upon which the decree appealed from was based, namely, that under the circumstances of this case there was nothing due from the Chesapeake Company to the Contract Company which the latter could set off. We think that the action of the Contract Company in taking back the stock ended the obligation of the Chesapeake Company upon its guaranty of the bonds of the Ohio Valley so far as the contract of March 6, 1891, was concerned. Of course, it could have no effect upon the guaranty indorsed on the bonds held by purchasers without notice, but, as between the parties to the contract of March 6, 1891, we must hold that the effect of the retaking of the stock by the Contract Com-

pany was to cancel the contract as to the part of it executory and unperformed. It is said that there is nothing expressed in the contract to warrant such a conclusion. This may be conceded, but the circumstances and the real nature of the contract leave no doubt in our minds that the conclusion is in accordance with the intention of the parties. The contract between the parties, shortly stated, was that if the Contract Company would give the Chesapeake Company control of the Valley road, the latter would guaranty the Valley bonds, of which the Contract Company was a large holder. On a single default in the payment of interest the Contract Company reserved the right to resume control of the Valley road, not temporarily, but forever. Under the contract the reciprocal benefits to the parties were concurrent,—control of the road on one side, receipt of interest on the other. Any power reserved in the contract given to one to withdraw one of these concurrent benefits forever would seem, upon its exercise, to be consistent only with the release of the corresponding obligation of the other party. It is true that the Chesapeake Company must have known that, even though control of the Valley road might be withdrawn by retaking the stock upon default in the guaranty, it would not escape from its obligation upon bonds already sold to purchasers without notice. But this was an unavoidable incident to making a guaranty at all, and cannot, we think, change the view to be taken of the intention of the parties as to the binding force of the obligation of guaranty as between them after the Contract Company should resume possession forever of the only consideration inducing the guaranty. It is said that the Chesapeake Company has had control of the road for two years. That is true, but the Contract Company has had its interest. The road was improved by the new management, and, what is the most important benefit to the Contract Company, and that which doubtless led it into the contract, it has sold more than half a million of the Valley bonds at a price probably much increased by the indorsement of guaranty. But it is said, if the retaking of the stock rescinds the contract, how can the stipulations of the Contract Company as to the deposited bonds be enforced against it? Courts, in giving effect to rescissions, always, if possible, preserve vested interests and avoid a forfeiture. *Railroad Co. v. Howard*, 13 How. 307, 340. The stipulations as to the payment of the debts of the Ohio Valley Company were merely preliminary, and were inserted to clear the field of negotiation and contract for the concurrent operation of the two reciprocal benefits which the contract was intended to confer, each as an inducement for the other,—the control of the road on the one hand, the guaranty of the bonds on the other. The Chesapeake Company wished to be sure that the then debts of the Valley Company would not embarrass it in obtaining from the earnings of that road enough to pay the interest the Chesapeake Company had guarantied to pay, and the Contract Company accordingly provided for the debts by devoting to their payment bonds which it owned by depositing the bonds with a trustee for the purpose, and by expressly stipulating that money advanced to pay these debts of the Valley Company should be repaid from the proceeds of the bonds when sold. When the

bonds were deposited, and advances were made on the faith of them, the contract, so far as the Contract Company was concerned, was executed, the interest of the Railroad Company making the advances became fixed, the trustee holding the bonds became its trustee, and its rights in the bonds were as completely vested as if it had manual possession of them under pledge for a loan.

We have already pointed out that a diversion of the earnings of the Valley Company to pay these debts amounted, in effect, to an advance by the Chesapeake Company to pay them, because of the increase of the amount of interest on the guarantied bonds of the Valley Company which the Chesapeake Company was obliged to pay. To the extent that the debts and Car Trust notes of the Valley Company were paid, we think the contract executed, and that no subsequent rescission could or should affect the vested interest in the deposited bonds acquired by the Chesapeake Company through such payments.

It is suggested that the unsoundness of our conclusion will appear if we suppose that the Chesapeake Company had failed to pay the first installment of the guarantied interest. It is asked whether, in such a case, it would be equitable, after the Contract Company had retaken the stock, to allow the Chesapeake Company to have the bonds of the Contract Company sold, and to put the proceeds thereof in its pocket. Certainly it would not, except to the extent to which the Chesapeake Company had directly expended its own money to pay such debts. As the Chesapeake Company in such a case would have paid no interest, the diversion of the earnings of the Valley Company to pay its old debts would give the Chesapeake Company no equity or right to be reimbursed out of the deposited bonds for such diversion. It is because the Chesapeake Company has paid a large amount of the guarantied interest, far in excess of the earnings of the Valley Company diverted, that the Chesapeake Company has a standing here to ask reimbursement equal to the diversion out of the bonds which were appropriated by contract, and actual deposit with a trustee to that specific purpose, before either the interest was paid or the earnings were diverted.

The next question is whether the United States Trust Company, as the assignee of the Newport News & Mississippi Valley Company, is entitled to subject part of the 86 bonds deposited under the contract of March 6, 1891, to meet Car Trust obligations, to the payment of the amount advanced by the Newport News Company when operating the Valley Road to discharge a large amount of those Car Trust obligations. It is conceded that the amount thus advanced was \$49,898.33. The Chesapeake Company objects to the consideration of this appeal on the ground that it was not made a party thereto. An examination of the record shows an appeal allowed to the United States Trust Company without mention of the appellees. This was one of four appeals from the same decree. The record further contains a waiver in one instrument by all parties to the action below of the issuing of citations on "all the appeals." The record was made up as if in one appeal. Under these circumstances we must hold that all the parties to the action below have ap-

peared as parties to all the appeals now under consideration. It is true that the appeal bond of the United States Trust Company runs to the Western Contract Company alone as obligee, but this defect in the appeal bond cannot prevent the attaching of jurisdiction of all the parties appearing and waiving process. The giving and acceptance of an appeal bond is not jurisdictional. It is merely modal, and a defect in it is only an irregularity. *Brown v. McConnell*, 124 U. S. 489, 8 Sup. Ct. 559.

The learned judge at the circuit held that the United States Trust Company was not entitled to share in the security of the deposited bonds for the advances made by its assignor, the Newport News Company, to pay Car Trust obligations because it was a volunteer, and could not be subrogated, therefore, to the rights of the Chesapeake Company in respect of such security. We find ourselves unable to concur in this view. The Newport News Company, it seems to us, was nothing but the agent of the Chesapeake Company in making these advances, and it is in evidence that it made them at the request of the Chesapeake Company. It is true that there is nothing to show that the advances were ever charged on the books of account against the Chesapeake Company by the Newport News Company, but we must infer, in the absence of any averment to the contrary in any pleading by the receivers of the Chesapeake Company, that in the adjustment of affairs between the Newport News and the Chesapeake Companies at the cancellation of the lease, the latter company was permitted to become the real owner of the claim for these advances against the bonds, for a valuable consideration. Inasmuch as these advances were made for the Chesapeake Company, and at its request, the agent making them, and subsequently acquiring title to the debt based on them, has as much right to avail itself of the security deposited to secure repayment of them as the Chesapeake Company would have were it still the owner of the claim therefor. It is not, strictly speaking, a question of subrogation, as we view it. When these advances were made, they were the advances of the Chesapeake Company, and the security to repay them as an incident to the debt thus created between the Valley Company and the Chesapeake Company then attached, and passed with that debt into the hands of any assignee thereof. The mode of determining how many bonds and how much accrued interest are available as security for these advances must be the same as that followed with respect to the claim of the receivers of the Chesapeake Company; that is, the United States Trust Company shall be allowed as many bonds held by the trustee for Car Trust obligations as would be needed if sold at 90 per cent. of par to pay off the advances made. The accrued interest on these bonds which was paid in cash to the trustee, and is now held by him, is also to be appropriated to pay these advances as part of the security.

The appeal of S. S. Brown and others from that part of the decree below dismissing their intervening petition in which they, as creditors of the Valley Company, sought to take advantage of the same bond clause of the contract of March 6, 1891, under which we have held that relief may be granted to the Chesapeake Company and the

United States Trust Company, can be very shortly disposed of. The claims of the petitioners were part of the floating debt of the Valley Company contracted before the making of the agreement of March 6, 1891. That agreement was made for the benefit of the Chesapeake Company to secure any advances made by it or on its account or at its expense to pay the floating debt. It was not made for the benefit of the owners of the floating debt or the Car Trust notes. The petitioners, even if they might otherwise have taken advantage of the clause, have not changed their position, or advanced money on the faith of the security of the bond clause; and therefore, in no aspect of the case can they enjoy the security afforded thereby. It is true that where A. makes a contract with B. for the benefit of C., C. may usually sue on it, and enforce its obligations against B. It is also true that under certain circumstances where C. is compelled to discharge an obligation of A. to B., C. may have the benefit of the same security for reimbursement as A. would have had, on principles of subrogation. But neither of these principles applies in favor of Brown and his fellow petitioners—First, because the bond clause on which they rely was not made for their benefit; and, second, because they have not discharged any obligation for the benefit of the Chesapeake Company.

The decree of the circuit court is in part affirmed and in part reversed, and the case is remanded to the circuit court with instructions to set aside the decree as entered and to enter a modified decree in accordance with this opinion. The costs of the appeal will be assessed one-half against the receivers of the Chesapeake Company and one-half against the Contract Company and S. S. Brown and other petitioners.

HOOVER v. McCHESNEY.

(Circuit Court, D. Kentucky. June 14, 1897.)

1. POWER OF CONGRESS—POSTAL REGULATIONS—"FRAUD ORDERS."

Act Cong. March 2, 1895, extending the powers of the postmaster general, conferred by Rev. St. § 3929, as amended by Act Sept. 19, 1890 (26 Stat. c. 908) § 2, by authorizing him, on a determination upon evidence satisfactory to him that a person or company is using the mails for the purpose of conducting a lottery or other fraudulent scheme, to order a postmaster to return all mail received at his office directed to such person or company, or his or its agents or representatives, is within the power of congress to prescribe what matter shall be excluded from the mails, so far as applied to a corporation whose business has been so determined to be in violation of the postal laws, or to its officers, such order being but a mode of excluding matter which may be presumed to be nonmailable.

2. SAME—RIGHT OF CITIZEN TO USE MAILS—DUE PROCESS OF LAW.

A citizen of the United States has a property right in the use of the mails for lawful purposes, of which he cannot be deprived without due process of law; hence congress has no power to confer authority on the head of the postal department, upon a determination on evidence satisfactory to him that a citizen is using the mails for the purpose of conducting a lottery or other fraudulent scheme, to issue an order instructing a postmaster to return or send to the dead-letter office all mail matter coming to his office directed to such person, without regard to whether such matter is or is not nonmailable.

2. CONSTITUTIONAL LAW—UNREASONABLE SEIZURES—WITHHOLDING OF MAIL.

The refusal by a postmaster to deliver mail matter addressed to a private person, who is a citizen of the United States, and the return of such mail to the senders, or to the dead-letter office, without regard to whether it is nonmailable, though done in pursuance of an executive order of the postmaster general, on a determination by him that the person to whom such mail is addressed is using the mails for unlawful purposes, is a violation of the fourth amendment to the constitution, securing the people against unreasonable seizures of their papers and effects.

4. CIRCUIT COURT—JURISDICTION TO GRANT INJUNCTION—ULTRA VIRES ACT OF EXECUTIVE OFFICER.

The circuit court has jurisdiction to grant an injunction restraining a postmaster from withholding mail matter from a citizen to whom it is directed, under an order of the postmaster general which was beyond the scope of his constitutional authority.

On Exceptions to Answer and Motion for Temporary Injunction.

The plaintiff, in his bill, alleges: That he is a citizen of the state of Kentucky, and a business man, having extensive social, business, and general correspondence. That prior to the time indicated in the bill he enjoyed the usual and ordinary mail facilities of the citizens of the United States, not only in the conduct of his business, but also in the free enjoyment of intercourse with his family, relatives, friends, and acquaintances. That the defendant, W. M. McChesney, was duly appointed postmaster at Lexington, Ky., and qualified as such, and that as postmaster, in the exercise of his authority and the performance of his duty, and in due course of mail, received in his custody at the post office at Lexington each day for and during more than three months before the filing of the bill sealed letters, packages, and packets addressed and to be delivered to the complainant, which sealed letters, packets, and packages were mailed to him by his counsel, by his correspondents, friends, relatives, and others, and that it was the official duty of the defendant as postmaster to deliver said letters, packages, and packets so addressed to him, and received at the said post office; and that he requested of the defendant the delivery of said letters, but that in disregard of his official duty, and in violation thereof, and of the rights of the complainant, he refused to deliver said letters or packages or packets, or any of them, but arbitrarily and wrongfully, and without notice to the complainant, either before or after the seizure and detention of said letters and packages, seized and detained each and every one of said letters and packages and packets as they were received from day to day and from time to time in said office, and wholly refused to deliver said letters and packages to plaintiff, or to any one for him. That he unlawfully and wrongfully having seized and detained said letters and packages wrote or caused to be written or stamped on each and every one of said letters and packages the word "Fraudulent," and, instead of delivering the said letters and packages to him, returned part of said mail matter to the several offices from which it was forwarded, and other parts of it to the dead-letter office at Washington, D. C. That on each and every one of said letters and packages thus received at the Lexington post office the said defendant wrote or caused to be written the false, libelous, and defamatory word "Fraudulent" thereon, thereby publishing and causing to be believed by the public that this complainant was and is not a citizen of good repute, and that he was not and is not a law-abiding citizen, and that all mail matter addressed to him and received at the post office at Lexington, Ky., was of an unlawful, fraudulent, and nonmailable character, and was written and addressed to him (complainant) for an unlawful and improper purpose. That by reason of the wrongful seizure and detention of said letters and packages, and the false and libelous matter so written thereon and published, the complainant has been greatly injured in his reputation and business, and has been scandalized and humiliated, and has also been, and still is, by said postmaster wholly denied and deprived of the right and privilege of using the United States mail or said post office at Lexington, Ky., for any purpose whatever during said three months last past; and that said defendant, McChesney, continues to seize and detain the mail matter of this complainant, and continues to write upon each and every package and parcel the false word "Fraudulent,"

and refuses to desist therefrom, and disposes of the said mail matter by returning it to the place from which it came, or sending it to the dead-letter office at Washington, D. C.; and the said defendant, using and abusing his official power and authority as postmaster at Lexington, has for the purpose and in the manner herein set forth seized and stamped as fraudulent not only all the personal mail matter addressed to said complainant to be delivered to him, but also each and every letter and package and packet addressed to this complainant as an officer and employé of the firm, association, or corporation with which he has been and is connected as an officer and employé, and the same has been in like manner unlawfully and without due process of law seized and detained, and by the said defendant as postmaster, and by his orders, stamped and indorsed "Fraudulent," and has so disposed of said mail as to prevent this complainant or the company, firm, or corporation with which he is connected from receiving or coming in possession of the same, all of which he, the said defendant, continues to do, and refuses to cease from so doing, against the rights of this complainant as a citizen, and to the injury of his reputation, business, and property, and that by reason of said unlawful and wrongful acts of said defendant complainant is damaged in the sum of \$50,000. It is also alleged as a special damage that during the time in which his mail was so withheld from him he was, in the prosecution of his business, negotiating a loan for a client (Plummer) in the sum of \$45,000 with a party in Pennsylvania, and conducting said negotiations through the United States mail, and that said negotiations when nearly completed were broken up, and the loan defeated, by the unlawful and wrongful detention and seizure of the complainant's mail matter as herein indicated; and that by reason of said unlawful acts in thus interfering with his mail complainant was unable to correspond with said Plummer, and that by reason thereof complainant was damaged in the sum of \$2,500. The prayer of the bill is that the court may issue an order restraining said defendant from detaining, seizing, or tampering with the mail or mail matter of this complainant as hereinbefore mentioned, or otherwise, except to receive and deliver said mail matter to the complainant according to his rights in the premises, and on the final hearing that the defendant may be by decree perpetually enjoined from detaining and seizing the mail matter of this complainant, unless on complaint duly made, and by proper legal proceeding first had, and also enjoined from detaining or interfering with the mail received at said post office addressed to complainant, and which he is entitled to receive; and that damages be adjudged to him. The answer admits that he is the postmaster, and admits the allegations of the bill as to the detention and seizure of mail matter, and the disposition made of it, and denies all damages in any sum whatever, and sets up as justification for his acts in thus seizing, detaining, and returning complainant's mail two orders issued by the Honorable Wm. L. Wilson, postmaster general of the United States,—one dated February 12, 1896, as follows:

"Post-Office Department, Washington, D. C., February 12, 1896.

"Order No. 101.

"It having been made to appear to the postmaster general, upon evidence satisfactory to him, that the Southern Mutual Investment Company, Dr. A. P. Taylor, Pres., F. H. Norton, Vice Pres., T. B. Hoover, Sec., J. M. Graves, Treas., and Wm. J. Hoover, Gen. Mgr., at Lexington, Kentucky, are engaged in conducting a lottery or similar enterprise for the distribution of money by lot or chance through the mails, in violation of the act of congress entitled 'An act to amend certain sections of the Revised Statutes relating to lotteries, and for other purposes,' approved September 19, 1890: Now, therefore, by authority vested in him by said act, and by the act of congress entitled 'An act for the suppression of lottery traffic through international and interstate commerce and the postal service, subject to the jurisdiction and laws of the United States,' approved March 2, 1895, the postmaster general hereby forbids you to pay any postal money order drawn to the order of said company or its officers, and you are hereby directed to inform the remitter of any such postal money order that payment thereof has been forbidden, and that the amount thereof will be returned upon the presentation of a duplicate money order applied for and obtained under the regulations of the department. And you are hereby instructed to return all letters, whether registered or not, and other mail matter which

shall arrive at your office directed to said company or its officers to the postmasters at the offices at which they were originally mailed, to be delivered to the senders thereof, with the word 'Fraudulent' plainly written or stamped upon the outside of such letters or matter: provided, however, that where there is nothing to indicate who are the senders of letters not registered, or other matter, you are directed in that case to send such letters and matter to the dead-letter office, with the word 'Fraudulent' plainly written or stamped thereon, to be disposed of as other dead matter under the laws and regulations applicable thereto.

Wm. L. Wilson, Postmaster General.

"To the Postmaster, Lexington, Kentucky."

—And the other, dated February 17, 1896, as follows:

"Post-Office Department, Washington, D. C., February 17, 1896.

"Order No. 106.

"It having been made to appear to the postmaster general, upon evidence satisfactory to him, that T. B. Hoover, at Lexington, Kentucky, is engaged in conducting a lottery for the distribution of money by lot or chance through the mails, in violation of the act of congress entitled 'An act to amend certain sections of the Revised Statutes relating to lotteries and for other purposes,' approved September 19, 1890: Now, therefore, by authority vested in him by said act, and by the act of congress entitled 'An act for the suppression of lottery traffic through international and interstate commerce and the postal service, subject to the jurisdiction and laws of the United States,' approved March 2, 1895, the postmaster general hereby forbids you to pay any postal money order drawn to the order of said party, and you are hereby directed to inform the remitter of any such postal money order that payment thereof has been forbidden, and that the amount thereof will be returned upon the presentation of a duplicate money order applied for and obtained under the regulations of the department. And you are hereby instructed to return all letters, whether registered or not, and other mail matter, which shall arrive at your office directed to the said party to the postmasters at the offices at which they were originally mailed, to be delivered to the senders thereof, with the word 'Fraudulent' plainly written or stamped upon the outside of such letters or matter: provided, however, that where there is nothing to indicate who are the senders of letters not registered, or other matter, you are directed in that case to send such letters and matter to the dead-letter office, with the word 'Fraudulent' plainly written or stamped thereon, to be disposed of as other dead matter under the laws and regulations applicable thereto.

"Wm. L. Wilson, Postmaster General.

"To the Postmaster, Lexington, Kentucky."

—Which orders are alleged to have been issued by virtue of an act of congress entitled "An act to amend certain sections of the Revised Statutes relating to lotteries and for other purposes," approved September 19, 1890, and the act approved March 2, 1895. The material parts of said acts are as follows:

"Sec. 2. That section thirty nine hundred and twenty nine of the Revised Statutes be and the same is hereby amended to read as follows:

"Sec. 3929. The postmaster general may, upon evidence satisfactory to him that any person or company is engaged in conducting any lottery, gift enterprise, or scheme for the distribution of money, or of any real or personal property by lot, chance, or drawing of any kind, or that any person or company is conducting any other scheme or device for obtaining money or property of any kind through the mails by means of false or fraudulent pretenses, representations or promises, instruct postmasters at the post offices at which registered letters arrive directed to any such person or company, or to the agent or representative of any such person or company whether such agent or representative is acting as an individual, or as a firm, bank, corporation or association of any kind, to return all such registered letters to the postmaster at the office at which they were originally mailed, with the word "Fraudulent" plainly written or stamped upon the outside thereof; and all such letters so returned to such postmasters shall be by them returned to the writers thereof, under such regulations as the postmaster general may prescribe."

"But nothing contained in this section shall be so construed as to authorize any

postmaster or other person to open any letter not addressed to himself. The public advertisement by such person or company so conducting such lottery, gift enterprise, scheme or device, that remittances for the same may be made by registered letters, to any other person, firm, bank or corporation or association named therein shall be held to be prima facie evidence of the existence of said agency by all the parties named therein; but the postmaster general shall not be precluded from ascertaining the existence of such agency in any other legal way satisfactory to himself.

"Sec. 3. That section four thousand and forty one of the Revised Statutes be, and the same is hereby amended to read as follows:

"Sec. 4041. The postmaster general may, upon evidence satisfactory to him that any person or company is engaged in conducting any lottery, gift enterprise or scheme for the distribution of money, or of any real or personal property by lot, chance or drawing of any kind, or that any person or company is conducting any other scheme for obtaining money or property of any kind through the mails by means of false or fraudulent pretenses, representations or promises, forbid the payment by any postmaster to said person or company of any postal money orders drawn to his or its order, or in his or its favor, or to the agent of any such person or company, whether such agent is acting as an individual or as a firm, bank, corporation or association of any kind, and may provide by regulation for the return to the remitters of the sums named in such money orders."

"But this shall not authorize any person to open any letter not addressed to himself. The public advertisement by such person or company so conducting any such lottery, gift enterprise, scheme or device, that remittances for the same may be made by means of postal money orders to any other person, firm bank or corporation or association named therein, shall be held to be prima facie evidence of the existence of said agency by all the parties named therein; but the postmaster general shall not be precluded from ascertaining the existence of such agency in any other legal way."

—And the act of congress of March 2, 1895, as follows:

"Sec. 4. That the powers conferred upon the postmaster general by the statute of eighteen hundred and ninety, chapter nine hundred and eight, section two, are hereby extended and made applicable to all letters or other matter sent by mail."

This answer is excepted to by the complainants, and raises the question of whether or not the answer presents a sufficient defense to the bill of complaint, and whether or not the Honorable W. L. Wilson, postmaster general, had the constitutional right to issue the orders of February 12 and 17, 1896, and whether or not the acts of congress authorize the issuing of said orders. The complainant also moves the court for a temporary injunction restraining said defendant McChesney from withholding from him any private mail matter which comes directed to him individually, and which has no words or language or indication that they were addressed to the complainant as an officer or employé of the Southern Mutual Investment Company, and moves the court for a temporary injunction enjoining and restraining said McChesney from withholding any of his mail.

Benj. Butterworth, J. C. Dowell, W. C. P. Breckenridge, C. B. Mathews, and J. H. Nelms, for complainant.

W. M. Smith, Dist. Atty., for defendant.

BARR, District Judge (after stating the facts as above). It will be seen from this statement of the pleadings that it is nowhere alleged that the complainant is in fact engaged in conducting a lottery scheme for the distribution of money by lot or chance, through the mails, in violation of the acts of congress, nor that any of the mail which has been seized by the defendant for the three months prior to the filing of the bill is in fact nonmailable. The defense rests entirely upon the orders issued by the postmaster general, in which it is recited that it

has been made to appear to him upon satisfactory evidence that said complainant is conducting a lottery for the distribution of money by lot or chance, through the mails, in violation of the acts of congress. The questions presented, therefore, are exceedingly important, and one of them, we think, a new one.

The colonies, prior to the old confederacy, or the adoption of the present constitution, exercised the right as a governmental one of establishing post offices and post roads. As early as 1692, in the reign of William and Mary, the colony of Virginia fixed by law the rate of postage to be charged for mail matter, a patent having been issued to Thomas Neale in that reign granting to him for a period of 120 years the right to establish and maintain a postal service in the colony of Virginia upon rates to be thereafter fixed by the colony. The act of 1692 established the postal rates, and made the postal service exclusive, except that the right to send by a friend or private person, without compensation, mail matter, was reserved. The colony also required of the patentee, Thomas Neale, that he should establish in each county one post office at least. See 3 Hen. St. at Large, p. 112. Under the old confederation, congress was invested with the sole and exclusive power of establishing and regulating post offices from one state to another throughout the United States, and exacting such postage on the papers passing through the same as might be requisite to defray the expenses of said office. When our present constitution was adopted, this power was extended, and the power of establishing post roads as well as post offices was given. In the discussion of the powers granted to the federal government this power was regarded as a very harmless one. "The power," says the Federalist, "of establishing post roads, must in every view be a harmless power, and may perhaps by judicious management become productive of great public conveniency. Nothing which tends to facilitate the intercourse between the states may be deemed unworthy of the public care." This power, however, has proven to be a most important one, and has become an indispensable part of the social and commercial life of the nation. Judge Story wrote more than 60 years ago:

"The post-office establishment has already become one of the most beneficent and useful establishments under the national government. It circulates intelligence of a commercial, political, intellectual, and private nature with incredible speed and regularity. It thus administers in a high degree to the comfort, the interests, and the necessities of persons in every rank and station of life. It brings the most distant persons and places, as it were, in contact with each other, and thus softens anxieties, increases the enjoyments, and cheers the solitude of millions of hearts. It imparts a new influence and impulse to private intercourse, and by a wider diffusion of knowledge enables political rights and duties to be performed with more uniformity and sound judgment. It is not less effective as an instrument of government in its own operations." 3 Story, Const. § 1120.

When this was written, the postal establishment of the United States was comparatively small, costing less than \$2,000,000 a year, and having less than 8,000 post offices. Now it has been extended and perfected so that not only the convenience and comfort of the citizens is dependent upon it, but the business interests of thousands of citizens. This power, having been exercised by the federal govern-

ment, is exclusive of the power of the several states to establish any postal system, and has been by law made a monopoly excluding all private individuals from establishing competing or postal systems in the United States. See Rev. St. c. 9, tit. 46. As a necessary incident to this power it is now settled that congress has a right to designate what mail matter shall be carried through the mails, and how. This right of designation of necessity involves the right to exclude from the mails by declaring what postal matter is nonmailable, and the courts have sustained the exercise of what may be called the police power of excluding from the mails that which may be declared immoral or injurious to the morals of the people of the several states, and thus the power of congress to exclude from the mails all matter concerning lotteries, and all mail matter concerning fraudulent schemes, has been sustained. See *Ex parte Jackson*, 96 U. S. 727; *In re Rapier*, 143 U. S. 110, 12 Sup. Ct. 374; *Horner v. U. S.*, 143 U. S. 571, 12 Sup. Ct. 522. In *Ex parte Jackson* the supreme court say:

"The power possessed by congress embraces the regulation of the entire postal system of the country. The right to designate what shall be carried necessarily involves the right to determine what shall be excluded. The difficulty attending the subject arises, not from a want of power in congress to prescribe regulations as to what shall constitute mail matter, but from the necessity of enforcing them consistently with the rights reserved to the people of far greater importance than the transportation of the mail. In their enforcement a distinction is to be made between different kinds of mail matter, between what is intended to be kept free from inspection, such as letters and sealed packages subject to letter postage, and what is open to inspection, such as newspapers, magazines, pamphlets, and other printed matter purposely left in condition to be examined."

While the supreme court has thus indicated the general power of congress to determine what mail matter shall be excluded, it has not as yet, we think, decided that congress has the power to delegate to an executive officer the power to determine the person or persons who shall be excluded from the right of sending and receiving mail by the postal service. If we understand the trend of the decisions, it has not yet decided that either congress or an executive officer has the right, under this power, to exclude any particular person or any class of persons, citizens of the United States, from the benefits arising from the use of the postal service of the United States. It is true, the circuit court of appeals of this circuit have affirmed the right of the postmaster general to exclude the Enterprise Savings Association and the officers of that association from the use of the money orders and registered letters under the authority of the act of 1890. The postmaster general had under said act declared that said association was engaged in conducting a lottery or a similar enterprise for the distribution of money or personal property by lot or chance through the mails in violation of the provisions of section 3894, Rev. St., as amended; but, as this was a corporation presumably organized and conducted for the purpose of carrying on a business which was declared to be nonmailable, it may be fairly said that this was a mere mode of excluding postal matter from the mail which was nonmailable. The order of the postmaster general, however, under the then law, only applied to money orders and the registered mail. Judge Lurton, in delivering

the opinion of the court (*Association v. Zumstein*, 15 C. C. A. 153, 67 Fed. 1000), indicated that there may be a difference between the ordinary mail and the postal service by money orders and registered mail, saying:

"Neither of these departments of the postal service are essential to the ordinary use of the mail, and congress has reposed in the postmaster general an unlimited discretion as to when and where he would afford the facilities of this department. We see no reason why congress may not confer upon him authority to prevent the use of these facilities by any person engaged in using them for the propagation of any business deemed by it vicious, and not entitled to the use of such special facilities in the extension and conduct of such schemes."

This decision would seem to decide that the order of the 12th of February, 1896, was valid, and authorized the defendant to retain mail matter coming to the Southern Mutual Investment Company and its officers.

In the order of the 17th of February, 1896, of the postmaster general, he has excluded the complainant, a citizen of the United States, from the use of the mails in receiving any mail matter of any kind or description, and this exclusion is intended to deprive, and does in fact deprive, him of any benefit of the postal service of the United States, so far as receiving mail is concerned. The order does not confine this exclusion to matter which is declared nonmailable under the act of congress, or that which the defendant may believe from inspection to be nonmailable under the law, but excludes him from receiving mail of any kind or description. If the complainant has a right to receive mail which is mailable, and that right is in the nature of a property right, then certainly he has not in this case been deprived of such right by due process of law. If, however, the use of the postal service of the United States by a citizen thereof is a mere privilege or gratuity which can be given or refused by those in charge of the postal service, then he has no right to invoke the protection of the fifth amendment of the constitution. As we understand, this right of seizure and detention of the mail of the complainant under the order of an executive officer is justified upon the theory that all of this correspondence through the mails concerns matter for the use of which the mail has been prohibited. It will be observed that this order deprives all correspondents with the complainant of their right to the use of the mails of the United States for correspondence with him, so that the order assumes not only that he is engaged in conducting a lottery enterprise, but that all persons who correspond with him are thus engaged, and to that extent deprives other persons who are presumably innocent from the use of the mail. It may, in this connection, be admitted that the government of the United States has heretofore exercised the power, and has the constitutional right, by its executive officers or agents, to seize a thing which is being used in violation of law. In such cases the thing seized is treated as guilty. Thus, in the revenue law, illicit distilleries are seized, if found in operation, and destroyed if under \$500 in value, with a provision that, if shown not to be guilty, the owners thereof may have compensation therefor; if over \$500 in value, proceedings are taken in the courts against the thing seized, and, if found guilty, forfeited by the owner and condemned.

But it would be quite a different exercise of power if congress should authorize the secretary of the treasury or the commissioner of internal revenue, after being satisfied by evidence that a particular citizen was guilty of carrying on the business of illicit distilling, that thereafter the several collectors should be directed that that particular citizen should not be allowed to have the preliminary surveys or to execute the bond which would be necessary for him to lawfully carry on the business of a distiller. So in the postal service, the authority of congress to have seized nonmailable matter that may come into the mails, whether that matter be so because of its physical condition or moral character, may be conceded; but we submit that it is the exercise, not of an executive power, but of a judicial one, for an executive officer to exclude a citizen from the use of the mail because he, in the opinion of the executive officer, at some time previously or then had been or was violating the law by using the mail in an improper manner by sending nonmailable matter, unless this right to use the mail be a mere privilege or gratuity, which may be given or refused at the will of those who control the postal service.

It is not to be overlooked that the establishment of the postal service and its operation is the exercise of a governmental function; that the money which pays for this perfect postal system is raised by the postage charged, and all deficits paid out of the common treasury of the United States; that it is a monopoly which excludes not only the states, but all individuals, and that it has become a part of the business operations of the citizens of the United States, and an indispensable part in some kinds of business; and that this right to the use of the mails by sending and receiving mail is a most valuable one to the citizens, and one the depriving of which would destroy the business and the living of very many of the citizens of the United States. This postal monopoly, if granted and exercised by a citizen or a corporation, would, from the fact of its being a monopoly, make it imperative that all persons who paid the postal rates and conformed to the reasonable regulations of the postal service should have a common right to the use of the mails, and that because of the fact of the monopoly thus granted. This right would be protected in the courts if the citizen or the corporation controlling the postal service should attempt to deprive him of it. If the United States government should hereafter become the owner of all the transportation lines in the United States, and thus the common carrier of the nation, and by law exclude all others from becoming common carriers, it would seem to follow inevitably that the citizens of the United States would have a common right to travel and ship freight over the lines thus owned and operated by the United States, and that all of its citizens, subject to such general laws and regulations as to rates and the operation of the lines as might be enacted and established, would have this common right, and that such a right would be readily recognized as a property right in the citizen, and one of which a particular citizen could not be deprived except by due process of law. We think the right to the use of the mails, though in degree much less valuable than the use of the transportation lines, would be equally a property right, and one which could not be taken away except by due process of law. Mr. Webster,

in the Dartmouth College Case, 4 Wheat. 518, defined "the law of the land," which is but another expression for "due process of law," thus:

"By the law of the land is most clearly intended the general law,—a law which hears before it condemns; which proceeds upon inquiry, and renders judgment only after trial. The meaning is that every citizen should hold his life, liberty, and property and immunities under the protection of the general rules which govern society. Everything which may pass under the form of enactment is not, therefore, to be considered the law of the land. If this were so, acts of attainder, bills of pains and penalties, acts of confiscation, acts reversing judgments, and acts directly transferring one man's estate to another, legislative judgments, decrees, and forfeitures in all possible forms would be the law of the land. Such a strange construction would render constitutional provisions of the highest importance completely inoperative and void. It would tend directly to establish the union of all powers in the legislature."

Mr. Cooley thinks that this definition of Mr. Webster is quite accurate as applied to the judicial department of the government, but probably is not broad enough as applied to all the departments, and expresses the opinion that the definition of Judge Johnson in the case of *Bank of Columbia v. Okely*, 4 Wheat. 235, as more comprehensive and more accurate. Justice Johnson says:

"As to the words from Magna Charta incorporated into the constitution of Maryland, after volumes spoken and written with a view to their exposition, the good sense of mankind has at length settled down to this: that they were intended to secure the individual from the arbitrary exercise of the powers of government unrestrained by the established principles of private right and distributive justice."

If we are correct in concluding that the use of the postal service of the United States by a citizen thereof is a right in the nature of a property right, then it must follow that the order of the 17th of February, 1896, of the postmaster general, which finds complainant guilty of a violation of the postal laws, and prohibits to him the use of the postal service of the United States as far as the receiving of mail is concerned, during his pleasure, is not due process of law within the constitutional meaning. In this connection we think the fourth amendment to the constitution is also applicable, which provides that "the right of the people to be secured in their persons, houses, papers, and effects against unreasonable search and seizures shall not be violated, and no warrant shall issue but upon probable cause supported by oath or affirmation, and particularly describing the place to be searched, and the person or thing to be seized." The supreme court, by Justice Field, in the case of *Ex parte Jackson*, says:

"A distinction is to be made between different kinds of mail matter, between what is intended to be kept free from inspection, such as letters and sealed packages subject to letter postage, and what is open to inspection, such as newspapers, magazines, pamphlets, and other printed matter purposely left in a condition to be examined. Letters and sealed packages of this kind in the mail are as fully guarded from examination and inspection, except as to their outward form and weight, as if they were retained by the parties forwarding them in their own domiciles. The constitutional guaranty of the right of the people to be secured in their papers against unreasonable search and seizure extends to their papers thus closed against inspection wherever they may be; whilst in the mail they can only be opened and examined under like warrant, issued under similar oath or affirmation, particularly describing the thing to be seized, as is required when papers are subjected to search in one's own household. No law of congress can place in the hands of the officials of the postal

service any authority to invade the secrecy of letters and such sealed packages in the mail, and all regulations adopted as to mail matter of this kind must be in subordination to the great principle embodied in the fourth amendment of the constitution."

Whether we regard these letters, which were sent through the mail properly addressed, and in the hands of the defendant, as belonging to the sender or to the complainant, to whom they were sent, they should be and are constitutionally equally exempt from seizure, except under this provision of the constitution. When, therefore, sealed letters and packages were seized by the defendant under the order of February 17, 1896, without warrant, and marked "Fraudulent," and returned to the dead-letter office, to be there disposed of as other dead matter under the laws and regulations, we submit that this provision of the constitution has been violated. In the case of *Boyd v. U. S.*, 116 U. S. 616, 6 Sup. Ct. 524, the supreme court decided that the fifth section of the act of June 22, 1874, entitled "An act to amend the custom revenue laws," etc., which section authorized a court of the United States, in revenue cases, on motion of the government's attorney, to require the defendant or claimant to produce in court his private books, invoices, and papers, or else the allegations of the complainant be taken as confessed, to be unconstitutional, because within this provision of the constitution. The opinion of the court, delivered by Justice Bradley, goes elaborately into a discussion of this subject, and holds that, although this act did not authorize the actual seizure of the private books, invoices, and papers of the defendant, yet it required him to produce in court these papers under a penalty of a confession of the allegations of the information, which was within the spirit of the constitutional inhibition, and was, in the constitutional sense, a search and seizure of the papers without warrant. It is true that Justice Miller and Chief Justice Waite dissented from this construction of this constitutional provision, and held that in fact there was no search and no seizure authorized by the law. They concur in the conclusion of the court because of the fifth amendment to the constitution, which declares that no one shall be compelled in a criminal case to be a witness against himself. Still we think the case is in point here, whichever view is the correct one, as there clearly is in fact a detention and seizure of the mail, and, instead of delivering it to the complainant, it is returned to the sender in one case and in the other to the dead-letter office, there to be opened and destroyed or otherwise disposed of as might be ordered. If the detention and seizure was lawful, there is nothing to prevent these letters and sealed packages from being used as evidence either against the complainant or his correspondents.

The remaining question is whether or not the complainant's bill for an injunction will lie. It is the settled doctrine that the courts cannot control or interfere with the judgment or discretion of an executive officer, except where the duties to be performed are purely ministerial. See *Marbury v. Madison*, 1 Cranch, 137; *McIntire v. Wood*, 7 Cranch, 504; *Kendall v. U. S.*, 12 Pet. 524; *Decatur v. Paulding*, 14 Pet. 497; *Commissioner of Patents v. Whiteley*, 4 Wall. 522; *Gaines v. Thompson*, 7 Wall. 347; *U. S. v. Black*, 128 U. S. 40, 9 Sup. Ct. 12;

U. S. v. Windom, 137 U. S. 636, 11 Sup. Ct. 197. Or, as we think, where the statute under which he acts is unconstitutional. In this case no objection has been made, either by motion, plea, or answer, to the jurisdiction of the court. The judiciary act, conferring jurisdiction on the circuit court, gives that court jurisdiction of all cases arising under the laws and constitution of the United States which exceed in value \$2,000. It must be conceded, notwithstanding there has been no objection to the jurisdiction of the court, that the court cannot grant relief under the motion for temporary injunction if it is without jurisdiction. An action at law would be ineffectual, and could not be sustained in this case by the complainant for the recovery of this mail, because no description could be given of the mail thus seized and detained, and because of the multiplicity of suits that would necessarily follow, and the utter inadequacy of a common-law remedy. It is conceded to the broadest extent that, if the postmaster general had the constitutional right to not only declare that the complainant was engaged in conducting a lottery for the distribution of money or other personal property by lot or chance through the mails, but thereupon to prohibit him from the use of the mails absolutely, then this court cannot revise the postmaster general's discretion and judgment under said statute; but we submit that, if he had no constitutional right to exercise the judgment and discretion which he has exercised in thus condemning the plaintiff to a forfeiture of the use of the postal service of the United States, this court can, by proper proceeding, so declare. We fully recognize that the court, in taking jurisdiction, is not asked either to compel by mandatory injunction or by restraining order the performance of a ministerial duty. We fully recognize the settled doctrine as announced in the case of *Gaines v. Thompson*, 7 Wall. 347, and the various other cases therein reviewed and those since that time, as well as the authority of the case of *Association v. Zumstein*, 15 C. C. A. 153, 67 Fed. 1000, but we, however, submit that, if correct in our view, congress had no constitutional right to give to the postmaster general the authority thus to prohibit to a citizen of the United States, without notice and without trial, the use of the postal service of the United States, at his pleasure, because he became satisfied that that citizen had been or was engaged in conducting a lottery or similar enterprise. Chief Justice Marshall, in the case of *Marbury v. Madison*, 1 Cranch, 137, we think indicated clearly in his opinion that if the authority under which the executive department or an officer thereof was acting was unconstitutional, the judiciary could so declare in a proper case brought before it, which affected the private rights of a citizen. In the case of *Commerford v. Thompson*, reported in 1 Fed. 417, and in *Bank v. Merchant*, reported in 18 Fed. 841, both Justice Brown and Judge Pardee sustained a bill to enjoin a postal officer of the United States. In the first case, Justice Brown (then District Judge Brown), though sustaining the jurisdiction, refused the injunction, because the answer, the allegations of which were admitted, alleged that the mail which had been detained and seized was concerning lotteries; and in the case of *Bank v. Merchant*, Judge Pardee granted the injunction. In the case of *Noble v. Railroad Co.*, 147 U. S. 165, 13 Sup. Ct. 271, a bill for an in-

junction against the secretary was recognized as the proper remedy. The lower court decreed an injunction, which was affirmed by the supreme court. There the secretary of the interior, under an act of congress which gave him the right to designate a railroad, and grant to that railroad a right of way over the public lands, had exercised the right, but it was admitted in the pleadings that the railroad was not engaged in the business of a common carrier of passengers and freight, but simply in the transportation of logs for the private use and benefit of the persons composing the logging company, and carrying on a private business. Subsequently the successor of the then secretary of the interior, Mr. Vilas, being satisfied that the right of way should not have been given to this private railway, revoked the order of his predecessor. The logging company filed a bill in equity to enjoin the secretary of the interior and the commissioner of the general land office from executing the order revoking the approval of the complainant's maps and right of way over the public lands, and also from molesting it in the enjoyment of such right as was secured by said previous order under the act of congress. The supreme court, by Justice Brown, in reviewing and setting out the doctrine and the distinction between the power of courts to require of an executive officer the execution of a merely ministerial duty and those duties in which he was given an executive discretion, say:

"We have no doubt the principle of these decisions applies to a case wherein it is contended that the act of a head of a department, under any view that can be taken of the facts that were laid before him, were ultra vires, and beyond the scope of his authority. If he has no power at all to do the act complained of, he is as much subject to an injunction as he would be to a mandamus if he refused to do an act which the law plainly required him to do. As observed by Justice Bradley in *Board of Liquidation v. McComb*, 92 U. S. 531: 'But it has been well settled when a plain official duty requiring no exercise of discretion is to be performed, and performance is refused, any person who will sustain personal injury by such refusal may have mandamus to compel its performance; and when such duty is threatened to be violated by some positive official act, any person who will sustain personal injury thereby, for which adequate compensation cannot be had at law, may have an injunction to prevent it. In such cases the writs of mandamus and injunction are somewhat correlative to each other.'"

And the lower court's decree was affirmed upon the distinct idea that the subsequent secretary of the interior had no power over the matter, after a careful consideration and discussion of the finality of the act of the previous secretary. And in the case of *New Orleans v. Paine*, 147 U. S. 264, 13 Sup. Ct. 305, the court, by Justice Brown, say:

"In *Noble v. Railroad Co.* (decided at the present term) 147 U. S. 165, 13 Sup. Ct. 271, we had occasion to examine the question as to when a court was authorized to interfere by injunction with the action of a head of a department, and came to the conclusion it was only where, in any view of the facts that could be taken, such action was beyond the scope of his authority. If he were engaged in the performance of a duty which involved the exercise of discretion or judgment, he was entitled to protection from any interference by the judicial power. In that case it appeared that the only remedy of the plaintiff was to enjoin the secretary of the interior from revoking his approval of a certain map, which operated as a grant of land. His contemplated action amounted in fact to the cancellation of a land patent."

These cases, we think, are a distinct ruling that a bill of injunction is the proper remedy, if in law the authority exercised by the postmaster general is beyond his constitutional authority. Any other view than herein expressed would leave a citizen without remedy, and this perfect and magnificent postal system of the United States subject as to its use to the arbitrary will of the postmaster general. If he can decide finally, without court or jury or other legal trial, whether a business which is being carried on is within the statutory prohibition, and also that a certain citizen or citizens are engaged in that business, and, having thus decided, can prohibit absolutely by general order the use of the mails and postal service of the United States, not only in that business, but by such citizen or citizens, then, indeed, as to this use, are the citizens of the United States outside of the guaranties of the constitution.

As already indicated, the principles announced by the circuit court of appeals in the case of *Association v. Zumstein*, and which are binding upon this court, prevent the granting of motion No. 1 for temporary injunction against the defendant, McChesney, restraining him from withholding any mail matter which comes to him as postmaster under the order of February 12, 1896, addressed to complainant as secretary of the Southern Mutual Investment Company; but motion No. 2, for a temporary injunction to restrain the defendant, McChesney, as postmaster, from withholding and refusing to deliver to complainant letters directed to him upon which there are no words, language, or indications that they are addressed to said Hoover as an officer or connected with the Southern Mutual Investment Co., should be sustained, upon the execution of a proper bond in the penalty of \$———. The said opinion of the circuit court of appeals is decisive, we think, against the exceptions to the answer which are based upon the contention that the order of the postmaster general of the 12th of February, 1896, is invalid, and beyond his constitutional authority; but exceptions Nos. 4 and 8, which relate to the order of the 17th of February, 1896, should be sustained, and so much of the other exceptions as relate to said order of February 17, 1896, and said motions and exceptions, will be sustained, and overruled as herein indicated.

BROWN v. INGALLS TP.

(Circuit Court, D. Kansas, Second Division. June 21, 1897.)

1. REFUNDING BONDS—BONA FIDE PURCHASERS—DEFECTS IN ORIGINAL BONDS.
Refunding bonds issued in compliance with the statute authorizing them, and which recite a compliance with its provisions, are valid in the hands of bona fide purchasers, though the original bonds were void and the funding transaction was a mere subterfuge to avoid that objection.
2. SAME—NOTICE OF ELECTION.
As the Kansas statute of 1879 authorizing townships to refund their outstanding indebtedness pursuant to a vote leaves to the determination of the township board what the notice of election shall contain, a notice which refers to the act, and otherwise gives the electors the information necessary to enable them to determine the questions submitted, is sufficient.

3. SAME—BOARD AUTHORIZED TO CANVASS VOTE.

As that act makes no provision for canvassing the returns of the election therein provided for, a provision of the act of 1875, relating to the same subject-matter, the effect of which is to devolve upon the board of county commissioners the duty of canvassing the returns of the election provided for by that act, applies also to elections held under the act of 1879.

4. SAME—CANVASS OF VOTE BY UNAUTHORIZED BOARD.

Refunding bonds issued pursuant to a vote canvassed by an unauthorized board are void.

5. SAME—ESTOPPEL.

A township, by paying interest on bonds for a short time, does not estop itself from denying their validity on the ground that the vote pursuant to which they were issued was canvassed by an unauthorized board.

This is an action to recover on refunding bonds issued by defendant, a township of Gray county, Kan., under the provisions of chapter 50 of the Laws of Kansas enacted at the session of 1879.

The facts are that in 1889 the legislature of Kansas authorized its municipalities, including townships, to extend aid to companies and corporations engaged in the manufacture of sugar from sorghum cane by issuing bonds. The constitutionality of this act was considered doubtful at the time, and it has since been declared unconstitutional by several of the district courts of the state, and also by one of the judges of this court. In December, 1889, a company about to engage in the manufacture of sugar from sugar cane in Ingalls township presented a petition to the township board for \$15,000 of its bonds, which was voted at an election ordered for that purpose. On February 10, 1890, the board issued these bonds, and on the next day agreed to submit to the people a proposition made by the sugar company to refund these bonds issued on the preceding day, and the validity of which was deemed doubtful. An election was ordered and held on this proposition on February 24, 1890. The returns of the election were made to the township board, and upon a canvass by that board the proposition was found to have been approved by the electors, whereupon the bonds in controversy were issued in lieu of those issued on February 10th. The bonds recite the act under which they were issued, and also the following: "And it is hereby certified and recited that all acts, conditions and things required to be done precedent to and in the issuing of said bonds have been done, happened and performed in regular and due form as required by law." The interest coupons up to and including those maturing January 1, 1894, and six of those maturing July 1, 1894, were paid promptly. Since then nothing has been paid, and this action is instituted to recover on past-due coupons held by plaintiff as executrix of the last will of Ephraim A. Brown, deceased, who is admitted to have bought them in good faith for value before maturity.

Valentine, Godard & Valentine, for plaintiff.

M. W. Sutton and E. H. Madison, for defendant.

WILLIAMS, District Judge. There can be no doubt but that the bonds sued on were issued in order to avoid the doubts existing in the minds of the sugar company as to the constitutionality of the sugar bounty act. The original bonds were issued to the sugar company on February 10th, and on the next day the company made its proposition to the township board to have them refunded under the act of 1879, and an election for that purpose was ordered for February 24, 1890. *Loan Ass'n v. Topeka*, 20 Wall. 655, and *Parkersburg v. Brown*, 106 U. S. 487, 1 Sup. Ct. 442, are decisive that the act authorizing municipal corporations to issue bonds in aid of private corporations was unconstitutional and void, and it naturally follows that the bonds issued to the sugar company under the provisions of that act

could not have been legally enforced against the defendant. In this compromise there was no reduction in amount, nor, so far as the record shows, any reduction in the rate of interest, or extension of time; the only difference in the two bonds being that the original bonds were absolutely void, while the bonds to be received in lieu of them, and issued under the refunding act, were deemed valid securities. Defendant sets up the following grounds as defenses to this action: First, the electors were not advised of the terms and conditions upon which the refunding bonds were to be issued; second, the votes cast were only canvassed by the township board, which was not authorized by law to do so, the county commissioners being the only body legally authorized to do so; third, the bonds were never registered in the office of the county clerk of the county, as required by law; fourth, there was no actual refunding of a valid indebtedness.

As to the last proposition, it cannot be seriously contended that bonds in the hands of an innocent purchaser, issued under the refunding act, can be defeated by showing that the original bonds were void. In many instances these new bonds are issued in compromise of evidences of indebtedness, the validity of which is in doubt, sometimes at a liberal discount; and in other instances it obtained for the municipality a lower rate of interest, or an extension of time. But if these bonds are issued under the provisions of the statute, and in compliance with the requirements thereof, it is a well-settled rule of law that the validity of the original bonds cannot be inquired into in an action on the refunding bonds by bona fide holders of them, if the bonds recite a compliance with the provisions of the law under which they are issued, as in the case at bar. *Town of Coloma v. Eaves*, 92 U. S. 484; *County of Jasper v. Ballou*, 103 U. S. 745; *National Life Ins. Co. of Montpelier v. Board of Education of City of Huron*, 27 U. S. App. 244, 10 C. C. A. 637 and 62 Fed. 778. Of course, fraud vitiates everything, and had these bonds still been in the hands of the sugar company, or parties affected with notice, the question whether this entire funding transaction was not a mere subterfuge to avoid the issue which might have been raised against the first bonds would be an important one; but, the bonds having passed into the hands of a bona fide purchaser, that question could not in any way affect the result of this cause, and need not be discussed in the determination thereof.

Was the notice of election given by the township board so indefinite as to vitiate the election? The notice was as follows:

"For the purpose of voting upon a proposition for issuing fifteen bonds of said township of Ingalls, for the sum of one thousand dollars each, for the purpose of refunding the outstanding indebtedness of said township, under sections 1, 2, and 3 of an act of the legislature of the state of Kansas entitled 'An act to enable counties, municipalities, corporations, boards of education of any city and school district to refund their outstanding indebtedness,' which law took effect March 10, 1879. Said refunding bonds to bear interest at the rate of six per cent. per annum, payable semiannually, and to become due January 1st, 1920; the form of ballots to be cast to be in words and figures as follows, to wit: 'For issuing fifteen bonds, of the sum of one thousand dollars each, to refund the outstanding indebtedness of the township of Ingalls, county of Gray, state of Kansas.'"

As to what the effect of a want of a proper notice would be in a suit by a bona fide holder of the bonds, it is unnecessary to determine in

this action, as in my opinion the notice given was sufficient under the statute. The act only requires an assent of the legal voters at an election called for such purpose after at least 10 days' notice. What the notice is to contain is intrusted entirely to the township board, and, as in this instance the notice gives the electors sufficient information to enable them to determine the questions submitted, this defense necessarily fails. *Belfast & M. L. R. Co. v. Inhabitants of Brooks*, 60 Me. 568. Courts cannot indulge in the presumption that the officers elected by the people, and intrusted by them with the management of the affairs of the public, will willfully act in a manner tending to mislead them; but, on the contrary, all presumptions, in the absence of proof to the contrary, are in favor of the honesty of purpose of the public officials.

Was it essential to the validity of the bonds that the votes should be canvassed by the county commissioners, and by them only? If, under the laws of Kansas, a board of county commissioners is the only body which can legally canvass and declare the result of an election held for the purpose of authorizing the issue of refunding bonds, then these bonds are void; for there would be no authority in the township board to estop the township by certifying to a state of facts, the determination of which was not intrusted to it by law. *Northern Bank of Toledo v. Porter Tp. Trustees*, 110 U. S. 608, 4 Sup. Ct. 254; *Dixon Co. v. Field*, 111 U. S. 83, 4 Sup. Ct. 315. The act itself does not make any provision by whom the votes of such an election should be canvassed or the result declared. It merely provides "that no compromise of any township or school district shall be of any validity unless assented to by the legal voters of said township or school district at an election or school meeting called for such purpose, of which election or meeting at least ten days' notice shall be given." Paragraph 466, Gen. St. 1889. Paragraph 442 of the General Statutes of 1889 (Laws 1875) provides that before the issuing of such funding bonds (as provided for by the act of 1875) an election should be held, "to be conducted and the returns thereof ascertained in the manner provided by law for holding general elections." The votes at general elections for township offices must be canvassed by the board of county commissioners. The act of 1875 was in force at the time of the passage of the act of 1879 under which these bonds were issued. The fact that no provision was made in the later act as to whom the returns of the election should be made, or by what board the votes should be canvassed and the result declared, raises a strong presumption that the legislature deemed the provisions of the act of 1875, which related to the same subject-matter, and was peculiarly applicable to the objects for which the act of 1879 was enacted, sufficient without additional legislation. Such is the construction adopted by the Kansas court of appeals in *Faulkenstein Tp. v. Fitch*, 2 Kan. App. 193, 43 Pac. 276; and although that court is not one of last resort, and for this reason its decisions are not conclusive on this court in the construction of a statute of the state, yet the opinion of the court shows a careful consideration of the questions of law involved, and coincides with the conclusions reached by me, independent of that decision. This view is also strengthened by the fact that section 4 of the act

of 1879 provides that the record of all bonds issued under the act shall be kept by the clerk of the county, and the bonds refunded, canceled, and preserved in the office of the county clerk, or destroyed by the board of county commissioners. If no returns of the election were to be sent to the board of county commissioners, and by it canvassed, then there is no provision of law how the commissioners would ever be advised of the refunding, or the county clerk enabled to keep record of the new bonds. Plaintiffs' testator could have ascertained from an examination of the records of the county commissioners that no returns of any election authorizing these bonds were ever made to them or canvassed by them. Failing to make that examination, he is chargeable constructively with notice of all facts which he could have ascertained by making the examination. The fact that the township did pay the interest on these bonds for a short time does not estop it from questioning their validity upon this ground. *Loan Ass'n v. Topeka*, *supra*.

As these views entitled defendant to a verdict, it is unnecessary to determine the issue raised by the third paragraph, whether the failure to have these bonds registered in the office of the county clerk affected their validity, although I find that there is no proof that they were ever registered. The case of *West Plains Tp. v. Sage*, 16 C. C. A. 553, 69 Fed. 943, is not applicable to the case at bar. The question of what board must canvass the vote and declare the result was not before the court in that case, and therefore not determined. Had this question been raised, and decided by the court against the township, such decision would have been conclusive on this court in the case at bar. But neither in the opinion of the majority of the court nor in the dissenting opinion is that question referred to. From these views it necessarily follows that the defendant is entitled to judgment, and it is so ordered.

STEINLE v. NEW YORK LIFE INS. CO.

(Circuit Court of Appeals, Fifth Circuit. May 18, 1897.)

No. 554.

LIFE INSURANCE—COMPLETION OF CONTRACT—ACCEPTANCE OF APPLICATION.

The payment to an insurance agent of a sum equal to the first premium, and the taking of a receipt therefor, which expressly declares that, if the application is accepted by the company, the insurance shall take effect from the date of application, but that, if the application is not accepted, the money shall be returned, and the receipt surrendered, does not amount to a contract of insurance until acceptance by the company, and, if the insured die before acceptance, the company is not liable.

In Error to the Circuit Court of the United States for the Western District of Texas.

This was an action at law by Emma S. Steinle against the New York Life Insurance Company to recover upon an alleged contract of insurance upon the life of her husband, Gustav Adolph Steinle. The court sustained a demurrer to the petition, and, plaintiff declining to amend, entered judgment for defendant. Plaintiff thereupon sued out this writ of error.

The material allegations of the complaint were:

That heretofore, to wit: on the 18th day of March, 1895, Gustav Adolph Steinle made application to the said defendant life insurance company, through its then authorized agent, J. B. Hargrave, for a policy of insurance on his life, payable in the event of his death to his wife, Emma S. Steinle, for the amount of twenty thousand dollars (\$20,000), and at the same time the said Gustav Adolph Steinle paid to the agent of the defendant life insurance company the sum of nine hundred and twenty-eight dollars (\$928), being the first premium on the above policy of insurance, and the said agent of the defendant life insurance company gave Gustav Adolph Steinle a conditional receipt for the nine hundred and twenty-eight (\$928) dollars, said receipt being in words and figures as follows, to wit:

"No. 11,321. Conditional Receipt. Amount, \$20,000.00

"Received at Rockdale, state of Texas, this 18th day of March, 1895, of Gustav Adolph Steinle, the sum of nine hundred twenty-eight dollars on the following express conditions, agreements and understandings:

"1st. That, if an application made by him this day to the New York Life Insurance Company for an insurance of twenty thousand dollars, to take effect from this day, is approved and accepted by said company, and its policy issued, said sum shall be applied to payment of the first annual premium on said insurance.

"2nd. That, if said application is not approved and accepted, said company shall incur no liability thereunder, and said sum shall be returned on surrender of this receipt.

"3rd. That, if a policy is not received within forty days, a statement of the facts should be mailed to the home office, and, if not received within sixty days, the application must be considered declined, and claim made for return of said sum.

"4th. That no agent has power to make or modify any contract of insurance, or to bind the company, by making any promises, or making or receiving any representation or information.

"5th. That this receipt is not valid if any alterations or erasures are made in the printed form. J. T. & Dan'l Boon, State Agents.

"J. B. Hargrave, Agent.

"[Countersigned] J. B. Hargrave, Agent.

"This receipt is void if not issued within sixty days from March 4, 1895."

Plaintiff further alleged that on the date of the foregoing receipt the applicant was duly examined for insurance by a physician authorized thereto by the defendant, was found to be in good health and a perfect insurable risk, and the report of the examination was forwarded by the physician to defendant's home office, with a recommendation that the applicant be insured in the said sum of \$20,000. Plaintiff then alleged "that on the 28th day of March, 1895, the insured, Gustav Adolph Steinle, died in the city of Marlin, Texas, and was buried on the 29th day of March, 1895, at Marlin, Texas; and that prior to his death the said defendant company never at any time notified the insured, Gustav Adolph Steinle, that his above application for twenty thousand dollars (\$20,000) insurance in the defendant company was not approved or accepted by the said defendant company, nor did said defendant company ever at any time prior to the death of Gustav Adolph Steinle notify the said agent, J. B. Hargrave, who sent the application of Gustav Adolph Steinle for twenty thousand dollars (\$20,000) insurance, that said application was not approved or accepted by the defendant company." Plaintiff further alleged "that it is a custom of the said defendant company, when an application for insurance is made, and a receipt, similar to the receipt copied herein from original, is given, to immediately notify the agent who sent the application and immediately notify the insured under the conditional receipt and application if said applicant was suspended or rejected for insurance by said defendant company." Plaintiff then alleged that at the special instance and request of defendant she made out and submitted to it proper proofs of loss, but that defendant failed and refused her the said \$20,000, though the same had been demanded. The general demurrer and special exceptions filed by the defendant and sustained by the court were

based, substantially, upon the ground that the petition failed to show that any contract of insurance was ever completed.

James C. McLeary and Arthur W. Seeligson, for plaintiff in error.
Thos. H. Franklin and T. D. Cobbs, for defendant in error.

Before PARDEE and McCORMICK, Circuit Judges, and NEWMAN, District Judge.

PER CURIAM. On the conceded facts of this case there was no contract of life insurance perfected, and the judgment of the circuit court must be affirmed.

KINNEAR & GAGER CO. v. CAPITAL SHEET-METAL CO.

(Circuit Court, S. D. Ohio, E. D. June 29, 1897.)

1. PATENTS—NOVELTY—BURDEN OF PROOF.

The patent itself is prima facie evidence of its own validity. The burden is on defendant to show want of novelty by evidence beyond a reasonable question, and doubts on the subject of novelty are to be resolved in favor of the patent.

2. SAME—ANTICIPATION.

A patent covering a successful and useful panel section in a metallic ceiling is not to be defeated by showing a prior bird-cage bottom, tea tray, or coal-vase cover, resembling in mere outline of form the patented panel; these things being wholly foreign to, and not suggestive of, the use to which the patent relates.

3. SAME.

The Kinnear patent, No. 388,285, for a panel or ceiling section stamped from sheet-metal plates, and used in metallic ceilings, was not anticipated by the Northup patent, No. 330,916, also for a metallic ceiling.

This was a suit in equity by the Kinnear & Gager Company against the Capital Sheet-Metal Company for alleged infringement of a patent for a sheet-metal ceiling panel.

D. F. Patterson and Booth & Keating, for complainant.
Chester C. Shepherd, for respondent.

CLARK, District Judge. This suit is for alleged infringement by defendant, and is brought for injunction, based upon letters patent No. 388,285, granted to William T. Kinnear, of date August 21, 1888. That patent is for a panel or ceiling section stamped from sheet-metal plates, and used in metallic ceilings. The defendant is engaged in the manufacture and sale of metallic ceiling panels, and it is conceded and fully shown by the proof that the defendant is infringing the plaintiff's patent. The only question raised by the pleading and proof is that of patentable novelty. The claim which is alleged to be infringed is claim No. 2 in the Kinnear patent, and is as follows:

"In a ceiling such as described, the panels thereof constructed from continuous sheets, and having margins raised above the body, and a connecting portion between the body of the panel and the margins having rounded corners, substantially as described."

The patent is good on inspection, and the question of novelty then becomes one of fact. Certain general propositions applicable to this

and similar cases may be restated, and must be borne in mind in the determination of the question. The letters patent being regularly issued to the plaintiff makes a prima facie case in favor of the plaintiff, and the burden of proof is on the defense to sustain the allegation of want of novelty, and the proof should be sufficient to show a want of novelty beyond a reasonable question. If reasonable doubt exists as to the novelty, it is to be resolved in favor of the patent. *Blount v. Société*, 6 U. S. App. 335, 3 C. C. A. 455, and 53 Fed. 98; *Walk. Pat.* § 76; *Coffin v. Ogden*, 18 Wall. 120; *Cantrell v. Wallick*, 117 U. S. 696, 6 Sup. Ct. 970; 3 Rob. Pat. §§ 1022, 1026, note 2. The patent here is one for a new and useful improvement, and is to be so treated. Such being the case, the novelty may be in the mode of operation, or in the end accomplished by the new device; and this novelty is evidenced, among other ways, by the improvement's comparative utility and its success with the public, which are important facts in any case of doubt. It must be remembered, too, that an invention, whether original or an improvement, is not anticipated by a thing which was, in its original form and use, neither designed, adapted, nor actually used, to perform the same function as the thing covered by the patent does; and novelty is not negatived or overcome by any such consideration, nor by showing prior construction of a similar thing for a wholly different and foreign use, not suggestive of the particular use to which the patent is being applied. *Walk. Pat.* § 68; *Topliff v. Topliff*, 145 U. S. 156, 12 Sup. Ct. 825; 3 Rob. Pat. § 963; 1 Rob. Pat. § 117. In *Griswold v. Wagner*, 37 U. S. App. 171, 15 C. C. A. 525, and 68 Fed. 494, the court, following the case of *Potts v. Crea-ger*, 155 U. S. 597, 15 Sup. Ct. 194, quoted with approval the rule laid down in that case, as follows:

"But, where the alleged novelty consists in transferring a device from one branch of industry to another, the answer depends upon a variety of considerations. In such cases we are bound to inquire into the remoteness of relationship of the two industries, what alterations were necessary to adapt the device to its new use, and what the value of such adaption has been to the new industry. If the new use be analogous to the former one, the court will undoubtedly be disposed to construe the patent more strictly, and to require clearer proof of the exercise of the inventive faculty in adapting it to the new use,—particularly if the device be one of minor importance in its field of usefulness. On the other hand, if the transfer be to a branch of industry but remotely allied to the other, and the effect of such transfer has been to supersede other methods of doing the same work, the court will look with a less critical eye upon the means employed in making the transfer."

It is perfectly evident that under this rule the attempt on the part of the defendant to defeat the patent by showing a continuous sheet in a bird-cage bottom, or tea tray, coal-vase cover, etc., entirely fails. It is probable that the patent right in many of the more useful inventions of the time could be defeated by considerations such as those, so remote and so foreign. The only resemblance is in the merest outline of form, and there is not the slightest resemblance suggested in the end accomplished, and in the uses to which the two things are applied. The government undertakes by appropriate legislation to encourage inventive genius, and to justify experiment and long-sustained mental efforts, in order that the public may receive the benefit of the time, energy, and expense devoted to bringing out useful in-

ventions in constantly increasing forms of industry with new demands for invention; and to say that a successful and useful panel section in metallic ceiling, with its obvious importance and practical value, may be defeated because the bottom of a bird cage may, in mere outline of form, resemble the thing covered by the patent, is not to afford that protection intended by the law, and is not to keep good faith with the patentee by furnishing protection. It will not do to strike down a patent obviously useful and important to the public by a long-range suggestion of resemblance, while the two things have no practical or just relation to each other whatever, either in mode or time of construction, or importance of use to the public.

The only real difficulty, therefore, presented in the case, and about which there is doubt, is whether the plaintiff's patent was anticipated by the Northup patent, No. 330,916, for a metallic ceiling, of date November 24, 1885. It is conceded by defendant's counsel, and could not be controverted, that the structural form of the Northup panel is substantially different from the one here in question. The contention is that the Northup panel was a continuous sheet, and that the element of a continuous sheet in the plaintiff's patent was therefore anticipated by the Northup patent. This leaves out, of course, the rounded corners in the section which it is claimed was anticipated by the tea tray, bird cage, etc. It is evident, on inspection of the Northup panel, that it is a continuous sheet in no just sense of those terms. The corners are square, and there is at the corners a space cut out extending entirely through the margin and cornice molding, so that when the panel is finished it is not a continuous sheet at all, in the sense in which the plaintiff's is, and still less is it so when the mode by which the panels are adjusted to each other in the ceiling is considered. So the modes by which the panels are placed in position and attached to each other so as to form a compact ceiling are different. I am satisfied that the ceiling section covered by this patent is a new and useful improvement on the Northup ceiling section, and it is not claimed that any previously patented ceiling section anticipates the present invention. That the panel, as well as the ceiling into which it enters, is a substantial improvement on the Northup patent, it seems to me is obvious. The panel is continuous,—without cuts or separate sheets or pieces. The modes by which they are secured in position in the ceiling and to each other are different, and without cuts or breaks in the sheet, and entirely superior in this and other important points to the Northup patent. In the very nature of the case, a ceiling thus constructed renders the building much more secure against fire, and is an important advance towards fireproof buildings. It is not merely an extension or better mode, but is a new and distinct improvement. The question should be regarded as a practical one, and the validity or invalidity of the patent should be determined, as far as may be, by practical considerations. It would not be difficult, by a hostile and strained course of reasoning, to destroy any patent. I have concluded, therefore, that the patent is good, and that the plaintiff is entitled to the relief sought, and the decree will go accordingly. I may add that I consider the question fairly close, and not free from difficulty; but this seems to be generally the case where the question is

one of novelty, and there exist previous patents at all in relation to the same subject. The difficulty is very largely brought about by differences in the power to correctly perceive the mechanical bearing of the question. In the case cited (*Topliff v. Topliff*) the court upheld the invention secured by letters patent, while admitting expressly that the question was by no means free from doubt. I feel better satisfied with the result, as I recognize thereby that I do not deny the patentee the just fruits of his time, energy, and study, and also recognize that I have done no injustice to any one else.

NORTON et al. v. JENSEN.

(Circuit Court, D. Oregon. June 15, 1897.)

1. PATENTS—COMBINATIONS—MECHANICAL EQUIVALENTS.

The term "equivalent," as applied to inventions consisting merely of combinations of old ingredients, is special in its signification, differing somewhat from its application to an invention consisting of a new device, or an entirely new invention. In the former case it covers only such other ingredients as, in the same arrangement of the parts, will perform the same function, if they were well known at the date of the patent as proper substitutes for the one described in the specifications.

2. SAME—CAN-HEADING MACHINES.

In a can-heading machine, a device consisting of a disk moving horizontally upon which the can bodies are delivered in an upright position, so that completely filled cans can be automatically headed, is not an equivalent of an inclined chute down which the cans roll horizontally, in the special sense in which the word "equivalent" is used in relation to inventions consisting merely of combinations of old ingredients.

3. SAME—LIMITATION OF CLAIMS—REJECTIONS AND AMENDMENT.

Where a patentee is enabled to obtain his patent only by abandoning broader claims and inserting a precise description of a particular device, this latter device becomes essential to the claim allowed, and it does not avail him to say that he does not wish to limit himself to any particular form of construction, or to invoke a broad and liberal construction of his patent.

4. SAME—IMPROVED MACHINES—PRIMARY INVENTIONS.

An invention consisting in an improved machine does not become primary in its character by the fact that, as improved, it is the first of its kind.

5. SAME—RES JUDICATA.

Where, in a former suit, the court, by reason of the absence of evidence contained in the file wrapper, found the invention to be of a primary character, and gave the patent a broad and liberal construction, *held*, in a subsequent suit, between the same parties, in which the alleged infringing machine was made under a new patent granted since that adjudication, that the particular ground of controversy was not the same, so that the court was at liberty to give the patent its true and narrower construction, whereby infringement was avoided.

6. SAME.

The Norton patent, No. 267,014, "for certain new and useful improvements in machines for putting on the ends of cans," is not for a primary invention, and is not entitled to a broad range of equivalents. It is limited to the particular combination shown and described, and is not infringed by a machine made under the Jensen patent, No. 443,445, for an improvement in can crimpers and cappers.

7. SAME.

The Norton and Hodgson patent, No. 294,065, "for an improvement in can ending and seaming machines," is not for a primary invention, the machine not being the first to combine can heading and crimping, and is not infringed

by the machine of the Jensen patent, No. 443,445, in which the crimping device is distinct from the heading mechanism, whereas in the Norton machine the crimping process is performed in the heading mechanism.

This was a suit in equity by Edwin Norton and Oliver W. Norton against Mathias Jensen for alleged infringement of certain patents relating to automatic can-heading machines.

Munday, Evarts & Adcock and Snow & McCamant, for plaintiffs.
Dolph, Nixon & Dolph and J. T. Lighter, for defendant.

BELLINGER, District Judge. This is a suit for infringement of four letters patent, owned by the complainants, for automatically putting the bottoms and heads on tin cans. The complaint involves the following patents: (1) The Norton patent, No. 267,014, dated November 7, 1882, as to claims 1 and 2. (2) The Norton and Hodgson patent, No. 274,363, dated March 20, 1883, as to claims 6 and 7. (3) The Norton and Hodgson patent, No. 294,065, dated February 26, 1884, as to claim 14. (4) The Jordan patent, No. 322,060, dated July 14, 1885, as to claims 1, 2, 6, 7, 11, 12, and 13. The first of these patents, the Norton patent, No. 267,014, is upon what complainants claim to be the original invention of a machine for automatically applying tight exterior fitting can heads to can bodies. The Norton and Hodgson patent, No. 274,363, and the Jordan patent, No. 322,060, are for improvements upon the Norton patent, No. 267,014; and the Norton and Hodgson patent, No. 294,065 is for a combined can heading and crimping machine. It is claimed for this last invention that it is primary and generic, but this is contested by the defendant, who contends that it is merely for an improvement in can ending and seaming machines. The alleged infringing machine of the defendant, Jensen, is under a patent issued to him, and numbered 443,445, this being the second patent issued to Jensen for a can heading and crimping machine, and is dated December 23, 1890. Jensen's first patent is for "an improvement in can crimpers and cappers." It is numbered 376,804, and is dated January 24, 1888. This earlier patent was held by the circuit court of appeals, in a suit brought by these complainants against the defendant, Jensen, and one John Fox, to infringe the four patents now sued on. *Norton v. Jensen*, 1 C. C. A. 452, 49 Fed. 859. Complainants contend that the rights asserted by them in the two suits and the matters of defense presented in each are the same, and that the questions arising under the several patents are therefore *res adjudicata* between the parties.

Claims 1 and 2 of Norton's patent, No. 267,014, being his amended claims after the patent office had rejected his original claims, are what are known as "combination claims," and are as follows:

(1) "In a machine for applying to can bodies heads fitting outside the same, the combination of a device for sizing the exterior diameter of the can body to conform to the interior diameter of the can head, and holding the same so sized while the head is applied, said sizing and holding device having its end enlarged to fit the exterior diameter of the can head, so as to leave an annular space between it and the can body for the reception of the flange of the can head, with a device for forcing the can head into said annular space, and thereby applying the head outside the can body, substantially as specified."

(2) "In a machine for applying to can bodies heads fitting outside the same,

the combination of a chute or device for delivering the can bodies to the machine, with a movable device for clamping the can body and sizing its exterior diameter to conform to the interior diameter of the can head, said clamping and sizing device having its end or mouth enlarged to leave an annular space between the same and the can body clamped therein for the reception of the flange of the head, a chute or device for delivering the can heads to the machine, and a device for forcing the can head into said annular space at the end of said clamping and sizing device, substantially as specified."

In the case of *Norton v. Jensen*, above referred to (1 C. C. A. 452, 49 Fed. 859), the circuit court of appeals, having concluded that Norton's invention was prior to that of Pierce, held that Norton's invention must be "considered as being of a primary character, standing at the head of the art as the first machine ever invented for applying tight, exterior fitting can heads to can bodies automatically," and that the appellees were entitled to a broad and liberal construction of the claims of their patent. But in the more recent case of *Wheaton v. Norton*, 17 C. C. A. 451, 70 Fed. 837, the same court says:

"The contents of the file wrapper, not in evidence in the case of *Norton v. Jensen*, 1 C. C. A. 452, 49 Fed. 859, show that Norton, in his application for the patent, claimed to have invented, not an automatic or any other kind of machine for putting ends on fruit or other cans, but to have invented 'certain new and useful improvements in machines for putting on' such ends."

In the first case, the court, misled as to the fact by what appeared in the case, concluded that Norton's machine stood at the head of the art. It appears from the wrapper, not in evidence in that case, but introduced in the case of *Wheaton v. Norton*, that Norton's claims 1, 2, 3, 4, 5, and 6 were rejected by the patent office on the ground that they were anticipated by other inventions, mainly those of Pierce. These rejected claims are as follows:

"(1) In a can-ending machine, the combination of a clamping mold conforming to the exterior of the can body, a piston for forcing the cap or end piece upon the body, and devices for operating said mold and piston, substantially as specified. (2) In a can-ending machine, the combination of a clamping mold conforming to the exterior of the can body, and chamfered away at the end so as to give room for flange of the cap or end piece, a piston for forcing the end piece upon the body, and devices for operating both mold and piston, substantially as specified. (3) In a can-ending machine, the combination of a clamping mold conforming to the exterior of the can body, a chute for admitting the can ends, a piston for applying the ends to the body, and devices for operating both mold and piston, substantially as specified. (4) In a can-ending machine, the combination of a series of clamping molds, mounted and rotating about a common center, devices for opening and closing said molds, a piston or pistons for each mold, and a device or devices for operating said pistons, substantially as specified. (5) The combination, with a movable can-clamping and discharging mold, of a device for forcing the can end upon the can body while clamped in said mold, substantially as specified. (6) The combination, with a clamping mold for the can body, of a chute or device for delivering the can bodies to said mold, a device for presenting and retaining the can end in position at the mouth of the mold, and means for forcing the can end upon the can body, substantially as specified."

Norton did not contest this ruling of the patent office, but acquiesced in it, and amended and limited his claims so as to conform to it, and his invention is therefore not entitled to the broad and liberal construction accorded it in the case of *Norton v. Jensen*, and so the court held in *Wheaton v. Norton*, saying, among other things, that "the complainant's (Norton's) patent is by the record in this case

placed in a very different position from that occupied by it in the case of *Norton v. Jensen*." Instead of the broad and liberal construction allowed the Norton invention in the former case, the court of appeals in *Wheaton v. Norton* applied the rule laid down in *Sargent v. Lock Co.*, 114 U. S. 63, 5 Sup. Ct. 1021, that "in patents for combinations of mechanism, limitations and provisos imposed by the inventor, especially such as were introduced into an application after it had been persistently rejected, must be strictly construed against the inventor, and in favor of the public, and looked upon as in the nature of disclaimers." Such is the rule applied without exception in the construction of patents. And so the supreme court says, in *McCormick v. Talcott*, 20 How. 402:

"If he [the patentee] be the original inventor of the device or machine called the 'divider,' he will have a right to treat as infringers all who make dividers operating on the same principle, and performing the same functions by analogous means or equivalent combinations, even though the infringing machine may be an improvement of the original, and patentable as such. But if the invention claimed be itself but an improvement on a known machine by a mere change of form or combination of parts, the patentee cannot treat another as an infringer who has improved the original machine by use of a different form or combination, performing the same functions. The inventor of the first improvement cannot invoke the doctrine of equivalents to suppress all other improvements which are not mere colorable invasions of the first."

And in the case of *Proctor v. Bennis*, 36 Ch. Div. 740, the court, in referring to this rule, says:

"Where there is no novelty in the result, and where the machine is not a new one, but the claim is only for improvements in a known machine for producing a known result, the patentee must be tied down strictly to the invention which he claims, and the mode which he points out of effecting the improvement."

In the case of *Norton v. Jensen*, the court, upon the ground that Norton's invention was of a primary character, says that, Norton being the original inventor, he would have the right to treat as infringers all persons who make devices or machines operating on the same principle and performing the same functions by analogous means or equivalent combinations, even though the infringing machine may be an improvement of the original, and patentable as such; and the court accorded to Norton the benefit, under the broad and liberal construction to which upon such a state of the case he was entitled, of the doctrine of equivalents. And upon such a construction the court held that the fact "that by rounding and sizing the can body by external pressure, and by centering and guiding the can head accurately in line with the can body, the entire circumference of the can body could be entered simultaneously into the can head by forcing its two parts squarely together," was Norton's discovery, and that the can-body mold was his invention. As to both of these matters, if one can possibly be the subject of discovery and the other of invention, the decision is erroneous in view of the very different position in which the Norton patent is placed in *Wheaton v. Norton* from that occupied by it in the former case. It can only be because of the liberal construction erroneously accorded the Norton patent as an original invention standing at the head of the art that the Jensen tapering hole and can-head recess were

held to possess all the general features of the so-called "Norton Mold," "though different in form." The latter could not be identified or recognized from a description of the former. There is nothing in either that suggests the other. Nor can the Jensen tapering guide and sizing hole be held an infringement of the Norton mold, unless Norton is entitled to claim every form of sizing and guide device invented after his patent. No one would think of designating the Jensen device as a mold, nor the mold of the Norton combination by any other name. The latter clamps the entire can body, except at the end where the can head fits upon it, and holds it immovably. The Jensen device does not clamp the can body in any part, nor close around it. It is comprised of two semicircular plates, probably five-eighths of an inch thick, mounted upon a table through which there are two fixed tapering holes, opposite each other. Each of the plates has on each side one-half of a conical hole, conforming with the fixed tapering holes in the table, so that when the ends of the plates meet over the fixed hole, the two half holes in the plates will form with the fixed hole an entire conical guide or hole of a depth of about one inch. The end of the can body is sized by this conical hole to fit the can head; not by the clamping process of the Norton machine, but by a scraping action brought about by pushing the end of the can body through the conical hole. In their brief filed in this case, complainants' attorneys, speaking of the old Jensen machine in litigation in the former suit, and of the differences between that machine and the machines shown in the drawings of the patents sued on, say: "Thus as to the difference in shape and movements of parts, the mold of the old Jensen machine was very different from the Norton mold in form." In the Jensen sizing device in the old machine there was a recess for centering the can head, and this gave to the device the only resemblance it bore to the mold of Norton's combination, since, though not so deep, it corresponded in feature to the large diameter in such mold. The Jensen device is, therefore, unlike the mold used by Norton in its general features and in its mode of operation. Its construction involves the use of the inventive faculty, and it is an improvement "upon any can-heading machine previously constructed, and a very useful invention," and was so declared by a majority of the court in *Norton v. Jensen*.

It is only by giving the very broad and liberal construction to the Norton patent that was not allowed it in *Wheaton v. Norton*, that the Jensen mechanism, consisting of a feed fork by which the can bodies were pushed along a horizontal passageway, in a vertical position, to the heading machine, was decided to be an infringement of the Norton chute. If in any case the can-conveying mechanism of the first Jensen can be considered the equivalent of the Norton chute, it cannot be so considered where the patent is one for improvements upon combination claims. The doctrine of equivalents is allowed to patentees of inventions consisting merely of combinations of old ingredients. But, as stated in *Imhaeuser v. Buerk*, 101 U. S. 655, "The term 'equivalent,' as applied to such an invention, is special in its signification, and somewhat different from what is meant when the term is applied to an invention consisting of a new device or an entirely new machine." The rule as to equivalents in such cases is stated by the court as follows:

"Patentees of an invention consisting merely of a combination of old ingredients are entitled to equivalents, by which is meant that the patent in respect to each of the respective ingredients comprising the invention covers every other ingredient which, in the same arrangement of the parts, will perform the same function. If it was well known as a proper substitute for the one described in the specification at the date of the patent. Hence it follows that a party who merely substitutes another old ingredient for one of the ingredients of the patented combination is an infringer if the substitute performs the same function as the ingredient for which it is so substituted, and it appears that it was well known at the date of the patent that it was adaptable to that use. *Gill v. Wells*, 22 Wall. 1, 28."

The new Jensen differs from the old in respect to the can-conveyor device. In the new machine the can bodies are conveyed by a revolving disk to the heading mechanism. The resemblance claimed by complainants between this device and that of the first Jensen is in the fact that it is a positive conveyor, and much stress is put upon this point in Jensen's cross-examination, the assumption being that, inasmuch as the feed-fork device of the first machine was held to infringe the gravity chute of Norton, therefore any positive conveyor, regardless of form or mode of operation or of inventive skill in construction, is within the adjudication that has been had; in short, that the decision is an adjudication that all positive mechanism by which can bodies and can heads are moved to the heading device is within the domain of the Norton patent. And this gravity chute is not an invention by Norton. He has merely adopted it, to the exclusion, if his claim is upheld, not of a particular device, but of every possible contrivance by which can bodies and heads may be moved to the heading mechanism in the can-heading process. This claim is extensive enough to wholly exclude invention from this particular field. The doctrine of equivalents does not admit of such an application as this. An invention that moves can bodies by a conveyor is not necessarily the equivalent of the Norton chute; at least in the special sense in which the doctrine of equivalents is applied in cases like the one on trial, where the complaining patentee's invention is limited to a mere combination of old ingredients. Expert witnesses called by complainants testify, in effect, as they have with reference to other features of the Jensen machine, that the Jensen rotary disk is the equivalent of the Norton gravity chute, and that it is a familiar mechanism for the use to which it is put in the Jensen machine. But in the determination of this question the obvious fact cannot be overcome by such testimony. Experts are usually but special advocates, to be found on every side of every question of sufficient importance to engage their services. After all, the ultimate fact must depend upon the judgment of the court, not upon the conclusion of witnesses.

The Jensen carrying device is not, in my judgment, an equivalent or substitute for the Norton chute. It is not in any sense within the description of an equivalent within the rule laid down in the case cited. It is not such a case as where a weight is substituted for a spring, or a lever for a screw; these ingredients being at all times well-known substitutes for each other. In all such cases the ingredient used may be said, for obvious reasons, to include whatever is at the time of the patent a known substitute for it. The Jensen device, as already shown, consists of a disk moving horizontally, upon which

the can bodies are delivered in an upright position, thus enabling completely filled cans to be automatically headed. The Norton chute is a mere incline, down which the cans roll horizontally. The positive conveyor does not copy the principle of operation of this gravity incline. Whatever may be said in comparison of the conveyor in the first Jensen with Norton's chute, the utmost liberality of construction cannot make the conveyor in the new machine the equivalent of Norton's device, in the sense contended for. The fact is patent to the understanding that a mechanism by which cans are moved by positive force in a vertical position, is not the equivalent of an incline down which they roll horizontally by force of gravity. It does not admit of argument, and the testimony of witnesses to the contrary is mere impertinence.

In his amended application Norton makes substantially two claims which distinguish his invention from the claims made in his original application, and disclaimed by him in his amended application. These are (1) the new use of the mold to size the exterior of the can body, and (2) the annular space between the can body and mold, conforming to the thickness and width of the flange on the can head or end, into which annular space the head is forced. Of these two elements, Norton, in his amended specifications and claims, says: "None of the references show a mold or clamp for the can body having an annular space between the can body and the mold into which the head is forced, nor do any of the references show sizing the exterior of the can from the outside, both of which are essential features of applicant's invention." In providing the annular space, the end of the mold, according to the specifications of the Norton patent "is chamfered away interiorly to give room to the flange of the cap or can end to pass outside the can body." It is only necessary to examine the claims rejected by the patent office and disclaimed by Norton to see how the patent issued to him is limited, and to understand precisely what his invention is. The contention of complainants is that the enlargement in the end of the mold, which Norton, in his specifications, says is produced in his invention by "chamfering" the mold "away interiorly," constitutes the annular space of his machine. But the prior inventions had a mold "chamfered away at the end so as to give room for the flange of the cap or end piece." In the second claim of his original application he claimed the enlargement in the end of the can mold produced by "chamfering away the mold at the end so as to give room for flange of the cap or end piece" as a feature of his combination. But this was rejected on the ground of a prior patent, and Norton was, in effect, compelled to disclaim it. He was compelled to make a new claim in such terms as would distinguish it from the rejected claim; and, having done this, he cannot now go back to the rejected and abandoned claim. It was necessary to him in his amended claim to specify some new element, something more than the enlargement at the end of the can mold to give room for the flange of the can head, by which he had described what he now calls the "annular space" in his combination. That was not his invention, nor was the combination which included it his. Thereupon he added what he designated "an essential feature," by which he limited his

claim, namely, the "annular space between the can body and mold, conforming to the thickness and width of the flange on the can head or end, into which annular space the head is forced." In the note to his amended specifications and claims Norton says: "None of the references [meaning none of the prior patents upon which his original application had been rejected] show a mold or clamp for the can body having an annular space between the can body and the mold into which the head is forced, nor do any of the references show sizing the exterior of the can from the outside, both of which are essential features of applicant's invention." It follows, and the court in the Wheaton Case holds, that, inasmuch as Norton's patent is for a combination, unless the defendant's device contains the annular space and piston or device for forcing the can head therein, or their mechanical equivalents, the charge of infringement is not made out.

In *Wheaton v. Norton* this annular space is defined as "a space existing between the circumference of two concentric circles having different diameters." In the present *Jensen* machine this space does not and cannot exist. If the conical sizing hole of the *Jensen* machine is considered to be a mold, and the *Jensen* can-head device with its recess a part of such mold, as the court, upon the case then presented, decided, the effect is to ascribe to the *Jensen* machine a mold with an enlargement at the end within the description which Norton gave of his invention in rejected claim numbered 2. It is a fact that has the force of a demonstration that the description which Norton is compelled on the trial of this case to give of the "annular space" of his combination, in order to make it appear that *Jensen's* device contains it, and which the court of appeals in the former case gives of this essential feature of Norton's invention, namely, a sizing mold having two diameters, the smaller of which conforms to the exterior of the can body and the larger of which corresponds to the exterior of the can-head flange, is essentially the same as that given by Norton in the claims rejected by the patent office. It was only by limiting his claim, by a precise description, to a sizing device or mold having its end enlarged "so as to leave an annular space between it and the can body for the reception of the flange of the can head," and by abandoning, and, in effect, disclaiming, all the six claims as originally made, that he was enabled to obtain his patent. Having tied himself down in this way, it does not avail him to say in the patent that he does not wish to limit himself to any particular form or construction of can mold, and to invoke a broad and liberal construction of his patent. In the brief filed for complainants, it is said that the object of the mechanism is not to force a can head into a recess or annular space, but to put the head on the body. This is precisely what was stated in the rejected and abandoned claims, and manifestly no construction of the patent can be allowed that restores to it what the patent office rejected, and the patentee abandoned. The intention of the patent is not to be ascertained from statements in the patent or application made upon the basis of the claims originally made, but subsequently abandoned. Norton did not claim that his invention was primary or fundamental. He only claimed to have invented "certain new and useful improvements" in machines for putting ends

on cans, and one of these improvements—an essential one—is the device by which the annular space is produced. Any description of the Norton “annular space” to fit the Jensen machine as construed by the court of appeals takes it out of Norton’s patent, and restores the rejected claims of Norton’s original application; and any description within the patent wholly separates it from the Jensen machine. The patented device requires a space between the exterior diameter of the end of the can body and the enlarged interior diameter of the mold. The annular space of Norton only exists when the can body is in the mold. I am of the opinion that this “annular space” was a mere expedient to secure a patent, when all the claims by which the combination could properly be described had been rejected, and that it is not in any sense an invention. The can body is not a part of the device, and yet without it there can be no annular space by any description of it not in the rejected claims. The annular space of the patent only exists as a result of the can-heading process, and it cannot, therefore, be a means in that process. Nevertheless, such as it is, it is an “essential feature” of Norton’s combination, since he has so specified it in his application for a patent, and his right to the relief he seeks depends upon it.

In *Fay v. Cordsman*, 109 U. S. 420, 3 Sup. Ct. 244, the court says:

“In such a claim [a claim for combination], if the patentee specifies any element as entering into the combination, he makes such element material to the combination, and the court cannot declare it to be immaterial.”

But if Norton is not estopped by the rejected claims of his original application to show that the enlarged diameter at the end of the mold constitutes the annular space of his patent, yet neither this annular space nor its equivalent can, by any construction, however broad, be found in the Jensen machine. The Jensen machine contains a can-head recess in the under side of a plate above the tapering sizing and guide device. This recess holds the can head in place while the can body is forced into it through the tapering hole from below. It is semicircular in form, and is so fixed that when a can head is held against the semicircular recess end, it is directly over the tapering hole. Complainants contend that this recess constitutes “an enlargement at the end of the mold,”—assuming that the Jensen tapering hole and can-head recess constitute “a mold,”—and their brief refers to it as “a recess at the end of the mold, differing in size by the thickness of the tin from the smaller diameter.” By this process the Jensen machine is construed to have a sizing mold with an enlargement at the end corresponding to that in the Norton mold, and this in turn is construed as constituting the annular space of Norton’s combination. As we have already seen, the annular space is described by Norton in his amended specifications as the “space between the can body and the mold into which the can head is forced.” The mere existence of a space between the can body and the mold will not answer the description of Norton’s annular space, unless it is a space into which the can head can be forced upon the can body. In the Jensen machine such a thing is impossible. It is possible in that machine, by forcing the can body through the tapering sizing hole, to have a space between the can body and the semicircular side of the

can-head recess; but if this space is produced in the Jensen machine the can head cannot enter the recess, and such a space, so far from performing a function in the can-heading process, will obstruct, and altogether prevent, the can-heading operation. Norton has not patented this annular space. That is not the subject of patent. He has patented the device from which such space results. It would be enough if he could and had patented as an invention a particular space produced in the can-heading process into which the flanges of the can head are guided as the head is forced on the can body, without claiming the exclusive right to all space occupied by the can-head flanges while the can body is entering the can head, for, since the can-head flanges must occupy some space as well when the can head and can body are centered together as at other times, such a claim, if successful, will make any further invention in automatic can heading impossible.

In deciding whether Jensen's machine contains the "annular space," which is an essential feature of Norton's invention, or whether the rotary disk is the equivalent of the Norton chute, or the tapering sizing hole is the equivalent of Norton's mold, the claims of patent 267,014 must be strictly construed against the inventor and in favor of the public, Norton having, after the six claims of his original application had been rejected by the patent office, amended his application, and limited his claims to these "improvements" as such. But, without this, I am of the opinion that there is no possible construction of the claims of this patent, however broad and liberal, that will bring the Jensen machine within them in respect to the features named, more especially with respect to the annular space and gravity chute of Norton's combination.

It is not material to consider whether the Jensen device, by which the can body is forced through the conical guide, is the equivalent of the piston of Norton's combination. It performs an important function in the can-sizing operation that wholly separates it from the piston of Norton, and so differs from it in other particulars as to disprove the claim of infringement, unless all devices, regardless of form or mode of operation, that accomplish the results of Norton's devices, are held to infringe them. Nor is it material to consider whether the Norton spring device has its equivalent in Jensen's machine; nor the question whether the principle of the conical guide of Jensen, so far from infringing the Norton mold, is not found in the earlier patents of Marsh and Miller. Nor is it material to consider the other questions of infringement that are presented in the case. All the claims alleged to be infringed are combination claims, and in all of them the annular space is an essential feature. Without this essential feature, there can be no infringement. The contention of complainants that Norton's invention is fundamental, and stands at the head of the art as the first machine ever invented for automatically putting can heads on the outside of can bodies, contradicts the evidence of the file wrapper, from which it appears that his claim was not that he had invented a can-ending machine, but "certain new and useful improvements" in such machines; and it is so decided in *Wheaton v. Norton*. An invention does not become primary in its character by the fact that the

machine as improved is the first of its kind. The Norton-Hodgson patent, No. 294,065, which complainants contend is primary and generic, is, like the other patents involved in the suit, merely "for an improvement in can ending and seaming machines." It is not the first machine which combined can heading and seaming. The Miller patent, No. 232,535 is for a machine containing this combination. The ground upon which the claim is made that patent 294,065 is for an original invention is of the same character as that made for patent 267,014,—that it is the first machine that combined crimping and exterior can heading. As already stated, the fact that a machine as improved is the first of its kind does not give it the character of a primary and generic invention. Norton, in his application upon which patent 267,014 was issued, only claimed for an improvement; and the patent has, as we have seen, been adjudged to be merely for an improvement. And so of claim 14 of patent 294,065, which is merely for an improvement. It is not the first machine to combine can heading and crimping. In its elements, the Norton machine differs widely from that of Miller, and these differences are relied upon to give it an original character; but as to the difference between the Norton machine, in which the crimping and heading operation are both performed by the single heading mechanism, involving what is known as the "squeezing jaw," and the Jensen machine, where the crimping is performed by a rotary form of mechanism, separate from the heading mechanism, the complainants' position is altered. They contend that these differences do not give to Jensen's machine the character of an invention, nor relieve him from the charge of infringing the Norton-Hodgson can-heading and crimping combination; that the rotary form of crimping mechanism employed by Jensen is an old and well-known equivalent for the squeezing-jaw form of mechanism shown in the Norton patent, and that they are, therefore, entitled to it under the doctrine of equivalents. But, if this is so, it does not appear upon what principle the Norton patent can claim invention. The invention is not in the combination as such, since, as we have seen, that is in Miller's patent. If it is in the improvement of the combination, and such improvement combines with Norton's heading mechanism one of two well-known crimping devices, why may not Jensen combine the other with his heading mechanism, so long as he avoids the Norton method of uniting the two? The rotary crimper is not an ingredient in complainants' invention, within the rule that entitles a patentee to all well-known substitutes for parts that go to make up his machine, but it is in itself an aggregation of parts constituting an invention. If complainants' invention was on the principle by which a crimping machine is combined with a heading machine, and it was practicable to apply such principle to a rotary crimper, their contention would be upheld, and in such case it would, in my opinion, make no difference whether the crimper was an old and well-known machine or a new and patentable one. But the Norton invention does not admit of the employment of the rotary crimper. The latter is distinct from the heading mechanism, although the two mechanisms may be combined in one machine. In the Norton improvement the crimping process is performed in the heading mechanism. The can is headed and crimped by a single de-

vice, while in the Jensen machine there are two distinct devices combined. By "mechanical equivalent," as it is sought to have it applied in this particular, is meant, that Norton might have used the invention of the rotary crimper in his invention in lieu of the squeezing jaws; but this would be to substitute another invention for his own, in which the heading and crimping process are inseparable, and therefore would not avail to bring the rotary crimper of the Jensen machine within the scope of patent 294,065.

As to the effect of the former adjudication upon the questions now presented, the contention of complainants is that the construction given the patents sued on in the former suit is broad enough to include the changes made in the new Jensen, and so bring it within the boundaries of the Norton patent; "that the defendant cannot be heard to contend for any different construction, or more limited scope for the patents sued on, than that construction and scope which, after thorough contest, the court decided they were entitled to receive." As already appears, the court in the former case gave to the claims of Norton's patent 267,014 a broad and liberal construction, upon a mistake as to the primary character of the invention, and of Norton's claim in the patent office, upon which the patent was issued. In the more recent case of *Wheaton v. Norton*, 17 C. C. A. 447, 70 Fed. 840, the court held against the construction given the patent in the former case, saying, in effect, that the patent in fact occupied a very different position from that accorded it in the case of *Norton v. Jensen*. The rule as to res adjudicata is that, when a particular ground of controversy has been passed upon, the adjudication bars a subsequent action upon such ground. The ground of action in the present case is not that involved in the former suit. The present Jensen machine is a new machine, made under a new patent issued since the decree in the former suit, and differing from the machine in litigation in the other case. The particular ground of controversy is, therefore, not the same as that already decided, and the question is whether "the same scope" is to be given complainants' patents that was given them in the first case, and, if so, whether they are broad enough to include what complainants call the "changes" in the new Jensen machine. The former decision of the court of appeals is conclusive upon the particular question decided, but not upon similar questions that may subsequently arise between the parties. As to these, the principle of the decision only applies so long as it is not overruled. The decision is special, but the principle of the decision is a rule of universal application. There has been one rule of construction in the case of *Norton v. Jensen* and another in that of *Wheaton v. Norton*, but it does not follow that there is one law for Jensen and another for Wheaton; that in all cases where Jensen is a party Norton's patents are to have a different construction from that given them in all other cases, and one to which they are not entitled.

The defendant is entitled to a decree in his favor that the bill of complaint be dismissed, and it is so ordered.

UNITED STATES PRINTING CO. v. AMERIOAN PLAYING-CARD CO.

(Circuit Court, W. D. Michigan. June 23, 1897.)

PATENTS—COSTS OF REFERENCE.

Each party should, in the first instance, pay his own costs, on a reference in a patent case to ascertain profits and damages, leaving the question of their final disposition to be determined when the decree is entered.

On Motion by Defendant for an Order Directing the Master as to a Question of Costs.

Briesen & Knauth, Paul H. Bate, and Howard, Roos & Howard, for complainant.

Boudeman & Adams, for defendant.

SEVERENS, District Judge. On motion for an order directing the master in respect of the costs of taking testimony upon the reference heretofore ordered in this case. This motion is intended to raise before the court the question as to the obligation of parties to pay costs upon a reference ordered by an interlocutory decree for the purpose of ascertaining profits and damages which the court has adjudged the complainant is entitled to recover in a patent case. For several years past the parties and counsel in such cases have, in this district, quite generally followed a practice supposed to have been held to be the regular and proper one by Judge Wheeler in the case of *Urner v. Kayton*, 17 Fed. 539. In that case Judge Wheeler decided that the defendant should bear the costs of the reference in the first instance, leaving their ultimate disposition to be fixed when the final decree in the case should be entered, and it has been supposed that this was a precedent for all such cases. But the question whether such a duty rests upon the defendant has never been formally submitted to this court, and no rule of practice has been judicially established here upon this subject. Judge Lowell, in Massachusetts, held in the case of *MacDonald v. Shepard*, 10 Fed. 919, to the contrary of what has been by some supposed to have been ruled by Judge Wheeler, and that the practice in respect to the payment of costs pending a reference was not different from that which obtains upon references in equity courts in other cases. I think it is more than doubtful whether Judge Wheeler intended, in *Urner v. Kayton*, to lay down a general rule which should be applicable to all such references. On the contrary, I incline to construe his opinion as reported to be based upon the peculiar phraseology of the decree ordering the reference in that case, which it seems was a direct order on the defendant, requiring him to go forward and render the account; and it would seem that the decision of the court was rested upon the theory that there was an obligation to take an affirmative step by the defendant, and go forward in executing the order to account. Certainly the general practice in cases of reference is for each party to pay his own costs as the proceeding goes forward, and for the court ultimately to adjudge upon whom the payment of such costs ought equitably to be devolved; and I can hardly think Judge Wheeler intended to lay down a rule in opposition to the general one which governs this sub-

ject, without a more full exposition of the grounds and principles which he supposed justified such a departure. I learn that the practice is not at all uniform in the different districts in the circuit. I gather that the practice of requiring the defendant to pay the costs obtains only to a limited extent, and that the other practice is more generally followed. For the purpose of settling this matter for the practice of this court, I have conferred with several of the judges in the circuit, and we all agree that there is no substantial reason why the general practice in this respect upon reference should be departed from, and it is accordingly held that the usual practice should be pursued in this and other such cases; that is to say, that each party should pay the costs, upon the analogy of general equity rule 67, in the first instance, leaving the question of their final disposition to be determined when the decree is entered. The practice of requiring the defendant to pay the costs of the reference as they are incurred often proves an incitement to the taking of protracted, cumulative, and unnecessary testimony, and entailing needless costs. The affidavits read at the hearing of this motion create an impression that this case may be an illustration of the mischievous results of a departure from the general rule, but this is a matter which can best be determined later on. An order for directions to the master may be entered in conformity with the foregoing views.

BLUE STAR S. S. CO. v. KEYSER et al.
(District Court, N. D. Florida. May 28, 1897.)

1. CHARTER PARTIES—ADVANCEMENTS FOR DISBURSEMENTS—"CURRENT RATE OF EXCHANGE."

Where a charter party provides for the advancement of ordinary disbursements by charterers to master at "current rate of exchange," *held*, the expression "current rate of exchange" is one that is unambiguous, that custom of the port cannot be shown to vary the legal meaning, and that the expression necessarily means the amount of premium which it will cost to replace a sum of money in one country in the other, or which a right to a sum of money in one country will produce in another.

2. SAME—POWERS OF MASTER.

Held, that a charter party is a contract between the owners of the vessel and the charterers which the master of the vessel cannot vary, or bind the owners by acts unauthorized by its terms, as between the charterers and owners; and that the expressions in the charter party in controversy are clear and definite, and constitute a positive contract, and the master has no authority to vary its terms, to the detriment of the owners.

3. SAME—COMMISSIONS.

Address commissions are not included in the expression, "in charter party cash advanced for ship's disbursements," and therefore is to be excluded from the amount upon which they charge commission.

On Final Hearing on Libel and Answer.

Convers & Kirlin, Liddon & Eagan, and B. C. Tunison, for libellant.

John C. Avery, for respondents.

SWAYNE, District Judge. The respondents chartered the steamship Blue Star from the libellant corporation, and thereupon said

steamship proceeded to Pensacola, Fla., and was loaded by respondents with a cargo of timber for ports in England. Among the provisions of the charter party were the following:

"(7) Sufficient cash for ship's ordinary disbursements at port of loading to be advanced the master by charterers or their agents, at current rate of exchange, subject to $2\frac{1}{2}$ per cent. commission; master to give his draft at 30 days' sight on owners to cover same, which owners agree to accept on presentation, and to protect, ship lost or not lost."

"(17) The vessel to be consigned to the charterers or their agents at port of loading, paying them $2\frac{1}{2}$ per cent. address commission on amount of freight earned.

"(18) Merchant to do the stowing of the cargo, supply dogs and chains, pay wharfage, customhouse, tonnage, quarantine dues (but excluding fumigating expenses, should such be incurred), and consulate fees for entrance and clearance, harbor master's fees, harbor movements after vessel in loading berth, and pilotage in and out, at two (\$2) per load of fifty cubic feet on the entire cargo taken aboard at port of loading."

The charterers presented to the master for his signature a draft upon the libelant for £1,440. 13. 4, the amount of which was determined by a bill rendered the master of said vessel for items of disbursements, amounting to the sum of \$6,346.61, a copy of which was attached to the libel, and admitted to be correct in the answer. The draft, as presented by respondents, was signed by the master, indorsed to other parties by respondents, and in the course of business presented and paid by libelant. The libelant in this case contends that the draft was excessive; that the said sum of \$6,346.61, which, at exchange of \$4.83, alleged to be the "current rate of exchange," would equal £1,314, and $2\frac{1}{2}$ per cent. address commission on £4,074 added, being £101. 7. 0, would make a total of £1,415. 7. 0, the amount the draft should have been. The charterers, to make up the amount of the draft, added a charge of $2\frac{1}{2}$ per cent. upon the address commission of £101. 7. 0, reckoned at the rate of exchange of \$4.75, being \$12.10, and a commission of $2\frac{1}{2}$ per cent. on \$24.35, which was not advanced, and arose from error, amounting to \$.61, and that they reckoned exchange at \$4.75, instead of \$4.83. The respondents contend that the current rate of exchange contemplated and intended by the parties to said charter party at the making thereof was the rate of \$4.75 per pound sterling; that the address commission of $2\frac{1}{2}$ per cent. on amount of freight earned was payable to respondents at the port of loading, and was paid by including the same in the master's draft upon libelant as a disbursement of the ship at the port of loading, and that they were legally entitled to said commission. It is sufficiently admitted in the answer to the libel and the answer to the interrogatories propounded in the libel that sterling was convertible into American money at \$4.83 to the pound, but the answer sets up a custom of the merchants in Pensacola in dealing with foreign shipowners, who did all of the timber and lumber business in Pensacola, existing for more than 20 years, for the "current rate of exchange" to be regarded as the rate of exchange at which such drafts were currently taken by charterers of such vessels under such charters at Pensacola, and that the rate of \$4.75 was such at the time of the presentation of this draft, and that the expression "at current rate of exchange" found in said charter

party has never been regarded in the trade as meaning a premium of discount for replacing a sum of money at Pensacola by an equal sum in the country of the owner of the vessels, or vice versa; that these drafts have no market in Pensacola, but are sent on for collection.

The questions presented on argument were:

First. Has this court, as a court of admiralty, jurisdiction? This action is brought to recover from respondents a sum of money demanded and paid to the respondents from the master of the steamship of the libellant. It is alleged that under the terms of the charter party the respondents had no right to the money so paid by it. It is peculiarly within the jurisdiction of a court of admiralty to determine the essential questions herein involved,—i. e. the rights of the respective parties under the charter party,—and between the respective parties to such instrument a court of admiralty has jurisdiction to determine all the obligations arising therefrom. *The A. M. Bliss*, 1 Fed. Cas. 593; *Church v. Shelton*, 5 Fed. Cas. 674; *The Queen of the Pacific*, 61 Fed. 217, etc.

Second. As to the construction and application of the expression in the charter party, "current rate of exchange." Respondents' theory of construction seems to be that the expression is ambiguous, and that custom may be admitted to explain its meaning. The only bearing the alleged custom may have upon an express provision in a contract is to explain the meaning of words which the parties have used, where the words themselves are ambiguous, and where the court must resort for a legal construction to the surroundings of the parties, or gain their intent from business usages. Where they are customarily considered, in a certain trade, to have a particular meaning, and the parties are shown to know or be in such position that they are presumed to know of the meaning which the custom attaches, evidence of the custom may be admitted, but only for the purpose of showing what the parties did actually intend. The rights of the parties are governed by the contract, and the question is, simply, what is the intent of the parties as expressed in the contract, under the rules of legal interpretation? Where words are popularly used in one sense, and it is claimed that the custom of a trade imposes on them a different meaning, the main question is always this: Can it be said that both parties have used these words in this sense, and that each party had reason to believe that the other party so understood them? Mr. Parsons, in his work on Contracts, fully discusses this proposition on page 542. The question, then, is, can the expression in the charter party, "current rate of exchange," be considered as ambiguous, allowing usage or custom to control the courts in any particular locality as to its meaning? The object of a draft or bill of exchange is the transfer of money from one country to another, and the rate of exchange is the rate at which this can be done, or the price which a right to the payment of a pound sterling in England will command in dollars in America. That rate varies from time to time, and the object of using the word "current," meaning "now passing, present in its course, as the current month or year," and "exchange," the rate at which the pecuniary transfer of funds can be made, can, in my opinion, have no legal ambiguity.

The very name of the instrument by which this amount was collected indicates the office which it so frequently performs,—that of exchanging a debt in one place or country for a debt in another place or country; and the phrase “current rate of exchange” can have but one legal meaning,—the difference in value, at any particular time, of the same amount of money in different countries or places. Daniel, Neg. Inst. § 1440a. This is precisely the meaning which the respondents contend the phrase does not bear, but contend that it means a rate which does not fluctuate; that is, a nominal or customary par. The par of exchange is the value of money of one country in that of another, and may be either real or nominal. Nominal par is that which has been fixed by law or custom, and, for the sake of uniformity, is not altered, the rate of exchange alone fluctuating. Bouv. Law Dict. “Exchange.” And it has been held that an instrument containing a promise to pay a certain sum, “current rate of exchange” to be added, was not negotiable, because not definite in amount. *Bank v. Newkirk*, 2 Miles, 442, 443. The averment in the answer that there is no market for these drafts drawn by the master to his own order, and indorsed to the charterers as payment of disbursements, etc., and that they are sent on for collection, itself destroys the contention of respondents regarding the construction of this phrase. Obviously, no remittance of specie is made from England, but the bills, while still the property of the respondents, are negotiated somewhere in America, and the rate which the merchant realizes on them is greater than \$4.75, and is the current rate of exchange at the time. If this is all that the merchant realized on them, it should have been so alleged, and there would have been objection to their reckoning exchange at that rate.

In the answer to the third interrogatory, respondents admit that sterling was then and there convertible into American money at \$4.83 to the pound, and therefore, if they had deposited said drafts for collection, they would have realized \$4.83 per pound. If the drafts are drawn at \$4.75, the shipowners have to pay, not only commissions on disbursements, of 2½ per cent., but an additional amount in excess of the sum actually disbursed, which there is no reason they should pay or should agree to pay. If we can derive a known legal meaning from the expression “current rate of exchange,” parol evidence that the parties intended to use it in some different or popular sense will be rejected, unless these words, if interpreted according to their strict legal sense or acceptation, be wholly insensible with reference either to the context of the charter party or the extrinsic facts. *Tayl. Ev.* § 1165, citing other authorities; *Barnard v. Kellogg*, 10 Wall. 383. Proctors for libellant have cited many cases bearing on this question, which fully sustain this position. Proctors for libellant further contend in brief that a custom of a particular place only, as it seems from allegations in answer, this to be, cannot be imported into a contract not made at that place, the charter party in this case having been entered into in Liverpool, England; and that the clause referring and including custom of port of loading applies only to matters where the charter party is not express in its provisions; that the provisions relating to commissions and exchange are express, and therefore local custom cannot be imported into it.

Respondents maintain that the charter party expressly provides that this custom is a part of the contract, because the general law makes such custom a part of the contract, under the circumstances stated in the answer; and that the shipowners are presumed to know it, and to have had it in mind when they chartered their ship. But this contention cannot be maintained on the grounds set forth previously. The cases cited in support of same cannot be applied to the circumstances in this case. Although the owners knew of the usage, its character is such that it would not be binding upon one who attempts to resist it; and therefore, even if the parties knew that the usage had long and uniformly existed, such usage could not produce a custom binding upon one who chose to object to it. The provisions in the charter party that the custom of the port shall be valid unless specifically expressed, has no other effect than to put the parties in the same position as if they knew of the usage which prevailed at Pensacola. If they had known of the usage, it is not to be presumed that they intended to adopt it if unreasonable. Usage is not custom, but merely the evidence from which the existence of a custom may be inferred. An unreasonable usage does not establish a binding custom, and the adoption in the charter party of customs at Pensacola brings into the contract only those usages which would have been included had the contract been made at Pensacola, and with knowledge of the usage. It does not make a custom that which is not a custom.

In concluding this phase of the case, I may add that the term "current rate of exchange" can have but one legal signification, and that an unambiguous one,—the rate of exchange is the rate at which drafts are negotiated. It is the amount in dollars for which a draft for sterling will sell per pound. The purpose of the agreement is to fix what amount the master's draft shall be. It provides that it shall be a draft for the number of pounds which will sell for the number of dollars which have been advanced, and thus reimburse the charterers. The answer says that all charters at Pensacola contain the same provision, and that the manner in which they fix the amount of the master's draft is by saying that they shall be drawn at the rate at which they shall be drawn. Such an interpretation seems not consistent with law, because the rate of exchange is not the rate at which drafts are drawn, but the rate at which they are sold; and because it does not fix the amount of the draft, but leaves it subject to any variation which charterers may see fit to make, and would allow merchants in Pensacola to combine and fix arbitrarily the rate or "current rate of exchange" without relation to that which exchange could be procured upon the market. If, on the other hand, the rate meant the rate at which 30-day bills sell, there can be only one such rate intended,—the rate for marketable paper.

Regarding the question whether the charterers had a right to charge libellant a commission upon the commission on freight earned, allowed as address commission, that is a payment by the owner to the charterer for attending to the business of the ship, and provided for in another part of the charter party. I take the view that this was a special compensation to the charterers for managing the business of the ship, and clearly could not be classed among the items provided for in the charter party as disbursements of the ship under

the clause, "in charter party cash advanced for ship's disbursements." Respondents contend that this was payable to them at the port of loading, and was paid by the master's draft, the same as any other disbursement; and set up a custom in said port to that effect. But I cannot reconcile this contention with the facts as pleaded, and regard this commission in the light of compensation, rather than disbursement.

This brings me to a consideration of the last question urged by respondents as defeating the claim of libellant, viz. that the master was well advised of each and every item in the said account at the time that he gave the said draft, and well understood the rate of exchange at which it was given, and gave the same without protest, objection, or dispute at the port of loading. To support this, respondents have cited 4 Wait, Act. & Def. 476, 477, and *Ferrari v. Board of Health*, 24 Fla. 390, 5 South. 1. This decision is entitled to great consideration, and if I found it applicable to this case I would give it great weight in the disposition of this question. But in this case a draft had been given to the plaintiffs by the master of the vessel for quarantine dues, alleged to be illegal, but which the court held legal, and the owner refused to accept, and this action was brought against the drawer for the amount of the bill. The master interposed a defense of illegality of consideration, and among the questions decided by the court was that it was made without duress, etc., and no doubt this would hold as between the drawer and indorsee for value and without notice, or even under the circumstances of this case; but as between the acceptor and an indorser with full notice of all the circumstances, as in this case, the rule is different. Where knowledge of the defect on the part of the warrantor can be shown, the bill may be returned as worthless, or it may be accepted for the honor of subsequent indorsers, and rely upon the warranty of the indorser, and, on being obliged to pay money or suffer loss, to hold the warrantor liable for damages incurred. See *Norton, Bills & N.* p. 144. They are entitled, and indeed obliged, to pay this bill, under their promise in the charter party to protect and pay such drafts as should be drawn; and the drawing itself was a request for payment, made by the drawer to the drawee, which drawee it entitled to accept without prejudice to its rights. *Daniel, Neg. Inst.* § 1256. But, independent of this consideration, since there is no question of bona fide purchaser, we have the consideration of the question regarding the act of the master in drawing this bill for a larger sum than that to which the respondents were entitled under the charter party, and which was done at the request of respondents. In *Gracie v. Palmer*, 8 Wheat. 639, it was held that it was not in the power of the master to release the charterer from his contract to the owner, so long as the contract is in force, and has no power to modify the terms, since all the power delegated to him while the charter party is in force is to perform the undertaking of his employer in the fulfillment of the contract. It seems clear that the libellant had a right to accept the bill so drawn, and in fact it was his duty, and thereafter look to the respondents for any excess they may have induced the master to include. A decree may be entered for the amounts claimed in the libel.

PURDY v. WALLACE MÜLLER & CO., Limited.

(Circuit Court, D. Massachusetts. June 21, 1897.)

1. REMOVAL OF CAUSES—ATTACHMENT SUITS—WAIVER OF RIGHT TO REMOVE.

When an action is begun in a state court against a nonresident defendant by process of foreign attachment, without personal service, such defendant does not submit to the exclusive jurisdiction of the state court, nor waive the right to remove the cause to a federal court, by giving a bond to release the attachment in accordance with the state procedure.

2. SAME—LACK OF PERSONAL SERVICE—JURISDICTION.

Custody of a res being recognized by the federal courts as a ground of jurisdiction, as well as personal service of process, a suit begun in a state court by attachment of property, and removed into a federal court, will not be there dismissed for want of jurisdiction because there has been no personal service. *Goldney v. Morning News*, 15 Sup. Ct. 559, 156 U. S. 518, distinguished.

3. SAME—DISMISSAL.

When a suit commenced in a state court by attachment is removed into a federal court before the proceedings upon the attachment are complete, the fact that the federal court cannot complete such proceedings is not a reason for dismissing the action.

On Plaintiff's Motion to Remand, and Defendant's Motion to Dismiss.

Arthur Lord and James M. Newell, for plaintiff.

Charles P. Searle and William G. Thompson, for defendant.

BROWN, District Judge. This action is for breach of contract, and was begun by foreign attachment in the state court against the defendant, a corporation of New Jersey, not incorporated under the laws of Massachusetts, and having no place of business, officer, agent, or attorney therein. The only service was upon the garnishees, the case having been removed before the giving of notice to the defendant as required by the state statute in cases of foreign attachment. The plaintiff now moves to remand upon the ground that by giving bond to release the attachment, made by trustee process, the defendant has submitted to the exclusive jurisdiction of the state court, and waived the right to remove. As suggested by counsel for the defendant, the proposition that, as the price of a removal granted by an act of congress, a defendant must permit an attachment to remain upon his property, and cannot avail himself of the provisions of the state law for dissolving the attachment, involves an extraordinary limitation upon a right founded upon the constitution of the United States, and expressly granted by an act of congress. There appears no sound reason for such a limitation. In *Kern v. Huidekoper*, 103 U. S. 485, it was said:

"When the prerequisites for removal have been performed, the paramount law of the land says that the case shall be removed, and the case and the res both go to the federal court. The fact that the state court, while the case was pending in it, had possession of the subject-matter of the controversy, cannot prevent the removal; and when the removal is accomplished the state court is left without any case, authority, or process by which it can retain possession of the res. The suit and the subject-matter of the suit are both transferred to the federal court by the same act of removal, or when a bond

for the delivery of the property has been taken, as in this case, the bond, as the representative of the property, is transferred with the suit. There is no interference with the rightful jurisdiction of the state court, and no wresting from its possession of property which it has the right to retain."

Furthermore, by the act of March 3, 1875, § 4 (18 Stat. 471), the validity of attachments in the state courts, and of all bonds, undertakings, or security given by either party, is preserved after removal. This is a satisfactory indication that congress did not intend that the giving of such a bond should prevent a removal.

In support of the motion to dismiss, the defendant contends that jurisdiction of its person has been acquired by neither court, and that it now has the right to claim the same personal privilege which it could have claimed had the case been begun in this court, and that without jurisdiction of the person the case cannot proceed, and therefore should be dismissed. The defendant relies upon the case of *Goldey v. Morning News*, 156 U. S. 518, 15 Sup. Ct. 559, and quotes the language of Mr. Justice Gray:

"The theory that a defendant, by filing in the state court a petition for removal into the circuit court of the United States, necessarily waives the right to insist that for any reason the state court had not acquired jurisdiction of his person, is inconsistent with the terms as well as with the spirit of the existing act of congress regulating removals from a court of a state into the circuit court of the United States. * * * The legislature or the judiciary of a state can neither defeat the right given by a constitutional act of congress to remove a case from a court of the state into the circuit court of the United States, nor limit the effect of such removal."

Admitting, merely for the purposes of the motion to dismiss, that no jurisdiction of the person has been acquired, and that the defendant may now, in this court, insist upon the point, what is the proper consequence? Does it follow that the case should be dismissed? The case of *Railway Co. v. Brow*, 164 U. S. 279, 17 Sup. Ct. 128, which cites the foregoing language of Mr. Justice Gray, announces the rule that:

"The party has a right to the opinion of the federal court in every question that may arise in the case, not only in relation to the pleadings and merits, but to the service of process, and [that] it would be contrary to the manifest intent of congress to hold that a party who has a right to remove a cause is foreclosed as to any question which the federal court can be called upon under the law to decide."

It is significant, however, that in the latter case Mr. Chief Justice Fuller, in the first sentence of the opinion, distinguishes the case before him from one involving a proceeding in rem or quasi in rem. These two cases establish the principle that in removed cases the federal courts will determine according to their own principles of jurisprudence the question of whether jurisdiction of the person has been acquired, but they do not decide that the courts of the United States will recognize no jurisdiction as valid unless based upon personal service or voluntary submission.

There is a third basis of jurisdiction recognized by the supreme court of the United States, namely, the custody of a res. In *Pennoyer v. Neff*, 95 U. S. 714, 723, it is said:

"Every state owes protection to its own citizens, and, when nonresidents deal with them, it is a legitimate and just exercise of authority to hold and

appropriate any property owned by such nonresidents to satisfy the claims of its citizens. It is in virtue of the state's jurisdiction over the property of the nonresident situated within its limits that its tribunals can inquire into that nonresident's obligations to its own citizens, and the inquiry can then be carried only to the extent necessary to control the disposition of the property."

In *Cooper v. Reynolds*, 10 Wall. 317, it is said:

"So the writ of garnishment or attachment, or other form of service on a party holding a fund which becomes the subject of litigation, brings that fund under the jurisdiction of the court, though the money may remain in the actual custody of one not an officer of the court."

See, also, *Freeman v. Alderson*, 119 U. S. 185, 7 Sup. Ct. 165.

In the case of *St. Clair v. Cox*, 106 U. S. 353, 1 Sup. Ct. 357, Mr. Justice Field says of the case of *Pennoyer v. Neff* (wherein also he delivered the opinion):

"We held that personal service of citation on the party or his voluntary appearance was, with some exceptions, essential to the jurisdiction of the court." "The exceptions related to those cases where proceedings are taken in a state to determine the status of one of its citizens towards a nonresident, or where a party has agreed to accept a notification to others, or service on them, as citation to himself."

It is obviously not the purpose of the removal statutes to destroy a valid jurisdiction of the state court. Nor is it the purpose to secure to a defendant the right to litigate in the district of his own domicile, since the removal must be to the United States court for the district wherein the suit was begun. The cases of *Goldey v. Morning News and Railway Co. v. Brow* did not involve a consideration of the exception pointed out in *Pennoyer v. Neff* and *St. Clair v. Cox* to the general rule requiring personal service or voluntary submission. In the case of *Cowley v. Railroad Co.*, 159 U. S. 583, 16 Sup. Ct. 131, it was said:

"The case having been removed to the circuit court upon the petition of defendant, it does not lie in its mouth to claim that such court had no jurisdiction of the case unless the court from which it was removed had no jurisdiction."

It is urged as a further reason for dismissal that the removal has rendered it impossible to carry out the provisions of the state law for giving notice to the defendant. The service of citation by publication or notice required by the Massachusetts statute in cases of foreign attachment was not made before removal, and counsel have cited many cases, including *Toland v. Sprague*, 12 Pet. 300, *Picquet v. Swan*, 5 Mason, 35, Fed. Cas. No. 11,134, *Dormitzer v. Bridge Co.*, 6 Fed. 217, etc., to sustain the proposition that the courts of the United States have no power to give the notice required by the state law. From this it is urged that as this court cannot complete the service, and as by removal the state court is precluded from so doing, there exists no power to carry out the full procedure on foreign attachment, and that all proceedings instituted in the state court have therefore been rendered ineffective, and that not only is there no jurisdiction of the defendant's person, but also no complete attachment of property, and that the logical consequence is a dismissal. Such a conclusion is by no means necessary. If we have no power to deal with the case, this is a reason for remanding it to

a court which has such power. But is it necessary that the service by publication or notice should be completed? The object of service by publication or notice is to give the defendant due warning of the seizure of his property, and of the proceedings to appropriate it. By appearing in the state court before the lapse of the time within which notice might be given, and filing his petition for removal, wherein he recites the pendency of the suit, and alleges the dissolution of the attachment and the giving of a bond, he puts upon record conclusive evidence of his knowledge of the proceedings, and renders publication or further notice an idle formality. It is a familiar principle that a party, by appearing before service, waives it; and, although the appearance in this case was limited to the single purpose of removal, the appearance for that limited purpose is inconsistent with a claim of lack of actual notice of the existence of the case. Had the defendant waited until publication had been made or notice given, and then removed the case, he might then have objected in this court that the state statute had not been complied with. As a valid jurisdiction of the state court depends upon seizure of property, with seasonable notice to the defendant, it would seem reasonable to hold the appearance for purposes of removal, and the removal, which prevented further notice, a complete substitute for the notice required by the statute, and that the case should now stand exactly as if proper notice had been given, and full compliance with the Massachusetts statute had been made before removal. But, even if this is not the true view, the defendant's objection would lead, not to a dismissal, but to a remanding of the case, and therefore does not support the motion to dismiss. I think, moreover, that it is a serious question whether a defendant, by removing a case begun in a state court by a valid proceeding of foreign attachment, has not, by the very act of removal, submitted his person to the jurisdiction of the federal court, and that the decision in *Goldey v. Morning News* is not inconsistent with such view. The proceeding in that case could be regarded only as a personal action,—a personal action open to the objection that, according to the general rules of law, there had been no valid service. If there had been no proper service, there was no jurisdiction in either court which could be regarded as valid. The present case is substantially different. After seizure of the property, the case may, at the election of the defendant, assume either of two forms,—that of a proceeding in which only the res is involved, or that of a personal action between individuals. It is by treating it as the latter that the defendant comes within the provisions of the statute of removals, and introduces the necessary element of diverse citizenship. If the defendant does not appear and is not served, as was said in *Cooper v. Reynolds*, 10 Wall. 308, 312, the case becomes in its essential nature a proceeding in rem. If it is to be so regarded after removal, then should not the case be remanded, as not within the provisions of the statute authorizing the removal of suits between citizens of different states? If, on the other hand, the defendant treats it as a personal action, it becomes so, not by virtue of the service of process, but by virtue of its own act in electing to treat a proceeding in rem or quasi in rem, requiring

no personal service within the jurisdiction, as a personal action. But, in whatever light these questions may be regarded, I am satisfied that the proper alternative is, not to retain jurisdiction or to dismiss, but to retain jurisdiction or to remand. *Bliven v. Screw Co.*, 3 Blatchf. 111, Fed. Cas. No. 1,550. The question of dismissal in a case like the present has been the subject of prior adjudication in this circuit. *Perkins v. Hendryx*, 40 Fed. 657 (decided in 1889), is a direct authority for the granting of the motion to dismiss. In the later cases of *Bank v. Pagenstecher*, 44 Fed. 705, and *Richmond v. Brookings*, 48 Fed. 241, however, like motions to dismiss were denied, and jurisdiction was retained; the court intimating in the case of *Richmond v. Brookings* that the judgment could bind only the property. Considering this conflict of decision, and the language of the supreme court in the various cases above cited, I think that the present motion should be so dealt with as to recognize and preserve the validity of the jurisdiction acquired by the attachment in the state court, and also to recognize the right of the defendant to have the case remain in this court as a proceeding in personam, or even to claim hereafter, if it shall so elect, that the matter should remain here as a proceeding quasi in rem affecting the attached property merely according to the intimation in *Richmond v. Brookings*, 48 Fed. 241.

The motion to remand is therefore denied, not upon a decision of the question whether we can retain jurisdiction if the defendant does not choose to plead, but because the defendant has not, by giving bond to release the attachment, waived the right to remove. The motion to dismiss is denied on the ground that of the possible modes of dealing with the case, viz. dismissal, remanding, or retaining jurisdiction over the proceeding either as in personam or quasi in rem, the course urged by the defendant (i. e. dismissal) is improper. It would at this time be premature to decide either that the court has acquired full jurisdiction of the person of the defendant, or that it may retain the case, as a proceeding quasi in rem, without jurisdiction of its person, since counsel have not been heard upon these questions. To remand the case upon grounds other than those set up in the motion would deprive the defendant of the right to plead to the merits and thereby obtain the benefit of the removal statute, and also of the right to be heard upon the question of whether the case may proceed in this court as a proceeding quasi in rem, involving only the attached property. The motion to remand is denied. The motion to dismiss is denied. The defendant is allowed 30 days within which to plead or to take such other proceedings as it may deem proper.

SNOHOMISH COUNTY v. PUGET SOUND NAT. BANK OF EVERETT et al.

(Circuit Court, D. Washington, N. D. May 10, 1897.)

1. REMOVAL OF CAUSES—QUESTIONS OF LAW AND FACT.

There is no difference, in the method of determining whether a case can be removed from a state to a federal court, between cases in which the right to such removal depends on questions of fact and those in which it depends on questions of law arising on the record.

2. JURISDICTION OF FEDERAL COURTS—SUITS TO WIND UP NATIONAL BANKS.

A suit against an agent of the shareholders of a national bank, appointed pursuant to the act of congress to wind up its affairs, by which suit it is sought to restrain such agent from disposing of the property of the bank, and to secure the appointment of a receiver of such property in order that it may be distributed under the orders of the court, being in effect a suit to wind up the affairs of an insolvent national bank, is a suit arising under the laws of the United States of which the federal courts have jurisdiction concurrent with the state courts.

3. SAME—NATIONAL BANKS—RECEIVERS APPOINTED BY COMPTROLLER.

The assets of an insolvent national bank are not brought under the control or protection of the federal courts by being taken into custody by a receiver appointed by the comptroller of the currency, nor by their transfer from the receiver to an agent of the shareholders appointed pursuant to the act of congress to wind up the affairs of the bank. In re Chetwood, 17 Sup. Ct. 385, 165 U. S. 442, followed.

This was a suit by the county of Snohomish against the Puget Sound National Bank of Everett, and A. J. Hayward, and others, to enjoin an agent engaged in winding up the affairs of the bank from proceeding further, and to procure the appointment of a receiver to take charge of its remaining assets. The cause was heard on motion to dismiss, and on demurrers to the bill.

L. K. Church, for complainant.

C. E. Shepard and H. D. Cooley, for defendants.

HANFORD, District Judge. Owing to pressure of many duties, it is not practicable for me at this time, in ruling upon the motion to dismiss and the demurrers to the bill of complaint, to do more than give a general outline of my views upon the questions which were argued.

In entering upon the first inquiry as to jurisdiction, we are met by the questions whether the case is removable, and whether it has been removed from the superior court of Snohomish county, so as to invest this court with jurisdiction. The superior court made an order denying, on legal grounds, the petition to remove the case to this court, but I do not agree with counsel for the plaintiff in his contention that there is any such difference between cases in which the removability of a cause depends upon the determination of questions of fact and those in which only questions of law arising upon the facts shown by the record are to be considered, that a decision by a state court of questions of law affecting the right of removal is more conclusive than it would be if the court had assumed to determine questions of fact. In both classes of cases the parties have a right to take the judgment of the United States circuit court as to its own jurisdic-

tion, and in every such case the presentation of a petition for removal and bond to the court of original jurisdiction, and the subsequent filing of the transcript of the record in the circuit court, operates to remove the cause, and divest the state court of its jurisdiction completely, without any order granting the petition, if in fact the cause is removable under the laws of congress, and the proceedings are taken in time.

I find by the complainant's statement of its case in the bill of complaint that the case is one of which this court might have taken original jurisdiction as a suit of a civil nature, arising under the laws of the United States. It appears to me to be a suit against an agent of the shareholders of a national bank, elected in a manner provided for by an act of congress, and authorized by the same act to take from a receiver the entire assets of the bank remaining undisposed of, for the purpose of winding up the affairs of the banking association, and, to that end, empowered by the same law to prosecute and defend actions, and also required to render a final account of receipts and disbursements with vouchers, to the United States circuit or district court, for the district in which the bank was located. The object and purpose of the suit are to restrain this agent from proceeding to dispose of the property in his hands, held in his trust capacity, and from settling and compromising liabilities of certain debtors of the bank, and to take the whole of the remaining assets of the bank out of his hands, so that the complainant may realize therefrom a sum of money for which it has a claim against the bank. The bill calls for a discovery, and for an accounting by the agent, and for the appointment of a receiver to take the remaining assets into his custody, to the end that the court having jurisdiction of the cause may have complete control of the assets, and power to dispose of the same, and distribute the proceeds. For all practical purposes, this is a suit to wind up the affairs of an insolvent national bank, and jurisdiction of such cases is conferred upon this court by the laws of the United States defining the jurisdiction of circuit courts.

The motion to dismiss is upon the ground that the superior court of Snohomish county, in which the suit was originally brought, did not have jurisdiction. It is my opinion, however, that said court, being a court of superior and general jurisdiction in common law and equity causes, was a court of competent jurisdiction for the trial of the issues tendered by the averments of the bill. As a court of equity having jurisdiction of the parties, it had the power to remove an unfaithful or incompetent trustee, and to thereafter administer the trust for the benefit of those having rights according to the principles of equity. The jurisdiction of federal courts in civil causes is concurrent with the jurisdiction of state courts, except in cases in which the federal jurisdiction is made exclusive by some provision in the constitution or laws of the United States, and I have not been referred to any such provision applicable to this case. The jurisdiction of the superior court was not barred by the rule of law that an estate or property in the custody of one court cannot be interfered with by process from another court. The assets of the bank were not brought under the control or protection of this court by being taken into custody by a receiver

appointed by the comptroller of the currency, nor by the transfer from the receiver to the agent of the shareholders.

The decision by Judge Morrow in the case of *Stateler v. Bank*, 77 Fed. 43, 58, cited by counsel for defendants, upon this point, has been in effect reversed by the supreme court of the United States, in an opinion rendered on the 15th day of February, 1897, granting a writ of certiorari in the same case. In *re Chetwood*, 165 U. S. 443, 17 Sup. Ct. 385. In the opinion by Mr. Chief Justice Fuller the doctrine of the supreme court is given as follows:

"It is true, as stated in *Re Tyler*, 149 U. S. 164, 181, 13 Sup. Ct. 785, 789, * * * 'no rule is better settled than that, when a court has appointed a receiver, his possession is the possession of the court, for the benefit of the parties to the suit and all concerned, and cannot be disturbed without the leave of the court; and that if any person, without leave, intentionally interferes with such possession, he necessarily commits a contempt of court, and is liable to punishment therefor.' But we do not regard these proceedings as falling within that rule. * * * The receiver acts under the control of the comptroller of the currency, and the moneys collected by him are paid over to the comptroller, who disburses them to the creditors of the insolvent bank. Under Rev. St. U. S. § 5234, when the receiver deems it desirable to sell or compound bad or doubtful debts, or to sell the real and personal property of the bank, it devolves upon him to procure 'the order of a court of record of competent jurisdiction'; but the funds arising therefrom are disbursed by the comptroller, as in the instance of other collections. The circuit court did not have the assets or property of this bank in its possession on July 19, 1890, nor was the leave of that court necessary in order that the receiver might be made a party defendant to the action instituted by Chetwood on that day. In the bill filed by Stateler in the circuit court, January 4, 1896, to enjoin Chetwood and the bank, the averment is made that on February 21, 1889, the receiver filed an application in the circuit court entitled 'In re Application of Receiver of the California National Bank for the Sale of Personal Property'; and the bill asserts as a conclusion of law that thereby 'the said receiver submitted himself and the affairs of said banking association to the jurisdiction of this honorable court.' The application thus referred to is not made part of the return to the rule, but from the averments of the bill in regard to it, and from the terms of the national banking law itself, we think it plain that no such result followed its presentation. Our attention has been called to no case in which it has been held that the filing of such petitions by national bank receivers in the federal courts operates to make the receiver an officer of the court, or to place the assets of the bank within the control of the court, in the sense in which control is acquired where a receiver is appointed by the court. * * * About four years after the suit was commenced, Stateler was elected agent to succeed the receiver, and the usual assignment by the comptroller and receiver to him, as such, was executed. The legality of Stateler's election, though controverted, must be conceded for the purpose of this application. But did the substitution of an agent for the receiver oust the jurisdiction of the state court? Certainly not. He was no more an officer of the circuit court in the first instance than the receiver was. The agent proceeds in the settlement with like authority to that conferred upon the receiver although, at the conclusion of his duty, he is required to render to the circuit or district court of the United States, for the district where the business of the bank is carried on, 'a full account of all his proceedings, receipts, and expenditures as such agent, which court shall, upon due notice, settle and adjust such accounts, and discharge said agent and the sureties upon said bond'; and thus he and his bondsmen are protected by the final order of the federal court upon the performance of the conditions imposed. But there is nothing in the language of the statute from which it can be inferred that it was the intention that the jurisdiction of state courts of competent and concurrent jurisdiction, first obtained, should be interfered with by restraining orders issued by federal courts on the application of such an agent. The agent may, indeed, intervene in a case in the state court, and receive the fruits of the litigation to be administered, subject to the final approval of the federal court;

and, accordingly, Stateler, as agent, submitted himself to the jurisdiction of the state courts, and applied for an order turning over to him the funds so far as realized. Nevertheless, the agent must abide the result, and cannot control it, through the interposition of another independent and concurrent jurisdiction."

Assuming, as I must, for the purpose of the motion and the demurrers, that the facts stated in the bill of complaint are true, there appears to be just cause for rescuing the remaining assets of the bank from the agent of the shareholders, in order that something may be realized therefrom to satisfy the claim of the complainant.

For these reasons, the motion to dismiss will be denied, and the demurrers to the bill overruled.

PLIABLE SHOE CO. v. BRYANT et al.

(Circuit Court, N. D. California. June 28, 1897.)

1. JURISDICTION OF FEDERAL COURTS—SPECIFIC PERFORMANCE OF CONTRACT TO ASSIGN PATENT.

A suit for the specific performance of a contract to assign a patent is not one arising under the laws of the United States, and the federal courts have no jurisdiction of it as such.

2. SAME—DIVERSE CITIZENSHIP—JURISDICTIONAL AMOUNT.

In order to give jurisdiction of a suit to a federal court on the ground of diverse citizenship, it must be alleged that the matter in dispute exceeds, exclusive of interest and costs, the sum of \$2,000.

Bill in equity for specific performance of contract as to certain letters patent. Demurrer to the bill. Demurrer sustained on the ground of lack of jurisdiction.

Marcus Rosenthal, for complainant.

Smith & Murasky, for defendants.

MORROW, Circuit Judge. This is a bill in equity, brought to enforce the specific performance of a contract. The bill alleges that the defendant George Bryant, for certain considerations, on the 22d of January, 1896, assigned, sold, and conveyed to the complainant, a corporation, all of his right, title, and interest in and to the capital stock of the said corporation, "and in and to any and all inventions, improvements, and letters patent for pliable shoes, or machines for making the same"; and also further agreed, upon demand of complainant, to execute "any further assignments of patents or other documents which may hereafter become necessary to secure to the said company the full enjoyment of the said letters patent, or any of them"; that subsequently, upon the 20th day of May, 1896, the defendant George Bryant filed in the United States patent office an application for letters patent of the United States for a machine for manufacturing pliable shoes, and upon such application United States letters patent No. 568,892 were issued, bearing date October 6, 1896; that the said letters patent were issued to the defendant Alice E. Bryant as assignee of the defendant George Bryant; that Alice E. Bryant is a daughter of George Bryant, and was fully aware and had notice of the agreement between the complainant and George Bryant; that complainant, on the 16th of October, 1896,

demanding of defendant George Bryant an assignment of said letters patent to be executed in form necessary to secure to complainant the full enjoyment of the said letters patent. The bill asks for a decree that the defendants be directed to convey and assign to the complainant, by a proper instrument in writing, the said letters patent No. 568,892, together with all the rights and benefits thereunder. The complaint alleges that the Pliable Shoe Company is a corporation incorporated under the laws of the state of Maine, and the defendants are citizens of the state of California. If the jurisdiction of the court is assumed upon the diverse citizenship of the parties, it must appear that the matter in dispute exceeds, exclusive of interest and costs, the sum of \$2,000. Act March 3, 1887, as amended by Act Aug. 13, 1888 (25 Stat. 433; 1 Supp. Rev. St. p. 611). There is no allegation to that effect in the complaint. On the other hand, if jurisdiction be claimed on the ground that it is a suit arising under the patent laws of the United States, it is a sufficient answer to say that the object of the bill is to enforce the specific enforcement of a contract. The relief sought is founded on the contract, and not on the patent laws of the United States, and this court has no jurisdiction of such an action. *Nesmith v. Calvert*, 1 Woodb. & M. 34, Fed. Cas. No. 10,123; *Brooks v. Stolley*, 3 McLean, 523, Fed. Cas. No. 1,962; *Hartell v. Tilghman*, 99 U. S. 547; *Marsh v. Nichols*, 140 U. S. 344, 11 Sup. Ct. 798. The demurrer is sustained.

SIEGEL v. CITY OF NEW ORLEANS.

(Circuit Court of Appeals, Fifth Circuit. May 11, 1897.)

No. 568.

MUNICIPAL CORPORATIONS—INDEBTEDNESS — APPLICATION OF SURPLUS REVENUES.

The Louisiana statute declaring that the revenues of municipalities for each year shall be devoted to the expenditures of that year, provided "that any surplus of said revenues may be applied to the payment of the indebtedness of former years" (Act No. 30 of 1877, § 3), is merely permissive as to the surplus, and does not constitute it a trust fund to pay the debts of former years. Therefore a creditor having judgments payable out of the revenues of particular years, "with full benefit of the provisions of section 3 of Act No. 30 of 1877," has no right to have the surplus of subsequent years administered for his benefit. *U. S. v. Thoman*, 15 Sup. Ct. 378, 156 U. S. 353, followed.

Appeal from the Circuit Court of the United States for the Eastern District of Louisiana.

This was a suit in equity by Henry Siegel, a citizen of the German empire, against the city of New Orleans, to obtain an accounting of the revenues of the city alleged to be applicable to the payment of some 17 judgments theretofore obtained by the complainant against the city. These judgments aggregated \$74,262.17, and by their terms were made payable out of the revenues of particular years, extending from 1879 to 1887. Three of these judgments declared that they should be payable out of the revenues of the year 1882, and contained the additional clause, "provided that any surplus of the revenues of any subsequent year may be applied to the payment of the

debts of the year 1882, according to section 3 of Act No. 30 of 1877." The remaining 14 judgments, after providing that they should be paid out of the revenues of the years named in them, respectively, added, "with the full benefit of the provisions of section 3 of Act No. 30 of 1877." Act No. 30 of the Acts of Louisiana for 1877 declared that all the revenues of the parishes and municipalities of each year should be devoted to the expenditures of that year, provided "that any surplus of said revenues may be applied to the payment of the indebtedness of former years." The bill of complaint contained, among others, the following averments: "Your orator avers that said illegal diversion of the trust funds during the above-mentioned years amounts to the sum of thirty-nine thousand six hundred and forty dollars and twenty-two cents; and he now annexes an exhibit of the disbursement of said fund, giving the date, amount, and numbers of the ordinances making said illegal disbursements to the prejudice of the rights of your orator. Your orator further avers that the said sum of thirty-nine thousand six hundred and forty and $\frac{2}{100}$ dollars should be accounted for by said city, and be made subject to your orator's claims. Your orator further charges that all the interest which had accumulated on the various taxes for said years formed a part of the revenues, and that the dedication of the principal to the payment of the claims due by the city of New Orleans for the various years carries with it the dedication of the interest, and that, furthermore, the various claims created by said city against the funds of said years was in the shape of contracts, protected by the constitution of the United States from being impaired; that, in violation of the rights of your orator and the other creditors of said funds, the city of New Orleans diverted a large part of the interest received by her, and remitted, without consideration, a considerable part thereof; that your orator is unable to furnish at the present time an exact statement of the interest diverted and remitted, but avers that the sum amounted to considerably more than thirty thousand dollars, which the said city should be compelled to account for." In the court below a demurrer to the bill was sustained, and the bill dismissed. From this decree the complainant has appealed.

H. L. Lazarus and Chas. Louque, for appellant.

W. B. Sommerville, for appellee.

Before PARDEE and McCORMICK, Circuit Judges, and NEWMAN, District Judge.

PER CURIAM. The supreme court, in *U. S. v. Thoman*, 156 U. S. 353, 15 Sup. Ct. 378, in construing the judgments obtained by the complainant against the city of New Orleans, which contain the provision that the respective amounts were payable out of the revenue of particular years, with full benefit of the provisions of section 3, Act No. 30 of 1877, held that the complainant took nothing therefrom in regard to the revenues of subsequent years further than the city was willing to give. Therefore the surplus of the revenues subsequent to any particular year named in the judgments constitutes no trust fund which the complainant has the right to have administered. As to the diversion of revenues of any particular year (from the revenues of which the complainant's judgments were payable): If the bill contained specific allegations as to diversions for those years (which we understand to be 1879, 1880, 1881, and 1882), or either of them, the complainant might have a right to an accounting, and to such relief as an accounting would show the complainant entitled, but nothing further. Such allegations, however, are wanting; and to the bill, considered as one for an accounting and a receiver, the demurrer was properly sustained. The decree appealed from is affirmed.

SELIGMAN et al. v. CITY OF SANTA ROSA.

(Circuit Court, N. D. California. April 10, 1897.)

1. EQUITY PROCEDURE—INTERVENTIONS.

Under section 387, Code Civ. Proc. Cal., providing that any person interested may intervene in an action or proceeding "before the trial," an application to intervene comes too late which is made at the time of the submission of the case on bill and answer.

2. SAME—JURISDICTION OF FEDERAL COURTS—CITIZENSHIP—INTERVENTION.

The circuit court cannot take jurisdiction of an intervention in a merely personal action, in which no fund has come into the possession of the court, by one who is a citizen of the same state as the party against whom his complaint is directed.

3. SAME—INTERVENTION BY TAXPAYER—ILLEGAL TAXES.

Though a taxpayer may intervene in a pending suit to stop an illegal levy while his property is subject to taxation, he has no right to intervene to prevent the expenditure of money which has already been collected, upon the ground that the tax which produced it was illegal.

Jesse W. Lilienthal, for plaintiffs.

H. N. Clement and T. C. Judkins, for intervener Mark L. McDonald.

O. O. Webber and Thos. Rutledge, for city of Santa Rosa.

MORROW, District Judge (orally). This case was submitted on bill and answer. The bill contains 195 counts, alleging as many causes of action, from which it appears that the complainants are the owners of certain waterworks bonds issued by the city of Santa Rosa, in this state, in December, 1893. The proceedings relating to the issue of the bonds are set forth in the bill. The bonds held by the complainants are 190 in number, are numbered from 11 to 200, inclusive, and are for the sum of \$825 each. Five of these bonds, numbered 11 to 15, inclusive, amounting to \$4,125, became due and were payable upon being presented for payment at the office of the city treasurer in Santa Rosa on the first Monday in December, 1896. The bonds were so presented, and payment refused. One hundred and ninety coupons, representing the interest at 4 per cent. per annum on the bonds held by complainants, amounting to \$6,270, became due and were payable at the office of the city treasurer in Santa Rosa on the first Monday of December, 1896. It is alleged in the bill that the coupons were so presented, and payment refused. The total amount due on account of the 5 bonds and the 190 coupons is \$10,395, for which complainants ask judgment. The answer avers that Wells, Fargo & Co., on the 8th day of December, 1896, presented to the city of Santa Rosa the bonds mentioned in the bill of complaint and 182 of the coupons, and demanded payment thereof, and the common council of the city of Santa Rosa, being then in session, ordered the bonds and coupons to be paid, and directed the city clerk to draw his warrant on the city treasurer to pay the same; that the warrant was thereupon drawn in the manner and form prescribed by the city charter, was signed by the mayor and countersigned by the city clerk, and directed to the treasurer of the city to pay to Wells, Fargo & Co. the sum of \$10,131, the amount in full for the bonds and coupons then presented for payment. It is further averred that on the 10th day of December, 1896, Wells, Fargo

& Co. presented said warrant, together with the bonds and coupons, to the city treasurer, and demanded payment thereof, but at the time of the presentation and demand the city treasurer had been and was then enjoined from paying said warrant, or any of the bonds or coupons mentioned in the bill of complaint, by a restraining order issued out of the superior court of the state of California in and for the county of Sonoma. The answer then recites the commencement of an action on December 10, 1896, by one M. L. McDonald, in the superior court of the state of California in and for the county of Sonoma, against the city treasurer of Santa Rosa, praying for a judgment restraining him from paying any of the bonds or coupons described in the complaint in this action, the issuance by the court and service on the city treasurer of a restraining order enjoining and prohibiting him from paying the said bonds and coupons. The answer further recites the proceedings in court arising upon demurrers, amended complaints and motions to dissolve the restraining orders, from which it appears that the defendant has been and is ready and willing at all times to pay the bonds and coupons in question whenever presented for payment; that the city treasurer has also been ready to pay all bonds and coupons presented to him for payment, and would have done so but for the said restraining order. The answer is not sworn to, but it is the answer of a municipal corporation, and is signed by its attorney in his official capacity. I think I must take this answer as true, and find that 182 coupons were presented to the city treasurer for payment, and no more; and, as the bonds and coupons are only payable at the office of the city treasurer in Santa Rosa, it follows that judgment should be for the bonds and such coupons as were so presented. Judgment will therefore be entered for \$10,131.

When the motion was made for a judgment upon the pleadings, counsel appeared for Mr. Mark L. McDonald, of Santa Rosa, and moved the court for leave to file an intervention upon the statement that Mr. McDonald was a taxpayer of the city of Santa Rosa, and desired to resist the payment of the bonds and coupons in question. It was stated that a petition could be filed alleging collusion between officers of the city of Santa Rosa and the complainants, whereby a judgment was to be rendered and entered by this court for the recovery of the money sued for therein, it being well known by both parties in said action that the bonds and coupons sued upon were fraudulently, illegally, and collusively issued and delivered by the officers of the municipality of Santa Rosa to the complainants. The motion to intervene was opposed by the complainants upon the grounds: First, because the motion came too late. Section 387 of the Code of Civil Procedure of this state provides that: "Any person may before the trial intervene in an action or proceeding, who has an interest in the matter in litigation, in the success of either of the parties, or an interest against both." It was contended, on behalf of the complainants in this case, that when this motion was made to intervene the trial had not only commenced, but it had ended by the submission of the case on bill and answer. There was nothing left for the parties to do in presenting the controversy to the court for its determination, and it only remained for the court to enter its judgment. I think this is

the correct view to be taken of this motion. It came too late to be entertained as presenting any issue for the judgment of the court. Any other practice would lead to confusion or uncertainty. If the petitioner had been taken by surprise in the proceeding, or had been misinformed as to the time when a motion for a judgment on the pleadings could be made, a different case would have been presented for the consideration of the court, but he appears to have been fully informed upon the subject, and only delayed because of the time required to prepare a petition.

There are other objections to the motion that seem to me to be equally conclusive. The second objection is that the court has no jurisdiction over the intervention. This is an action over which the circuit court has jurisdiction by reason of the diverse citizenship of the parties. The complainants are citizens of New York, and the respondent is a municipal corporation of this state. The proposed intervention is by a citizen also of this state, and his controversy is with the respondent. His complaint is that the respondent is not properly defending the action. In the case of *United Electric Securities Co. v. Louisiana Electric Light Co.*, 68 Fed. 673, it was determined that the circuit court has no jurisdiction over such a controversy unless the controversy between plaintiff and defendant is one which draws to the court the possession and control of defendant's property, in which the intervener claims some interest. It is contended, however, that this case does draw to the court the possession of property in which McDonald, as a taxpayer, has an interest, namely, the fund out of which the bonds and coupons are to be paid. But I do not understand that the doctrine of the case cited has any such scope. It certainly does not mean that any person may come into a case as an intervener who has an interest in a fund provided by a corporation for the payment of a debt, the possession of which fund is retained by the corporation, but it must mean that the property of the corporation in which the intervener claims an interest must be property that the court has obtained possession and control of for some purpose connected with the case. That is clearly not this case.

The next objection is that the status of McDonald as a taxpayer does not entitle him to intervene in this case. It appears by the complaint that the money to pay these bonds and coupons has been raised by taxation, and is in the treasury for that purpose, but the payment has been enjoined by proceedings in the state court. This is admitted by the answer. A taxpayer may intervene to stop an illegal levy while his property is subject to taxation, because such a levy would cast a cloud upon the title to his property. But I do not understand that this principle can be extended to an intervener where the money has been collected and is in the treasury for the purpose of paying a specific debt. In *Kilbourne v. St. John*, 59 N. Y. 21, the court said:

"To permit every taxpayer in the state who believes that a tax for an unconstitutional purpose had been imposed by the legislature to commence an action in equity against the state treasurer to restrain him from applying the proceeds in his hands to the purpose directed, and compel him to distribute the fund among the taxpayers of the state, and upon the same principle every taxpayer of a city, county, town, or other municipal corporation, to maintain a like action for like purposes, against the official custodian of its funds, upon the

ground that the tax, or some portion, was not authorized by law, would, I think, lead to most alarming results. It would be the direct opposite of one of the acknowledged sources of equity jurisdiction, which is that it exists when necessary to prevent a great number of suits. This would, I think, inevitably cause an immense number."

There is nothing in the statement of this motion that, in my judgment, shows any right of intervention. The motion will therefore be dismissed.

WHITTEMORE v. PATTEN et al.

(Circuit Court, S. D. California. May 10, 1897.)

EQUITY PLEADING—EXCEPTIONS TO ANSWER.

Exceptions will lie to an answer for insufficiency or impertinence, even though answer under oath is expressly waived; the bill being one for relief as well as for discovery.

This was a suit by Charles A. Whittemore against William H. Patten and Norman Stafford, copartners under the name and style of Patten & Stafford. The cause was heard on exceptions to the answer.

Haines & Ward, for complainant.

Trippet & Neale, for defendants.

WELLBORN, District Judge. The question now under submission is, not whether the answer is insufficient or impertinent in the particulars pointed out by the exceptions, but simply whether or not exceptions for insufficiency or impertinence will lie to an answer where the bill, being one for relief as well as discovery, waives an answer under oath. If this question be determined negatively, of course the exceptions, for that reason, will be disallowed. If, however, the determination of the question is in the affirmative, then the parties are to have further hearing as to the merits of the several exceptions. The authorities are not uniform on the question above stated. Defendants' contention, that exceptions will not lie to an answer, for insufficiency or impertinence, where the oath is expressly waived in the complaint, finds support in the following cases: Sheppard v. Akers, 1 Tenn. Ch. 326; Smith v. Insurance Co., 2 Tenn. Ch. 599; Bartlett v. Gale, 4 Paige, 504; McCormick v. Chamberlin, 11 Paige, 543; U. S. v. McLaughlin, 24 Fed. 823. In Smith v. Insurance Co., supra, the court says:

"An answer, where relief is sought, properly consists of two parts: First, of the defense of the defendant to the case made by the bill; and, secondly, of the examination of the defendant on oath as to facts charged in the bill, of which a discovery is sought. * * *

"If this double office of an answer is kept in mind, the propriety of the rule which disallows exceptions to the sufficiency of an answer will be obvious. For, as has been observed by Chancellor Walworth, the answer of a corporation, without oath, where the complainant does not require it to be sworn to, or supported by the sworn answers of the officers of the corporation, cannot be said to answer the double purpose of a pleading to put the material matters of the bill in issue, and of an examination of the defendant for the purpose of obtaining his evidence in support of the complainant's allegations; and it is for this latter purpose alone that the complainant makes a witness of his adversary in

the cause. *Lovett v. Association*, 6 Paige, 59. No doubt, exceptions will lie to the sufficiency of an answer as a pleading, as well as to its sufficiency as a discovery. But, to use the words of the same great chancellor in another case, as the general denial of all the matters of the bill not before answered, with which the answer usually concludes, is sufficient as a pleading to put the several matters of the bill in issue, the principal object of the objections for insufficiency is to examine the defendant on oath for the purpose of the discovery merely. *Stafford v. Brown*, 4 Paige, 90. The general denial with which an answer usually concludes is, 'without this, that any other matter in the bill contained is true.' This traverse was at one time thought to be essential to an issue, until otherwise ruled by Lord Maclesfield in an anonymous case, 2 P. Wms. 86. If exceptions were taken to the sufficiency of an answer not sworn to, as a pleading, the defendant, by adding the general traverse, would cover the defect, and nothing would be gained. *Miller v. Avery*, 2 Barb. Ch. 590. Exceptions of this character would consequently be of no advantage, and are never made. * * *

"I am clearly of opinion, therefore, that exceptions to the answer of a corporation under its corporate seal alone, as a discovery, will not lie, and that exceptions to such an answer as a pleading would be a useless form."

The conclusions of the court announced in the last paragraph of the above quotation are not, in my opinion, well drawn; and I shall adopt the principle of the cases below cited, that an answer may be objected to because of insufficiency even though answer under oath be waived by the complaint. *Uhlmann v. Brewing Co.*, 41 Fed. 369. Equity rule 41 does not provide that, where answer under oath is waived in the bill, the answer shall not be evidence for any purpose; but the provision of the rule is that, under the circumstances therein stated, the answer shall not be evidence in the defendant's favor. Manifestly, the admission of the answer, however, may be used by the complainant in support of his bill. And the federal courts have repeatedly held that a corporation, although not compellable to answer under oath, can be required to answer fully every material allegation of the bill. *Gamewell Fire-Alarm Tel. Co. v. Mayor, etc.*, 31 Fed. 312; *Colgate v. Compagnie du Telegraphe*, 23 Fed. 82. Nor is the other of said conclusions, that an exception to an answer as a pleading would be a useless form, tenable. On the contrary, it has been well said that the complainant "is entitled to an answer to every material allegation in his bill of complaint, if for no other reason, in order that he may know exactly what is admitted, and what he is required to prove." *McClaskey v. Barr*, 40 Fed. 559. See, also, *Field v. Hastings & Bradley Co.*, 65 Fed. 279. In the last-cited case, answer under oath was expressly waived, and yet the court considered the exceptions upon their merits; overruling them, it is true, not, however, because exceptions were inappropriate to a case where answer under oath was waived, but because, in the language of the court, "the answers by admission or denial meet the substantial allegations of fact contained in the bill, and, being sufficient as pleadings, cannot be held to be insufficient on any other grounds." While it is true that, "if the answer neither admits nor denies the allegations of the bill, they must be proved upon the final hearing" (*Young v. Grundy*, 6 Cranch, 51, 7 Cranch, 549), yet where a denial is challenged on the ground that it is evasive, or a negative pregnant, the complainant cannot certainly know what is thereby admitted or denied unless he can invoke a decision of the court on the controverted question in advance of the final hearing. There is no

other procedure for the attainment of this end than by exceptions to the answer.

The other grounds urged by defendants against the consideration of the exceptions, I think, are not well taken. In this connection, however, it should be observed that whether or not the exceptions sufficiently point out the defects intended to be complained of are questions to be determined when the exceptions are severally examined on their respective merits. I hold that exceptions to an answer for insufficiency or impertinence will lie, even though answer under oath be expressly waived by the bill. Further hearing on the exceptions is continued to such time as may be hereafter fixed by order of the court.

J. I. CASE PLOW WORKS et al. v. FINKS.

(Circuit Court of Appeals, Fifth Circuit. May 25, 1897.)

No. 582.

SUITS AGAINST RECEIVERS—LEAVE OF COURT.

The provisions of the act of August 13, 1888, authorizing the bringing of suits, without leave of court, against receivers appointed by federal courts, in respect to any act or transaction in carrying on the business connected with the property in their charge, does not authorize the bringing of a suit, without leave, against such a receiver, to establish a right to the property placed in his custody, adverse to his right thereto.

Appeal from the Circuit Court of the United States for the Northern District of Texas.

George Clark, D. C. Bolinger, and J. B. Scarborough, for appellants.
A. P. McCormick, Jr., for appellee.

Before PARDEE and McCORMICK, Circuit Judges, and NEWMAN, District Judge.

NEWMAN, District Judge. This is an appeal from an interlocutory decree of the United States circuit court for the Northern district of Texas on December 5, 1896, on a bill filed by the Manser & Tebbetts Implement Company and Washburn & Moen Manufacturing Company against W. E. Dupree et al. Frank F. Finks was appointed receiver of all the property described in the bill, as well as the property conveyed by W. E. Dupree to one Birkhead, trustee, by chattel mortgage and deed of trust. The property embraced in this order, which passed thereby into the hands of Finks as receiver, consisted of a large stock of goods, wares, and merchandise, as well as certain real estate in Waco, Tex. Subsequently, on December 12, 1896, the presiding judge denied an application to dissolve the injunction, and to modify the order appointing the receiver. The appointment of Finks was confirmed, and he was directed as receiver to proceed with the administration of the trust. On February 6, 1897, Finks, as receiver, filed in the original case his interlocutory petition or bill against the J. I. Case Plow Works et al., in which he represented that the J. I. Case Plow Works and five other companies or firms had brought suit

against him as receiver in the state court, in which (quoting from the petition) "they seek to recover the title and possession from said receiver of certain personal property set down and described in said petition, which said property is in the hands of your receiver, and turned over and delivered to him in pursuance of an order of this court, and is a part of the goods named, formerly belonging to the said W. E. Dupree; that said suits are being prosecuted without the leave of the circuit court, and that all the property sued for was in his hands as receiver; and he prays for injunction against each of the plaintiffs, and the said court restrained them from further prosecution of said suits." Certain of the plaintiffs in the state court answered, and in their answer admitted the bringing of the suits as alleged by the receiver, and claiming that the title to the property for which said suits were brought was in them, although the possession was in said Finks as receiver. They denied any attempt to interfere with the custody of the property in the hands of the receiver, and averred their purpose to be upon the establishment of their title or ownership to apply to the circuit court for relief as might be proper in the premises. On the hearing the presiding judge entered a decree perpetually enjoining the prosecution of the suits in the state courts. The granting of this decree is the error assigned.

The appellants base their right to maintain these suits in the state court on the provisions of the act of March 3, 1887, as corrected by the act of August 13, 1888, as follows:

"That every receiver or manager of any property, appointed by any court of the United States, may be sued in respect of any act or transaction of his in carrying on the business connected with such property, without the previous leave of the court in which such receiver or manager was appointed, but said suit shall be subject to the general equity jurisdiction of the court in which such receiver or manager was appointed, so far as the same shall be necessary to the ends of justice." 25 Stat. 436.

It was a well-settled rule of equity practice prior to the passage of this act, and is now, independently of the act, that suits against receivers cannot be properly brought without the leave of the court appointing the receiver; so that the right to bring the suits against the receiver in this case must depend entirely upon the language of the section above quoted, and be controlled by its terms. A receiver may be sued, it will be perceived, in respect of any "act or transaction of his in carrying on the business connected with such property." The suits in these cases were brought to establish the title to certain personal property confessedly in the hands of the receiver, and embraced in the property placed in his custody by order of the court appointing him. There is nothing shown to constitute an "act or transaction" of the receiver. He was simply holding possession of, controlling, and managing the property under the order and direction of the court. The only "act or transaction" connected with the property sued for, shown by the record, was his entering into possession of the property under the order of the court. This was not an act of his "in carrying on the business connected with such property" in any sense whatever; it was more an act of the court in laying its hands upon the property, the receiver being only its instrument. No

other "act" of any kind, or "transaction" of any kind, of the receiver in carrying on the business connected with the property, is alleged or hinted at in these proceedings. The purpose of this act of congress was clearly to make receivers appointed by the circuit courts subject to suits for contracts entered into by them, and for wrongs done in connection with any business carried on by them as receivers, under the authority of the court. Suits such as were brought against the receiver in this case do not come either within the purpose or terms of the act of congress. Further discussion of this question or citation of authority is unnecessary. If these suits are to proceed at all, it must be under and by authority of the act of congress referred to; and, applying to them the language of that act, it is evident that they do not come within its terms.

We might well leave the judgment of the circuit court enjoining these suits to stand upon the language of the statute alone, but let us look at the question presented for a moment in another aspect. It has been held that the judgment of other courts against receivers will be held in the circuit courts as conclusive of the matters therein determined. This being true, to hold that the suits brought against the receiver in this case come within the act of congress would be to hold that other courts could determine and settle the title to all the property in the hands of the receivers of the circuit court. And the circuit court then, treating these judgments as conclusive, would be compelled to carry them into effect, thereby allowing another court to determine the rightfulness of the possession of the property in custody. It cannot be assumed that congress had any such purpose, and the language of the act does not justify any such assumption. It may be added that, even if these suits were properly brought, they would still, under the terms of the act, be subject to the "general equity jurisdiction of the court," etc.; but the opinion hereinbefore expressed makes it unnecessary to discuss the effect of this qualification or proviso to the section. It is contended that by the levy of certain attachments and the service of garnishments the legal custody of the property in controversy, indeed of all of Dupree's stock of goods, etc., had passed into the custody of the state court from which such attachments and garnishments issued prior to the appointment of the receiver by the circuit court. The fact seems to be from the record that at the time the receiver was appointed the actual possession of all this property was in J. C. Birkhead, to whom Dupree had, a few days before, made deed of assignment for the benefit of his creditors. The property was in the hands of this assignee at the time the attachments from the state court were levied. There had been no actual interference with the possession of the assignee by the state officers, and the possession of all the property passed from Birkhead to Finks as receiver, under the order of the circuit court. There was nothing in the levy of these attachments to deprive the circuit court of jurisdiction. It is doubtful, moreover, whether the question of jurisdiction can be properly raised by the appellants. There does not appear to have been any application for possession of the property by the state officers, or any objection to the possession by the receiver of the circuit court, by those whose rights the appel-

lants claim were invaded. We think the injunction against the further prosecution of the suits in the state court against Finks as receiver was properly granted, and the judgment of the court below is affirmed.

HUNT v. AMERICAN GROCERY CO.

(Circuit Court, D. New Jersey. June 16, 1897.)

CORPORATIONS—STOCKHOLDERS' MEETING—VOTE TO WIND UP BUSINESS.

The directors of the G. Co., a corporation organized under the laws of New Jersey to conduct a manufacturing and mercantile business, called a meeting of the stockholders to consider the propriety of a sale of the business. Less than one-third of the stock was represented at the meeting, but a resolution was passed by a large majority of the stock represented, instructing the directors to dispose of the business of the company on such terms as they should deem best. *Held*, that as the statutes fully provided for winding up the corporation in case its business were unprofitable, or it was obliged to suspend for want of funds, the directors should be enjoined, at the suit of a stockholder, from disposing of the assets, so as to prevent the corporation from carrying out the objects of its incorporation.

Washington B. Williams, for the motion.
H. Aplington, opposed.

KIRKPATRICK, District Judge. Application was heretofore made to the court in this suit for the appointment of a receiver for the defendant company, upon the ground that the directors had, without the assent of the stockholders, improperly disposed of valuable assets, and changed the nature of the company's business. These allegations were denied by the president of the company, and the assertion was made that no considerable amount of staple goods had been sold for less than cost; that none of the company's valuable trade-marks had been disposed of; and that only such changes had been made in the business as were necessary to bring its volume within the limits of its available capital. Affidavits were submitted on behalf of the defendant company tending to show that it was in an entirely solvent condition. Upon the case so made, the court refused to appoint a receiver, and thereupon a meeting of the stockholders was called by the directors, to consider the propriety of a sale of the business. The meeting was held pursuant to notice, and there were present, either in person or by attorney, stockholders representing 9,923 shares, out of a total of 35,000 shares issued. At this meeting, the following resolution was adopted by an affirmative vote of 9,615 shares, against 304 shares in the negative: "Resolved, that the board of directors be, and they hereby are, authorized and recommended to dispose of the business of this company, upon such terms as they shall deem for the best interest of the company." Against such action, this court, upon an application by a stockholder, granted its injunction, and the motion now is made to vacate the same.

The American Grocery Company was incorporated under the general corporation act of the state of New Jersey, for the purpose,

as stated in its certificate of organization, of "engaging in the manufacture, importation, buying, and selling of merchandise and commodities, and trading therein; the holding, purchase, and conveyance of real property useful or convenient for the purpose of its business, * * * and generally doing all acts and transacting all business necessary and incident to said objects." In pursuance of these objects, and with the assent of the stockholders, the company immediately purchased the wholesale grocery business of the Thurber Whyland Company, and the same has been managed and conducted by a board of directors pursuant to the statute. The purpose for which directors are chosen is to manage and conduct the business which the company is organized to carry on. Their duties are limited to managing and conducting the business, which cannot be said to include the sale of all its property, thereby defeating the very purpose of incorporation.

If the business is unprofitable, and, in the judgment of the directors, it is deemed advisable, and most for the benefit of the corporation, that the same should be dissolved, the statute states how it shall be done, affording ample protection to the rights of all the parties in interest. If the directors are obliged to suspend the ordinary business of the corporation for want of funds, the act points out the duty of the directors. There is neither need nor excuse for an indefinite continuance of a losing business. The affidavit of Mr. Marsalis, the president of the company, filed on this hearing, shows that the directors have decided that it is advisable that the corporation should be dissolved. If two-thirds in interest of the stockholders concur in this view, then the directors will become trustees, and vested with the power of selling out the business in such way as shall seem to them most for the benefit of the parties interested. If more than one-third in interest hold a different view, then the duty of the directors will be to continue to manage and conduct the business, even though it be at a loss, until such time as it must suspend for want of funds to carry on the same. Since the statute makes provision for all the conditions which can arise in this case, I do not think the directors should be permitted to pursue a course outside of the line so marked out. No necessity is shown for such extraordinary action on the part of the directors. The matter has been called to the attention of the stockholders, and far less than a majority in interest have signified their approval of the proposition. Under these circumstances, while the court has no desire to interfere in the management and conduct of the business which has been intrusted to the directors, it must, when its aid is properly invoked, prohibit such an unauthorized disposition of the entire assets of the company as will practically wind up its business, and prevent it from carrying out the objects of its incorporation. The motion to dissolve the injunction will be denied.

DU PONT v. ABEL.

(Circuit Court, D. South Carolina. July 2, 1897.)

SERVICE OF PROCESS—PUBLICATION—PROPERTY WITHIN JURISDICTION—JUDGMENT AGAINST NONRESIDENT.

Defendant, a resident of New York, held a mortgage on land in South Carolina, and was proceeding to sell the mortgaged land under a power in such mortgage. Plaintiff, the mortgagor, brought suit in a state court to enjoin the sale and to recover damages for breach of contract, and served defendant by publication. Defendant removed the case to the federal court, and moved to set aside the service. *Held*, that the state court had jurisdiction of the property right claimed by defendant under the mortgage, and the service, accordingly, could not be set aside, but that no general judgment could be taken against defendant, and, in requiring him to plead, it should be declared that no judgment or decree rendered should affect any interest or property outside the state of South Carolina.

Murphy & Legare and H. E. Young, for plaintiff.
Mordecai & Gadsden, for defendant.

SIMONTON, Circuit Judge. This case began in the state court for Charleston county. The defendant holds a mortgage upon lands of the plaintiff situate in said county, and advertised the lands for sale under a power contained in the mortgage. The complaint prayed an injunction and also set up breach of contract on the part of the defendant, and claims damages therefor. In South Carolina the procedure is governed by the rules of Code pleading. The defendant is a citizen of New York, and nonresident in this state. On his petition the cause was removed into this court, and he now moves to set aside the service of the summons and complaint which had been made under an order of publication. This he can do; his petition for removal not being a general appearance, or submission to the jurisdiction. *Railway Co. v. Brow*, 164 U. S. 271, 17 Sup. Ct. 126. It is denied that the state court had any jurisdiction of the case. The defendant was not within the jurisdiction, but he had property, or at least a claim of property, under his mortgage, within the state of South Carolina. He was proceeding upon this mortgage, and exercising his claim to the property. Indeed, in no other way could plaintiff obtain relief from the act complained of. She could not attach the debt nor garnishee herself. The state court clearly had jurisdiction. But another difficulty arises. As defendant cannot be made a party by personal service within the jurisdiction, and only becomes such by reason of the property within the jurisdiction, no general judgment can be had against him. Such judgment cannot affect any other property than that within the jurisdiction. The rule is clearly stated in *Machine Co. v. Radcliffe*, 137 U. S. 287, 11 Sup. Ct. 92. A personal judgment is without validity if rendered in a state court in an action upon a money demand against a nonresident upon whom no personal service within the state was made, and who did not appear. Such a judgment may be perfectly valid in the jurisdiction in which it was rendered, and enforced even against the property, effects, and credits of the nonresident there situated, but it cannot be enforced or made the foundation of an action in another state. The defendant therefore does not wish

to appear in person, fearing that he would lose the benefit of this principle, and would subject himself to the claim for personal damages. The present purpose of these proceedings is to secure an injunction against the sale of the plantation. Incidentally, they seek damages. If the damages grew out of, and are inseparably connected with, the injunction, and the equities upon which it is sought, this court, sitting in equity, may go on and administer full relief; grant damages, also. *Bird v. Railroad Co.*, 8 Rich. Eq. 55. If, on the other hand, the question of damages is not so intimately connected with the equities of the case, that question must be decided at law. As in this court the jurisdiction and form of procedure in law and in equity are entirely distinct, in such event the pleadings must be recast. At the present stage it cannot be determined what is, or what will be, the full scope of the case. The defendant's motion to dismiss the case must be refused. He is, however, entitled to protection. Let him plead to the complaint on or before the rule day in August next, taking such defense as he may be advised; it being distinctly understood and now declared that defendant is within this jurisdiction only as to the property right in the mortgage set out in the complaint, and that no judgment or decree of this court can in any way affect any other rights, interest, and property of the defendant except such as are within the district of South Carolina.

DE BEAUMONT v. WEBSTER. ¹

(Circuit Court of Appeals, Third Circuit. May 10, 1897.)

No. 15, March Term, 1897.

1. COMPETENCY OF WITNESS—TRANSACTIONS WITH DECEDENT—INTERESTED PARTY.

In the federal courts the competency of parties or interested persons as witnesses is controlled by Rev. St. § 858, and their testimony is not to be excluded thereunder in suits by or against administrators, etc., except as to any transactions with or statements by the deceased. 71 Fed. 226, affirmed.

2. CANCELLATION OF CONTRACTS—EVIDENCE.

Complainants, owning certain patents, by a written agreement gave defendants, who were to furnish the capital and have an interest in the business, the "exclusive rights to the sales and management of all the business connected with the said patents," etc. Defendants, after carrying on the business for some time, presented to complainants' attorney a statement thereof, showing large losses. Shortly afterwards they received from him a letter saying that by his advice complainants had given to a certain third person "a power of attorney to act as their exclusive agent in all things pertaining to their rights and interests in" such patents. One of the defendants afterwards in a personal interview stated to the attorney that he considered this a cancellation of the agreement, and was assured that that was what it meant. *Held*, that this, together with the subsequent conduct of complainants themselves, showed a cancellation of the contract by their own act.

Appeal from the Circuit Court of the United States for the District of New Jersey.

¹ Rehearing denied June 28, 1897.

This was a suit in equity by Alexandre De Beaumont and Della De Beaumont, his wife, against Warren Webster, a citizen of the state of New Jersey, for an accounting under a written contract dated March 21, 1887, between the said Alexandre De Beaumont on the one side and Warren Webster and Elwood S. Webster on the other. Elwood S. Webster died before the suit was brought. Alexandre De Beaumont had on July 7, 1887, assigned to his wife and co-complainant all his interest in the contract in question, to the use of himself and family. Alexandre De Beaumont died during the progress of the suit, and a suggestion of his death, and the appointment of his wife as administratrix of his estate, was duly made upon the record. The circuit court, after a hearing on the merits, dismissed the bill (71 Fed. 226), and the complainant has appealed.

Alexandre De Beaumont was the patentee of letters patent No. 187,825, dated February 27, 1877, for heaters and feeders for steam boilers, and of letters patent No. 199,038, dated January 8, 1878, for an improvement thereon. On January 31, 1887, he entered into a contract with Warren Webster and Elwood S. Webster whereby, in consideration of the sum of \$15 per week as wages, and the further sum of \$1 in hand paid by them, he agreed to allow them one-half the net profits arising from and growing out of the sales and adjustments made under these patents. The agreement provided that the Websters were to have the exclusive right to the sales and management of all the business connected with the sales and adjustment of said patent, and were to contribute all necessary capital. Business was begun under this agreement, but it shortly appeared that certain third parties, Palmer and Garratt, claimed title to the patent under an assignment from De Beaumont. Thereupon the contract of January 31, 1887, was canceled; and at the request of De Beaumont the defendant Warren Webster purchased with his own funds the outstanding interest in patent No. 187,825, and took an assignment thereof in his own name. A new contract was then made, dated March 21, 1887, between De Beaumont and the Websters, by which it was provided that the Websters "shall have the exclusive rights to the sales and management of all the business connected with the said patents, including sales to the right to the same in such localities as may by them, the said Warren and Elwood S. Webster, be deemed advisable; they to contribute so much capital as may be necessary for the prosecution of the business." The consideration of this contract was recited to be the before-mentioned purchase of the outstanding interests in the patent, and the sum of \$15 to be paid weekly by the Websters to De Beaumont for wages. De Beaumont agreed to allow each of the Websters one-third of the net profits of the business, which profits were declared to consist of the amount of money received, less all expenses incident to the prosecution of the business, including all the items for wages, labor, work, and duties performed in and about the business.

Under this new contract business was carried on for some time. De Beaumont claimed to cover by his patent, No. 187,825, the vacuum system of steam heating known as the "Willames System," and for which patent No. 256,080 was issued to Napoleon W. Willames; and suit was brought by Webster against Willames on March 15, 1887, for infringing the De Beaumont patents. Subsequently Mr. Webster was notified that he was infringing upon the Willames patent, and on January 3, 1888, Willames brought suit for infringement against De Beaumont and Webster jointly. Under these circumstances the business did not prosper, and prior to January 6, 1888, the Webster brothers submitted a statement of the business done under the contract, showing a loss of several thousand dollars, to Thomas B. Harned, De Beaumont's attorney. On that date Harned acknowledged the receipt of the same in the following terms: "I received the statement and am very much surprised at it. I will call and examine the books some time next week. The result is very unsatisfactory." Thereafter the Websters received the following letter from Mr. Harned:

"April 19, 1888.

"Messrs. Webster Bros.—Gents: By my advice Mr. De Beaumont and wife have given George A. Barnard, of New York, a power of attorney to act as their exclusive agent in all things pertaining to their rights and interests in

patents 187,825 and 199,038, and in the future he (Barnard) will give such interest his personal attention.

"Very resp'y, T. B. Harned, Atty. of Mr. & Mrs. De Beaumont."

To this letter the following reply was sent:

"Philadelphia, Pa., April 19th, 1888.

"Mr. T. B. Harned, Camden, N. J.—Dear Sir: Your letter of April 19th, '88, in the De Beaumont matter received. Is it written by the direction of Mr. Alexandre De Beaumont? Until disputing any right of Mr. De Beaumont to take this action we would like to have such notices signed by him, and then there will be no question of authority.

"Very respectfully,

Warren Webster."

Thereafter Mr. Webster received the following letter from Mr. Harned:

"Camden, N. J., April 21st, 1888.

"Dear Sir: Your letter of 19th is at hand. My letter of 19th was written by the direction of Alexandre De Beaumont. I am surprised that you should ask the question, inasmuch as you know I am his counsel.

"Mr. De Beaumont and wife have signed the power of attorney to Barnard, and my letter was written simply to inform you of that fact.

"Respectfully,

T. B. Harned.

"Mr. Warren Webster."

After receiving this letter, Mr. Webster called upon Mr. Harned, and with reference to the interview then had, he testifies as follows: "Mr. Harned stated that the business had been entirely unsatisfactory, and that the transfer to Mr. Barnard was for the best interest of Mr. and Mrs. De Beaumont. He also stated that he wanted the statement of the business just as soon as it could be gotten out." Referring to the same interview, Mr. Webster further testifies: "He stated that the interests of Mr. & Mrs. De Beaumont were in the hands of Mr. Barnard, of New York, which I told him I considered a cancellation of the agreement, and wanted to know if that was what he meant, which he said it was, and which I accepted." Mr. Webster further testified that after April 19, 1888, De Beaumont did no further work for Webster Bros., and that they paid him no money thereafter as wages, and did no further business under the contract. It appears, however, that between that time and September 28, 1891, the Websters did install five steam-heating plants, and that on the latter date they accepted a license under the Willames patent, and have since been engaged in introducing the Willames system, and in granting licenses for the use thereof. The present suit was commenced in October, 1893, and it seeks an accounting in respect to the business in steam heaters, etc., carried on by the Websters, and by Warren Webster after the death of Elwood S. Webster, up to the filing of the bill. In the summer of 1893 the De Beaumonts also brought a suit against Napoleon W. Willames for infringement of the same two patents involved in the present controversy. The latter suit was dismissed after a hearing on the merits, the court holding that the De Beaumont patent, No. 187,825, did not cover the Willames system of vacuum steam heating, and in fact had no relation to any system of vacuum steam heating. See 80 Fed. 995. In the suit at bar the bill was dismissed, the court holding that up to the time the statement heretofore mentioned was rendered to Mr. Harned as the attorney for the De Beaumonts the business had resulted in large losses, and that the contract between De Beaumont and the Websters was canceled by the letters which passed between Mr. Harned and the Websters in April, 1888. Before the argument of the cause was entered upon, complainant's counsel presented a motion in writing to strike out the testimony of Warren Webster on the ground that his examination as a witness in his own behalf occurred after the death of Alexandre De Beaumont, and the substitution of his administratrix as a party plaintiff. The court held that only such testimony should be excluded as related to transactions with or statements by De Beaumont, and that other testimony given by Webster should be retained. The assignments of error were in full as follows: "(1) The learned judge erred in not striking out all of the testimony of Warren Webster. (2) The learned judge

erred in considering any of the testimony of Warren Webster. (3) The learned judge erred in finding that the letter of Mr. Harned, dated April 19, 1888, was meant to cancel the agreement between the parties upon which suit was brought. (4) The learned judge erred in finding that Mr. Harned had authority to cancel the agreement. (5) The learned judge erred in finding that Mr. and Mrs. De Beaumont knew and acquiesced in what Mr. Harned had done, and fully understood that the contract had come to an end. (6) The learned judge erred in finding that the contract was canceled. (7) The learned judge erred in finding that the business prior to April, 1888, resulted in loss. (8) The learned judge erred in not finding that the contract was in force after April, 1888, and up to the time of the filing of the bill, and that the plaintiffs are entitled to an account. (9) The learned judge erred in dismissing the plaintiffs' bill of complaint. (10) The learned judge erred in not finding that the defendant had continued to use the invention of the plaintiff A. De Beaumont, and that the plaintiffs are entitled to an account as prayed for in the bill."

David C. Harrington and Carrie B. Kilgore, for appellant.

Earnest Howard Hunter and E. Cooper Shapley, for appellee.

Before ACHESON, Circuit Judge, and BUTLER and BUFFINGTON, District Judges.

ACHESON, Circuit Judge. The first assignment of error, namely, that the learned judge below "erred in not striking out all the testimony of Warren Webster," the defendant, and the second assignment, that he "erred in considering any of the testimony of Warren Webster," must be overruled. Undoubtedly the defendant was a competent witness except as to "any transaction with or statement by" the intestate, Alexandre De Beaumont (*Goodwin v. Fox*, 129 U. S. 601, 9 Sup. Ct. 367); and the court excluded from consideration all the testimony of this witness relating to such transactions or statements.

The third, fourth, fifth, sixth, and eighth assignments of error relate to the matter of the alleged cancellation of the written agreement between Warren Webster and Elwood S. Webster of the one part and Alexandre De Beaumont of the other part, dated March 21, 1887, and to the conclusions which the court reached, or should have reached, with respect thereto. Upon a careful examination of this record we are satisfied that there was competent and sufficient evidence to justify a finding that the agreement mentioned was canceled in the month of April, 1888. Thomas B. Harned, Esq., was then the legal adviser of, and acting as attorney for, Mr. and Mrs. De Beaumont with respect to that agreement, and to matters connected with it. By their express authority (as clearly appears), and in their behalf, Mr. Harned addressed to Webster Bros. the letter of April 19, 1888, in which he informed them that by his advice "Mr. De Beaumont and wife have given George A. Barnard, of New York, a power of attorney to act as their exclusive agent in all things pertaining to their rights and interests in patents 187,825 and 199,038, and in the future he (Barnard) will give such interest his personal attention." From this letter the defendant supposed—not unnaturally, we think—that Mr. and Mrs. De Beaumont, by constituting Mr. Barnard their "exclusive agent" in all matters relating to the named patents, intended to cancel their arrangement with Webster Bros. However, shortly after the

receipt of this letter, the defendant had a personal interview with Mr. Harned, and was then informed by that gentleman that the authorization to Barnard meant a cancellation of the agreement with the Websters. The defendant did not then, nor until long afterwards, see the power of attorney, but, had he known its contents, he might well have been confirmed in his understanding that Mr. and Mrs. De Beaumont thereby intended to terminate the agreement of March 21, 1887. That agreement invested the Websters with "the exclusive rights to the sales and management of all the business connected with the said patents, including sales to the right to the same in such localities as may by them, the said Warren and Elwood S. Webster, be deemed advisable." Now, the power of attorney authorized Barnard to act "in the sale or licensing of the patents of said Alexandre De Beaumont, Nos. 187,825 and 199,038." How this authority could be exercised by Barnard consistently with the continued enjoyment by Webster Bros. of the exclusive rights conferred upon them by the agreement of March 21, 1887, it is very hard to see. The clause in the power of attorney relating to that agreement may well be read as referring to past transactions under it. The case, however, by no means depends upon Mr. Harned's letter and verbal statement and the power of attorney alone. The after-conduct of all the parties in interest tends to sustain the defendant's allegation that the agreement of March 21, 1887, was canceled by Mr. and Mrs. De Beaumont with the assent of Webster Bros. Upon the clearly competent evidence, it is, we think, a fair deduction that no business was done on either side under the agreement after April, 1888. Again, the absence of any demand upon the defendant until July, 1893, is very significant. Such forbearance is inconsistent with a continuing contract with Webster Bros.

The conduct of Mrs. De Beaumont with respect to a certain circular deserves special mention. By a paper dated July 7, 1887, Mr. De Beaumont had assigned to his wife the agreement of March 21, 1887. Now, it appears that in the month of October, 1890, Mrs. De Beaumont came to the defendant's office, and left on his desk a copy of a circular purporting to be issued in her behalf and name by her husband. This circular relates to the above-named patents, and contains this notice: "No company or individual has any right to work these patents or negotiate for the same. I particularly notify all parties that Webster Bros. have no right to work these patents, or interest in the same." Now, if the agreement of March 21, 1887, was then in force, as the appellant now insists, there was no justification for that statement. This circular affords persuasive evidence that the agreement had ended. It is idle to suggest that Mrs. De Beaumont can neither write nor read. She must be presumed to have known the contents of a circular which purports to emanate from herself, and a copy of which she left at the defendant's office. Moreover, Mrs. De Beaumont was a competent witness to explain her own conduct, if it admitted of explanation; but she avoided the witness stand. Without further discussion of the evidence, we overrule all the assignments of error under this branch of the case.

The seventh assignment asserts that "the learned judge erred in

finding that the business prior to April, 1888, resulted in loss." We think, however, that the evidence fully justifies such a finding. The books show a loss of \$7,618.17. Moreover, early in the year 1888 a statement showing a loss in the business was furnished to Mr. Harned, who undoubtedly represented Mr. and Mrs. De Beaumont in all this matter. That statement was retained, and no attempt has been made to impeach its correctness.

The tenth assignment alleges error in that the learned judge did not find "that the defendant had continued to use the invention of the plaintiff A. De Beaumont, and that the plaintiffs are entitled to an account as prayed for in the bill." This assignment is based upon a mistaken idea as to the scope of the De Beaumont patent, No. 187,825. We have considered and construed that patent in an opinion just delivered in the case of De Beaumont v. Williames, 80 Fed. 995. The parties to the agreement of March 21, 1887, entered into it, and operated under it while it remained in force, upon an entire misconception as to the scope of the De Beaumont patent. That patent has no relation to a system of vacuum steam heating as the parties to the agreement supposed. Some of the apparatus which Webster Bros. set up while they were yet working under the agreement of March 21, 1887, infringed patent No. 256,089, granted on April 4, 1882, to Napoleon W. Williames, for a heating apparatus, and the five plants which the defendant installed after April, 1888, likewise infringed that patent. For all these infringements the defendant has settled with Mr. Williames. The defendant had a perfect right to take a license from Williames at the time he did. The De Beaumont and the Williames inventions are distinct, and the Williames steam-heating apparatus does not infringe the De Beaumont patents. We have only to add here that we fail to discover any ground for holding the defendant accountable under this bill for feed-water heaters and purifiers manufactured by him under his own patents.

In answer to the remaining—the ninth—assignment, namely, that the court erred in dismissing the bill of complaint, little need be added to what has been already said. The complainants' right to an account accrued in the spring of 1888. An account was furnished to the representative of Mr. and Mrs. De Beaumont. That account showed a great loss in the business, as do the books of the concern. The account was retained, and has not been impeached. It is quite certain that nothing is due to the De Beaumonts on the business transacted under the agreement. This bill was not brought until October, 1893. Its real purpose was an accounting for an alleged liability arising from transactions after April, 1888. But, as we have seen, there is no ground for such accounting. The supposed liability never existed. The appellant is not entitled to any equitable relief, and the bill was rightly dismissed. The decree of the circuit court is affirmed.

GRAND TRUNK RY. v. CENTRAL VERMONT R. R.

(Circuit Court, D. Vermont. July 1, 1897.)

RAILROAD RECEIVERS—BANK LOAN—PLEDGE OF DEPOSITS.

The R. Railroad was leased to the C. R. R. Co.; the lease providing that the receipts from stations on the road should be deposited in a certain bank, and held as security for the rent accruing monthly; the C. R. R. Co. having the right to check out any sums in excess of the monthly rent. Subsequently the C. R. R. Co. obtained a loan of \$20,000 from the bank, agreeing that the bank might hold any balance in its hands, above the rent, as collateral for such loan. Before the maturity of the loan, receivers of the C. R. R. Co. were appointed, there being at the time on deposit with the bank a sum, derived from station receipts, slightly less than the rent then due to the R. Co. The receivers subsequently deposited certain sums, received from stations of the R. Railroad and other sources, and the bank claimed to hold such sums to be applied on the loan. A sum sufficient to pay the rent was withdrawn by consent, without prejudice, and applied to the rent. *Held*, that the money on deposit at the time of the receivership was impressed with a trust for the payment of the rent to the R. Co., and was properly so applied by the receivers, but that, as the receivers took possession, not as the successors or assignees of the C. Co., but for the court, in the interest of all parties, the moneys coming to their hands could not be held by the bank under its agreement with the C. Co., though deposited by the receivers in the bank.

Benja. F. Fifield, for receivers.

Chas. A. Prouty, for Clement Nat. Bank.

WHEELER, District Judge. The Rutland Railroad connects with the Central Vermont at Burlington, and with the Fitchburg at Bellows Falls. It was leased to the Central, one clause of the lease being:

"Sec. 9. For the purpose of securing the payment of the rent and interest hereinbefore provided for, the party of the second part agrees to execute an irrevocable order, in favor of the party of the first part, upon the Fitchburg Railroad Company, and procure the acceptance of the same by that company, providing for the payment to the party of the first part by it of the sum of twenty thousand dollars monthly out of the traffic balances due from it to the said party of the second part, which shall be held by the party of the first part as a continuing security, and the said Fitchburg Railroad Company is hereby authorized and directed to pay to the said party of the first part the aforesaid sum of twenty thousand dollars monthly. The second party also agrees that the gross receipts from all the stations upon the line of the railroad hereby leased shall be paid directly into the Clement National Bank of Rutland, which is hereby authorized to hold the same as security to an amount equal to any sums due and unpaid under the provisions of this lease, whether of rent or of interest, and all sums to become due during the current month, deducting therefrom the amount of the aforesaid order, so long as the same is paid from month to month. If all sums due under this lease have been fully paid at the end of each month, any sums theretofore received and held as security by said bank shall be thereby released." "And if, at any time, the said Fitchburg Railroad Company neglects to pay the aforesaid order according to its terms, the party of the first part shall furnish some other suitable security in lieu thereof."

With reference to these clauses, the parties named in it, including the bank, further agreed in writing:

"Now, therefore, for the better understanding of the parties, it is agreed that the party of the second part shall be entitled to check out from said deposits all sums in excess of the difference between the amount of the Fitchburg R. R.

order referred to in said lease, so long as the same is regularly paid, and the balance due for the current month on the rent and interest from the party of the second part to the party of the first part; it being understood that, in case there is a balance due the party of the first part for any preceding month, the said bank shall be entitled to hold enough to cover said balance, and in case the Fitchburg order is not regularly paid, nor any equivalent security given, shall hold enough to cover the entire amount to fall due for the current month. Except as aforesaid, the party of the second part shall be entitled to check out all sums aforesaid. When the amount due for any month is paid, the Rutland Company shall notify the said bank, and thereupon any sums theretofore held as security shall be released."

The master reports that:

"While the bank was receiving the earnings of the Rutland Railroad as aforesaid, Wallace C. Clement, president, acting for the Clement National Bank, arranged with E. C. Smith, president of the Central Vermont Railroad Company, and acting for said railroad company, to loan the Central Vermont Railroad Company some \$20,000; and, as an inducement to secure this loan, President Smith agreed that the Clement Bank might hold any balance in its hands of said deposits as collateral security, and the bank agreed to, and did subsequently, make the loan in reliance upon this agreement."

Receivers of the Central Vermont Railroad and of the Rutland, as a leased line, were appointed in this cause on March 20, 1896, and took immediate possession. At this time the bank held two notes of the Central Vermont Railroad Company, of \$10,000, due one April 27, and the other May 27, 1896, made pursuant to this agreement. The rent then due amounted to \$20,029.12. The bank was notified of the receivership on March 23d. The credit to the Central Vermont Railroad Company then stood at \$20,013.73. The treasurer of the Central Vermont became the treasurer of the receivers, and continued to send receipts from the stations of the Rutland Railroad to the bank till April 7th; but the bank refused his checks, and he then stopped. The Fitchburg sent "about \$14,000" (\$14,017.52), as a final traffic balance, to the treasurer of the receivers, who deposited it in the bank. These deposits all amounted to \$44,890.85. The bank claimed \$20,000 on account of the notes, and has by order of court, without prejudice either way, paid over to the receivers \$24,958.65, and out of it the receivers have paid the rent accrued before the receivership, which amounted at the time of payment to \$20,429.82. The question now is whether anything, and, if so, how much, more the bank should pay over to the receivers. The possession of the property was taken by the receivers, not as assignees of any party, nor as successors of any by operation of law, but for the court, to be disposed of according to existing liens and rights of parties. *Railroad Co. v. Humphreys*, 145 U. S. 82, 12 Sup. Ct. 787; *Railroad Co. v. Humphreys*, 145 U. S. 105, 12 Sup. Ct. 795; *Park v. Railroad Co.*, 57 Fed. 799. Although the Fitchburg Railroad Company was not a party to the lease or to the agreement, and might pay traffic balances to the Central Vermont as they should become due, and the receipts from stations would belong to the Central Vermont, as between the roads, without deposit, when the rents should be paid, still, when the proceeds from these sources had come into the bank under the lease and agreement, the deposit would become a pledge for the rent, and all interested had a vested right that it should be

so treated. The \$20,013.73 on deposit when the receivers took possession had come from these sources, and was impressed with this trust, and the right to it in this condition the receivers took. As there was not any more than, nor quite, enough to pay the rent accrued, the bank had no right to it, nor to any part of it, under the agreement for securing the loan to the Central Vermont; for that agreement, by its terms, only covered the excess above the rent. After the receivers took possession, the proceeds from these sources belonged to them, and they could deposit them wherever directed by the court, or they should see fit without direction; and the deposit would belong to the general funds of the receivership, subject only to particular liens, if any, and not to the Central Vermont, or to any other party, as such. The bank had no such lien, or claim of any, but by virtue of the agreement with the Central Vermont as to any excess there might be above the rent; and, as there was no excess, it had no lien whatever upon that sum. It could have none upon anything but then future deposits made by the receivers, or the legal consequences of such. The Central Vermont Company could not, on common principles, pledge these then future earnings by mere agreement, without possession. The covenants for rent, even, and all mere executory agreements of the insolvent corporation, were but obligations to be reckoned in distribution of assets only. *Seney v. Railway Co.*, 150 U. S. 310, 14 Sup. Ct. 94. The agreement as to excess could only operate upon what the Vermont Central could deposit, and become effective only upon what that company should deposit, which was only the \$20,013.73 on deposit, not amounting to any excess above rent when the receivership excluded that company. The bank attempts to hold the amount of this deposit against the receivers because the Central Vermont made it, or caused it to be made, and the Central Vermont owed the notes, on the principle that the ultimate balance of a debt due from an insolvent is the proper subject of a dividend from the estate. *Scott v. Armstrong*, 146 U. S. 499, 13 Sup. Ct. 148. But here the bank did not owe the Central Vermont anything to which that company was entitled at the time of the commencement of the receivership, or to which it could ever become entitled but by payment of the rent, which it has never paid. The rent has been paid by the receivers, and, if they had been mere successors or assigns of the Central Vermont, their payment might relieve this deposit for the benefit of the bank; but they represent other rights, also, and have made payment from funds in their hands as receivers in which others have interests. As the receivers took the \$24,958.65 of the whole deposit, and out of this sum paid the rent under order of court, expressly without prejudice, this receipt and payment may as rightfully now be taken to have been made from one part of the deposit as from another, and to have included the \$20,013.73 expressly held for payment of rent, and an application of it upon the rent where it belonged, as well as to have included any of the deposits made by the receivers themselves. And if the receipt and payment should be considered as of and from the deposits made by the receivers, as they paid the rent for which the prior deposits were pledged, they

would be entitled to the pledge. The claim of the bank to hold any of these deposits for the payment of its own debt cannot be maintained without holding that the agreement of the Central Vermont that the bank might hold the excess of deposits over the rent for its security so operated as an assignment or pledge of the future receipts from stations and the Fitchburg balances to the bank as to give the bank a right to them after the right of the Central Vermont had been superseded, and before they had been deposited or earned. But this agreement could not operate upon these sources of income any further than the Central Vermont could so carry it out as to create an excess for the security of the bank's debt, which that company did not and could not do to any extent at all. The receivers created and deposited for themselves, in other rights, what the bank claims to hold as such excess; and, without regard to any form the deposits have been given, they have a right to the results of those they have made. Report of master accepted and confirmed, and balance of deposit thereupon decreed to receivers.

UNITED STATES v. TENNESSEE & C. R. CO. et al.

(Circuit Court of Appeals, Fifth Circuit. April 20, 1897.)

No. 538.

PUBLIC LANDS—RAILROAD GRANTS—FORFEITURE.

Lands sold by a land-grant railroad company prior to the forfeiture act of September 29, 1890, and which lie opposite to and coterminous with a part of the road which was completed and in operation before that act, are not subject to forfeiture thereunder.

Appeal from the Circuit Court of the United States for the Northern District of Alabama.

This was a bill in equity, filed by the United States against the Tennessee & Coosa Railroad Company, Hugh Carlisle, and others, under the act of congress of September 29, 1890, to forfeit certain land granted to the state of Alabama to aid in the construction of a railroad. The circuit court, after a hearing on the merits, entered a final decree, the material part of which was as follows:

First. The court finds that prior to the 29th day of September, 1890, the Tennessee & Coosa Railroad Company had sold to bona fide purchasers all the lands embraced in the first 120 sections, which, by the terms of the granting act, it was authorized to sell in advance of the construction of the road; that these sales were bona fide and made to aid in the construction of the road; that the allegations of the bill that the sale to Carlisle was without consideration and colorable are not sustained by the evidence, but the sale to Carlisle was bona fide, and based on good consideration, and the proceeds of the sale used in the construction and equipment of the road. Second. The court finds that the Tennessee & Coosa Railroad from Gadsden to Littleton, a distance of 10 and $\frac{22}{100}$ miles, was completed and in operation on and before the 29th day of September, 1890, and that the lands described in Exhibit D to original bill, to wit, the lands embraced in and conveyed by the deed from the Tennessee & Coosa Railroad Company to Hugh Carlisle, bearing date the 4th day of April, 1887, are lands which lie opposite to that part of the road which was completed and in operation on the 29th day of September, 1890, and therefore not within the lands forfeited by the act of

September 29, 1890. The court is therefore of the opinion that there has been no forfeiture of the lands as to which a judicial declaration of forfeiture is sought by the bill, and it is accordingly ordered and decreed that the relief sought by the bill be denied, and the bill dismissed.

From this decree, the United States have appealed.

Emmet Oneal and Frank White, for appellant.

Oscar R. Hundley and Amos E. Goodhue, for appellee.

Before PARDEE and McCORMICK, Circuit Judges, and NEWMAN, District Judge.

PER CURIAM. Considering that the Tennessee & Coosa Railroad Company had the right to sell, and did sell, the 120 sections of the land grant before the act of forfeiture, and that the forfeiture act of 1890 did not forfeit any portion of the land grant lying opposite to and coterminous with that portion of the railroad then completed and in operation, we find no error in the decree appealed from, and it is therefore affirmed.

VAN PATTEN v. CHICAGO, M. & ST. P. RY. CO.

(Circuit Court, N. D. Iowa, W. D. June 29, 1897.)

1. ACTION FOR DAMAGES UNDER INTERSTATE COMMERCE ACT — NECESSARY SHOWING.

When relief by way of damages is sought under the provisions of the interstate commerce act, upon the averment that a shipper has been charged an unreasonable rate for goods transported by a railway company, the plaintiff, in order to be entitled to recover, must show that the rate charged is unreasonable according to the provisions of that act.

2. SAME—STANDARD OF REASONABLE RATES.

The interstate commerce act provides for and prescribes a standard by comparison with which it may be determined whether a given rate is or is not to be deemed unreasonable within the meaning of the act; and that standard is the rate adopted, printed, and kept posted, as required by the statute, by those engaged in the business, and subject to the effects of free competition. Courts and juries cannot resort to any other standard.

3. SAME—ACTIONS FOR DAMAGES—DEFENSES.

It is a good defense to an action for damages for alleged extortionate, unjust, discriminating, and unreasonable freight charges to show that the defendant, in obedience to the interstate commerce act, has adopted, printed, and posted a properly proportioned schedule of rates, and that the charges complained of are in accordance with those in the schedule.

Submitted on Demurrer to Answer.

Harl & McCabe and Spencer Smith, for plaintiff.

George R. Peck and Burton Hanson, for defendant.

SHIRAS, District Judge. In the first count of the petition filed in this case the plaintiff avers, in substance, that in the year 1893 he shipped over the line of railway owned and operated by the defendant railway company, between the town of Manning, Iowa, and the city of Chicago, Ill., certain car loads of grain for which the railway charged a rate per 100 pounds, it being then averred:

"That said rate so charged was an unjust, unreasonable, and extortionate charge for such service, and subjected this plaintiff and the town of Manning

to an undue, unjust, and unreasonable prejudice, disadvantage, and extortion and discrimination, all contrary to the provisions of the act of congress approved February 4, 1887, entitled 'An act to regulate commerce,' and the amendments thereto. That all of said rate in excess of 17 cents on corn and 20 cents on wheat, per 100 pounds, was unjust, unreasonable, extortionate, and discriminating, and subjected plaintiff and said Manning to unjust and unreasonable prejudice and disadvantage; the amount of said unlawful overcharge on each of said shipments being in the sum and amount set out in Exhibit No. 1, headed 'Overcharge,' and in the total amount on the shipments herein referred to and in Exhibit No. 1 set out in the sum of \$77.72. That by reason thereof the plaintiff has been damaged in the sum of \$77.72."

The petition contains in all some 23 counts, based upon shipments of grain from various places in Iowa and South Dakota in the years 1891, 1892, 1893, 1894, 1895, and 1896, and the total damages claimed are in excess of the sum of \$54,000.

To these several counts the defendant answers, among other things, that ever since the taking effect of the act of congress approved February 4, 1887, and commonly known as the "Interstate Commerce Act," it had, in accordance with the requirements of that act, adopted schedules of rates, showing the charges established for the transportation of freight over its lines of railway, and had kept these schedules, duly printed, posted up in its depots and offices, as required by the statute; and that the charges by it made for the transportation of the grain, described in the several counts of the petition, were in accordance with the schedule rates thus established, adopted, and made public as required by the interstate commerce act, and that the shippers made their several shipments and paid the scheduled rates therefor without demur or protest. To the several paragraphs of the answer setting up these general facts in different forms, a demurrer is interposed, based upon the proposition that if the rate charged for the shipment of the grain was unreasonable, then it is no defense to show that the rate charged and paid was the schedule rate. The theory of the plaintiff is that section 1 of the interstate commerce act declares that all charges made for the transportation of property shall be reasonable and just, and every unjust and unreasonable charge for transportation services is prohibited; that section 8 of the act declares that any common carrier who does anything prohibited by the act is liable for the damages caused thereby to the person injured; and that section 9 provides for an action at law in the courts of the United States for the recovery of the damages for which the carrier may be liable under the provisions of the act; and that in all cases it is a matter of fact, to be determined by the jury, whether the particular charge complained of was or was not reasonable. It will be noticed that the declaration of section 9 is that a person claiming to be damaged may bring suit in a court of the United States "for the recovery of the damages for which such common carrier may be liable under the provisions of this act." To sustain a recovery under this section, it must appear that the damages arise from a violation of the provisions of the act, and therefore, when the right to recover damages is based upon the averment that a given rate exacted of a shipper is unreasonable, we must have regard to the provisions of the act in determining whether the rate

complained of is reasonable or unreasonable. It will not be questioned, I presume, that the damages recoverable under the provisions of section 9 are those, and those only, which arise from a violation of some of the requirements of the interstate commerce act. Therefore, when relief by way of damages is sought under the provisions of the interstate commerce act upon the averment that a shipper has been charged an unreasonable rate for goods transported by a railway company, the plaintiff, to become entitled to recovery, must show that the rate charged is unreasonable according to the provisions of that act. Thus, if the interstate commerce act, construed in its entirety, has recognized, provided for, or prescribed a standard for determining whether rates charged by common carriers, subject to the provisions of the act, are reasonable or not, then it cannot be predicated of a rate charged that it is unreasonable, if it appears that it conforms to the recognized or established standard.

Thus we are brought to a consideration of the question whether the interstate commerce act provides for or prescribes the standard by comparison with which it may be determined whether a given rate is or is not to be deemed unreasonable within the meaning of the act. The intent of congress is to be gathered from a consideration of the entire act, and not solely from detached portions thereof, and the familiar rule of construction is to be followed, to wit, that, in determining the meaning of the words employed, the general purpose of the act and the evils sought to be remedied must be always kept in mind, and, furthermore, parts of the act are not to be so construed as to defeat other important features of the same; nor is such a construction to be given to the act, in whole or in part, as may tend to prevent the proper enforcement of the legislative purpose. Thus, in *Pennington v. Coxe*, 2 Cranch, 33, Mr. Chief Justice Marshall, speaking for the supreme court, said:

"That a law is the best expositor of itself; that every part of an act is to be taken into view, for the purpose of discovering the mind of the legislature, and that the details of one part may contain regulations restricting the extent of general expressions used in another part of the same act,—are among those plain rules laid down by common sense for the exposition of statutes which have been uniformly acknowledged."

In *Kohlsaat v. Murphy*, 96 U. S. 153, it is said:

"In the exposition of statutes, the established rule is that the intention of the lawmaker is to be deduced from a view of the whole statute, and every material part of the same. * * * Resort may be had to every part of a statute, or, where there is more than one in pari materia, to the whole system, for the purpose of collecting the legislative intent."

In *Platt v. Railroad Co.*, 99 U. S. 48, it is declared:

"We are seeking for the intention of congress, and to discover that we may look at the paramount object which congress had in view, as well as the means by which it proposed to accomplish that object."

In *Lau Ow Bew v. U. S.*, 144 U. S. 47, 12 Sup. Ct. 517, it is said:

"Nothing is better settled than statutes should receive a sensible construction, such as will effectuate the legislative intention, and, if possible, so as to avoid an unjust or absurd conclusion."

In *Holy Trinity Church v. U. S.*, 148 U. S. 457, 12 Sup. Ct. 511, we find it declared:

"Again, another guide to the meaning of a statute is found in the evil which it is designed to remedy; and for this the court properly looks at contemporaneous events,—the situation as it existed, and as it was pressed upon the attention of the legislature."

"All acts of the legislature should be so construed, if practicable, that one section will not defeat or destroy another, but explain and support it." *Bernier v. Bernier*, 147 U. S. 242, 13 Sup. Ct. 244.

And in *Smith v. Townsend*, 148 U. S. 490, 13 Sup. Ct. 634, it is said:

"It is well settled that where the language of a statute is in any manner ambiguous, or the meaning doubtful, resort may be had to the surrounding circumstances, the history of the times, and the defect or mischief which the statute was intended to remedy."

With these rules for our guidance, it is not difficult to ascertain the causes which brought the interstate commerce act into being, the evils sought to be remedied, and the general system which was inaugurated by the enactment made. The development of railways during the past 50 years had been so great that practically the carrying trade of the country had passed into their hands, especially in the portions of the country not bordering on the lakes or larger rivers. The business had grown so enormously, and the mode of handling the same had become such, that it was no longer possible for each shipper to make special contracts with the carrier for the transportation of his property. The railway lines extend over thousands of miles of territory, with hundreds of stations or shipping points, and it was impossible for the carrier to have at each shipping point an agent with the authority to contract with each shipper with respect to the rate to be charged upon each shipment. Therefore it became the custom for each railway to adopt general schedules of rates, which were furnished to their agents for their guidance in billing freight. These schedules, however, were not always made public, and it was soon developed that, notwithstanding the adoption of these schedules, which could not be varied from by the local or station agent, many shippers and localities were favored in the matter of rates, or, in other words, discrimination in favor of particular classes of business, or of particular localities, or of favored individuals became a common practice; the same being accomplished in many ways, but more generally through a system of rebates which were arranged for with the officials who had the power to make or change the schedule rate. As was naturally to be expected, these rebates would be secured the more easily by heavy shippers, and by men carrying on their business in the larger cities, who could readily reach the railway officials, and the inevitable result was that the smaller dealers, and those who were located in the small towns and villages of the land, were put at a disadvantage, which in many instances was of so serious a nature as to drive them out of business. Furthermore, the practice obtained of adopting certain lines of rates at competitive points, which would be less than those charged from noncompetitive points, although the latter might be nearer the point or place of delivery. Thus there had grown up a system of discrimination which resulted in placing unequal burdens upon the shippers, and, through them, upon the community at large; and

the discontent resulting therefrom was the most potent cause which operated to bring about the enactment of the interstate commerce act. Though not the only, it was the principal, evil sought to be remedied by that enactment. Another difficulty of which the public complained resulted from frequent and sudden changes in rates. It is well known that a large part of the products of the country are purchased from the producer at or near the place of production, and the shipping to market is done by the purchaser or middle man. Whether the purchases thus made are to prove profitable or the contrary depends largely upon the cost of transportation. Every one engaged in the purchase and shipment of the products of the farm or of the manufactory must figure upon the freight rate in determining what price he can afford to pay, and, unless he can place reliance upon the established rate, he is liable to suffer loss through a sudden increase in freight rates; and hence the desirability of having the rule established that the carrier cannot change established rates without reasonable notice. The final complaint of the public was that from the mode in which the carriers imposed their charges it resulted that the rates were unequal; that to make good the loss resulting from the favoritism shown to particular localities, persons, or classes of business a greater burden was placed upon the remainder of the traffic; and that through the practical monopoly acquired by the railways over the transportation business of the country the shippers were largely at the mercy of the carriers, and that as a result thereof the business of the community, in so far as the same depended upon the use of transportation facilities, was subjected to unequal and unreasonable burdens and exactions.

Thus we have presented the general causes which impelled congress to undertake legislation for the purpose of regulating interstate commerce. The first five sections of the act are devoted to defining the general principles which should govern common carriers in the transaction of the transportation business of the country; rates or charges for services rendered must be reasonable; must be equal for like service; no undue or unreasonable preference or advantage is to be given to any locality, person, or kind of traffic; a greater compensation must not be charged for a shorter than a longer haul under like circumstances, and competition must not be defeated by pooling contracts or agreements between two or more carriers. Coming now to the sixth section, we find therein provision made looking to the enforcement of the general principles contained in the preceding sections, and this provision consists primarily in the requirement for the adoption, printing, and posting up for public inspection of schedules showing the rates and charges established by the particular carrier. The slightest reflection shows that the adoption of a schedule of rates is a necessity of the situation. It forms the foundation of the whole system, and is an essential element in the creation and enforcement of any method of regulation which holds out the promise of successful results. It was open to congress to declare by whom and upon what basis the schedule of rates should be adopted. Provision might have been made for a commission to that end, or con-

gress might have prescribed the limits, but it did not. The declaration of section 6 is that the schedules which are to be printed and posted are to consist of the rates and charges for the transportation of passengers and property which the common carrier has established. The theory of the entire act is that, owing to the effect of free competition, railway companies will charge at competitive points only fair and reasonable rates. The rates thus established at competitive points furnish a standard for the rates at noncompetitive points, and thus it is proposed in time to secure the adoption of a reasonably fair and equal schedule of rates. However this may be, it cannot be questioned that under section 6 every common carrier subject to the act is compelled to adopt, print, and keep posted a schedule of rates and charges as established by it, and it is then enacted that: "When any such common carrier shall have established and published its rates, fares and charges in compliance with the provisions of this section, it shall be unlawful for such common carrier to charge, demand, collect or receive from any person or persons a greater or less compensation for the transportation of passengers or property, or for any service in connection therewith, than is specified in such published schedule of rates, fares, and charges, as may at the time be in force." Provision is then made for changes in the schedule, requiring, in case of an advance in rates, that 10 days' notice thereof shall be given. It is certainly the intent of congress to require of the carrier the adoption of a schedule of rates, and to make the same public; and it is equally certain that it is the duty of the carrier to charge the schedule of rates, neither more nor less, until a change is made therein according to law. There can be, therefore, no question that congress has, by this method, provided for the adoption of a fixed schedule, and has declared that the carrier must not deviate therefrom, provision being made for changes from time to time, as experience may show that the rates adopted are inequitable, or as changes in the circumstances may justify or demand a readjustment of the schedule charges. Therefore when a carrier, as in this case, is sued for damages on the ground that the rate charged for transportation of grain was unreasonable, it is competent and proper for the carrier to aver and show that in obedience to the interstate commerce act it had adopted, printed, and posted a schedule of rates, and that the charges complained of were in accordance with those contained in the schedule.

It is contended, however, on part of plaintiff, that as the first section of the act declares that the rates charged must be reasonable, and as section 8 declares that the carrier shall be liable to any person injured for the damages resulting from the doing of any act or thing prohibited, it is open to the plaintiff to now show that the schedule rates charged and paid without demur during the past five years were unreasonable, and therefore damages for charging the same are recoverable; and that, if this be not so, then the provisions of the act providing the right to sue for and recover damages for violation of the act are meaningless. If the carrier, after adopting, printing, and posting the schedule of rates as required by the

act, should charge or exact from a shipper in any form or by any device a rate greater than that fixed in the schedule, an action for damages would be maintainable, and in such case there would be no difficulty in defining the rule of damages, to wit, the difference between the schedule rate and that actually exacted. So, also, if the schedule on its face provided for the imposition of unfair and inequitable rates,—as, for instance, if it should require the payment of a greater charge for the transportation of freight for a shorter than for a longer distance, other things being equal,—an action might be maintained, and in that case a rule of damages could be based upon the provisions of the schedule itself, by taking the schedule rate for the longer distance as the basis for determining what the proper rate for the shorter distance should be. In the present case, however, the proposition of the plaintiff is that, after the carrier, in obedience to the requirements of the act, has adopted, printed, and posted a schedule of rates, and for the past five years has received and transported grain, charging the schedule rates therefor, and the shipper, without protest or demur, has delivered his grain for shipment, knowing the schedule rate, and has paid the charges in conformity with the established rate, he may now, and at any time within the period of the statute of limitations, bring an action at law for damages, not on the ground that more than the schedule rate was exacted, or that the schedule itself provided for unequal, and therefore unjust, rates, but solely upon the ground that the schedule rates, though uniform, and properly proportioned, were greater than they should have been; and thus the question is presented whether the interstate commerce act, considered as a whole, authorizes and provides for an action of this kind. If it can be maintained, it results in the holding that it was the intent of congress to place upon the courts and juries of the country the duty and burden of establishing the rates of transportation for interstate commerce, and upon the common carrier the burden of transportation, with the right to ultimately retain as pay therefor the rate fixed by the verdict of a jury rendered perhaps five years after the rendition of the services. How is it possible for a jury to pass understandingly upon the questions which inhere in the establishment of a properly proportioned and equalized schedule of transportation rates. Take this case as an example. As already stated, the petition contains 23 counts, each count being based upon shipments made from a different point, and at each point the shipments were made at many different times within the limits of from one to five years. Now, the theory of the plaintiff is that the jury must inquire into and determine what the reasonable rate was for each shipment when made, and, by comparing the reasonable rate thus fixed by the jury with that actually charged, determine whether the plaintiff is entitled to damages, and, if so, to ascertain the amount on each shipment made. It is self-apparent that, no matter how intelligent the jury might be, nor how conscientiously and carefully they might endeavor to deal with the problem thus submitted to them, it would be wholly impossible for them to reach a proper verdict under such circumstances.

But suppose the case involved but a single shipment, would the difficulty be remedied, if the theory of the plaintiff is to prevail? How could the jury fairly and understandingly deal even with the case of a single shipment, provided the duty is placed upon the jury of determining what a fair and reasonable charge for the particular service would be, unless some standard, already recognized and established, is given them for their guidance? It is impossible for the jury to deal with the questions of the total cost of building, equipping, and operating the line of railway as a whole, the proportionate cost of the particular transportation in question, the total amount of business done over the entire system, the total burden properly to be laid upon the total business for transportation charges, and the proper proportionate share which the particular shipment should bear. If these general lines of inquiry are not available as guides for the jury in reaching a solution of the question, can recourse be had to any other standard of charges than that which may be likened to the market rate, and which is the result of free competition among those engaged in the business of common carriers? If it be the fact that as the result of free competition among carriers certain rates have been established for given services, what better guide could be given to the jury, when they are called upon to determine whether a rate exacted by a carrier from a shipper is or is not reasonable, than the rate adopted by those engaged in the business, and subject to the effects of free competition? As I construe the act, this standard or guide is provided by the act in question. The statute is based upon the principle, which is the controlling element in regulating prices, values, and rates in the general commercial and manufacturing business of the country,—self-interest controlled by free competition. When the act was adopted, congress well knew that every railway line was using, and would continue to use, its utmost endeavors to secure as large a share of the transportation business within its reach as it was possible for it to do. The great complaint was that each railway, by means of secret rebates or other like devices, was endeavoring to outstrip its rivals in securing business. The theory of the act is that, if competition is left free at all points where two or more lines come into competition, there will be found established reasonable rates. If, in scheduling its rates as required by the act, a carrier should increase the rate beyond a reasonable limit, its competitors would speedily capture the business at the competitive points, and of necessity, and under the spur of self-interest, the carrier would be compelled to reduce the rate to one that was reasonable. Hence the act forbids pooling and all combinations having for their purpose the establishment of rates by agreements between competing carriers. Having thus provided for securing reasonable rates at competing points, a basis is found for the establishment of like reasonable rates at all intermediate places where direct competition does not exist, by the adoption of the clause forbidding a greater charge, under like circumstances, for a shorter than a longer haul, and by the liability of the carrier to damages if the schedule adopted and posted shows that a rate out of propor-

tion, and therefore unreasonable, has been fixed for any of the points named in the schedule.

These are the means provided for securing reasonable rates. By the provision requiring 10 days' notice of a proposed increase in the rate, the evil resulting from sudden and unforeseen fluctuations in the rates charged was sought to be guarded against; and, lastly, the greatest evil of all, that of unjust discrimination in favor of persons, places, or classes of business, was sought to be remedied by the provisions of the act prohibiting all undue preferences or advantages to persons, places, or classes of business, forbidding all special rebates, drawbacks, or other like devices, and by the requirement that the carrier must adopt, print, post, and thereby make public an established schedule of rates, and must not charge rates either greater or less than those set forth in the printed schedule. The act requires that the rates charged shall be reasonable, but the standard of reasonableness under the act is that which results from free competition among the carriers, which can be known when the carrier undertakes the duty of transportation, and which the act requires shall be set forth in the schedule posted by the company, and not a rate estimated by a court and jury years after the services have been rendered. If this suit can be maintained upon the contention advanced in support thereof, then the common carriers for the past five years, or whatever the period of limitation upon the right to sue may be, have been engaged in the transportation business of the country without knowing, and without the means of knowing, what remuneration they are ultimately to receive for the work done. If plaintiff's contention be sound, every person who, within five years past, more or less, has secured transportation for his property or person over a line of railway engaged in interstate business, can now sue the company, claiming damages on the ground that the rate charged and paid without demur was unreasonable; and in each case it will be for the jury to determine, as best they may, what a reasonable rate is, and award damages accordingly. The consequences that would follow if that contention be true need not be elaborated upon, but it is sufficient to say that it would speedily wreck every railway in the country.

Furthermore, if it be true that the establishment of reasonable rates for railway services is to be left to the verdict of juries, rendered long after the services have been performed, it is apparent that it will be wholly impossible to secure equality or uniformity therein, and of necessity preferences would result therefrom in favor of individuals and localities, thus violating the most important principle of the act in question. If the plaintiff maintains this action on the theory now contended for, and recovers damages in the sum of \$50,000 or thereabouts, this will have the same effect upon the shipments counted on in the petition as though the company should now allow a rebate for that amount, and these shipments will secure an advantage over all others made along the line, and upon which the schedule rates have been paid. To secure uniformity, it will be necessary for every shipper not only to see to it that he and all other

shippers are charged the posted schedule rates, but also to take note whether suits are brought for the recovery of damages, for, unless he does so, and promptly sues himself in case others do, he may find that a jury has greatly reduced the rate, by way of damages in favor of some competitor, and thus he is placed at a disadvantage. Moreover, it would render it not only possible, but a matter of comparative ease, for the carrier and favored shippers, to provide for rebates upon the schedule rates. The shippers can pay the scheduled rates. At the proper time suit can be brought to recover damages for an unreasonable charge. A jury can be readily convinced, in the absence of a vigorous defense, that the claim for damages is just, and a verdict follows, and thus the rebate is secured.

It is apparent that if the schedule of rates provided for by the act and adopted and posted in accordance with its provisions is not to be accepted as the basis for determining whether charges made are reasonable, then the carriers and shippers alike are left without any certain or reliable guide for determining the rate that should be demanded and paid for given shipments. Under such a system, uniformity and equality in rates cannot be secured, and the main object of the act, to wit, the prevention of discrimination by way of secret rebates and the like, which it is sought to secure by the provisions requiring the adoption and making public of a fixed schedule of rates and the requirement that the carrier shall not deviate therefrom, will be defeated, because, on the theory of the plaintiff, the shipper is not bound to pay that rate unless a jury decides that it is reasonable, and, if the shipper is not bound to pay it, the carrier is not entitled to demand, receive, and retain it. If the contention of plaintiff be sound, every schedule of rates posted by carriers under the provisions of the act should have attached thereto the memorandum: "Subject to change in accordance with the verdicts of juries which may hereafter be rendered." If the theory advanced by the plaintiff in support of the demurrer is sustained, to wit, that in suits of this nature, based upon the interstate commerce act, and wherein it is sought to determine the reasonable rate chargeable for a given number of shipments of freight, the schedule of rates established by the carrier, and posted as required by the act, is to be laid aside, and the jury must undertake to decide as best they may what the reasonable rate in fact was, the result must be that inequalities in rates exacted will be created, and discriminations in effect will be created and enforced; thus violating the more important and valuable provisions of the act. The statute does not confer upon courts and juries the power or the duty to prescribe in advance what rates may be charged. That duty the act does place upon the carrier; and when the carrier, in obedience to the statute, has established and posted a schedule of rates, it becomes binding on the carrier, who cannot deviate from it without being guilty of a misdemeanor, and becoming subject to the penalties provided by section 10 of the act; and yet the theory of the plaintiff is that when the defendant company made its charges for the shipments described in the several counts of the petition it ought to have deviated from the previously posted sched-

ule rates, and because it did not do so it is now liable in damages to the plaintiff. It is the consideration of these and like difficulties which would be created if the contention of plaintiff be sustained, and which would result in the practical defeat of the main purpose of the interstate commerce act, to wit, the securing uniform and equal rates for like services, and the prevention of unjust discriminations, which leads me to the conclusion that it is the intent of the interstate commerce act to make the schedule of rates required to be adopted, printed, and posted by the carrier the basis for determining whether a given rate exacted from a shipper is or is not unreasonable under the provisions of the act, and I therefore hold that the demurrer to the answer is not well taken, and must be overruled.

SELS v. GREENE et al. (four cases).

(Circuit Court, N. D. California. June 7, 1897.)

RECLAMATION DISTRICTS—LIABILITY FOR NEGLIGENCE.

A reclamation district, being, under the law of California, a corporation of a quasi public character, is not liable to a private action for negligence in the performance of its duties, or for a nuisance.

Bill in Equity to Abate a Nuisance.

Olney & Olney, for complainant.

Elwood Bruner (W. A. Gett, Jr., of counsel), for defendants.

MORROW, Circuit Judge. The bill in equity in this suit was filed to abate an alleged nuisance. A demurrer has been interposed. There are three other cases between the complainant and some of the defendants who are named in the bill in the present suit. One of these is a suit in equity to abate an alleged nuisance, and the other two are actions at law for damages claimed to have been caused by defendants entering upon complainant's lands, and excavating and maintaining ditches thereon, whereby the complainant's lands were flooded. It is understood that the determination of the demurrer in this suit will also dispose of the three other cases. Several questions are raised by the demurrer. The principal question, and the one which, in my judgment, will be conclusive of the cases, is whether or not a suit or action can be maintained against reclamation district No. 551, which is a defendant in each of the cases referred to, and is alleged to have been a tortfeasor with the other defendants. It is not disputed that a reclamation district is, under the laws and decisions of the state of California, a corporation of a quasi public character. See section 3446 et seq., Pol. Code Cal.; *Dean v. Davis*, 51 Cal. 406; *People v. Reclamation Dist. No. 108*, 53 Cal. 346; *People v. Williams*, 56 Cal. 647; *Lamb v. Reclamation Dist. No. 108*, 73 Cal. 125, 14 Pac. 625; *Elmore v. Drainage Com'rs*, 135 Ill. 269, 25 N. E. 1010. Quasi public corporations of this character are not liable, unless expressly authorized by statute, to private actions for negligence in the performance of their duties. There is no such statute, authorizing suits against

these corporations, in this state. It is true that the rule has been assailed and overruled in other states, and that there is a conflict of authorities on the proposition. But the rule that there is no liability seems to be sustained by the better weight of authority, and has been enunciated by the supreme court of this state. See 15 Am. & Eng. Enc. Law, p. 1143; *Sherbourne v. Yuba Co.*, 21 Cal. 213; *Barnett v. Contra Costa Co.*, 67 Cal. 77, 7 Pac. 177; *Chope v. City of Eureka*, 78 Cal. 588, 21 Pac. 364; *Arnold v. City of San Jose*, 81 Cal. 618, 22 Pac. 877. See, also, *Elmore v. Drainage Com'rs*, 135 Ill. 269, 25 N. E. 1010.

In *Chope v. City of Eureka*, supra, which was an action to recover damages for alleged personal injuries, caused by the plaintiff falling into an excavation for a sewer within the corporate limits of the defendant, a municipal corporation, Mr. Justice McFarland said:

"It has long been the settled law of this state that a municipal corporation is not liable for personal injuries to individuals, such as that claimed to have been sustained by plaintiff, where there is no statutory provision declaring such liability. There is, no doubt, some conflict of decisions on the question in other states, although it is to be observed that in the New England and some other states there are statutory declarations of the liability. But in California the doctrine above stated has been clearly and continuously adopted; and, if any change in the law is desirable, that change must be made by the legislature; and so far, at least, the legislature has shown no disposition to make the change."

The same views were iterated in the case of *Arnold v. City of San Jose*, supra.

In *Elmore v. Drainage Com'rs*, supra, the facts were these: The defendant corporation was organized in the town of Mason City, Mason county, Ill., under the statute in force July 1, 1879, providing for the organization of drainage districts, and for the construction, maintenance, and repair of drains and ditches by special assessments on the property benefited thereby, the commissioners of highways being the drainage commissioners of said district. Appellant was the owner of lands included in said district, and was assessed \$800 for draining said lands; and, after the payment by him of such assessment, the defendant, without his knowledge or consent, enlarged the boundaries of said district, by taking in a large area of territory, including the greater part of Mason City, which territory had a natural drainage for the water falling thereon, in a direction opposite to the lands of appellant, and defendant, by a system of drainage, collected the water falling on said area, and discharged all said water into the ditches on the lands of appellant, which were too small to carry off the additional water without enlarging the same, and also performed the work so carelessly and negligently as to overflow and submerge appellant's lands with the water from the territory so added to the district, and precipitated upon his lands. He thereby lost his crops planted thereon, and the use of the lands; and having called the attention of the commissioners to the condition of his lands, without avail, he brought an action on the case against the corporation. It was held, in a well-considered opinion, that the appellee was to be regarded as a public, involuntary, quasi corporation; and that the well-established and uniform doctrine with respect to this class of

corporations was that there is no corporate liability to respond in damages to an individual injured by the negligent or wrongful act of its officers, agents, or servants; and that the district could not be held liable for the illegal acts of the commissioners of such district. The applicability of this case to that before the court is too obvious to require any extended reference. Reclamation districts, like drainage districts, are for the purpose of "the reclamation of large bodies of swamp and overflowed lands, and their consequent improvement is justly to be regarded as a matter of public concern." *Elmore v. Drainage Com'rs*, 135 Ill. 275, 25 N. E. 1011.

But the case of *Lamb v. Reclamation Dist. No. 108*, supra, would seem, both upon principle and facts, to settle the question involved as to whether reclamation districts are liable at all, even if suit could be entertained against them. That was an action to abate and remove as a public nuisance a levee erected by the defendant along the west bank of the Sacramento river, and across a place on said bank called "Wilkin's Slough," and to recover damages for the overflowing of plaintiff's land on the other side of the river, about two miles below, alleged to have been caused by said levee. The case, in the trial court, was submitted on certain parts of the pleadings taken as true, and judgment was given for the defendant, from which plaintiff appealed. The court considered two questions:

"Did respondent have the right to construct the levee which it completed in 1872, notwithstanding the damage which was caused thereby, several years afterwards, to appellant's land? And has it the right to maintain said levee, notwithstanding any damage which it may possibly or probably cause to said land hereafter, as apprehended by appellant, and described in his complaint?"

Both of these questions were answered in the affirmative, and it was held that the works of the reclamation district did not constitute a nuisance, and that the defendant was not legally liable for the incidental damage caused thereby, and the judgment of the trial court was affirmed.

The case of *Coburn v. San Mateo Co.*, 75 Fed. 520, referred to upon the argument, and decided by me, must be distinguished from the cases just cited and the case at bar. In that case, a municipal corporation, the county of San Mateo, was held liable for certain acts of trespass by one of the supervisors of the county, committed upon the lands of the complainant. These acts consisted in tearing down a gate, and, by force, keeping a road, leading through this gate, and over complainant's lands, to a pleasure resort called "Pescadero Pebble Beach," open to the public. It was held by me that the road was not a public road, and that the county had no right to commit these acts of trespass, and the general doctrine was applied that a municipal corporation is liable for trespasses or damage done to private property by its officers, in the exercise of powers conferred for the benefit of the locality and its inhabitants, such as those relating to the opening and keeping open of roads, as distinguished from powers relating to the administration of the general laws and the enforcement of the general policy of the state.

The distinction between the two classes of corporations is well stated in *Elmore v. Drainage Commissioners*, supra, as follows:

"The grounds upon which the liability of the municipal corporation proper is usually placed are that the duty is voluntarily assumed, and is clear, specific, and complete, and that the powers and means furnished for its proper performance are ample and adequate. *Browning v. City of Springfield*, 17 Ill. 143. In such case there is a perfect obligation, and a consequent civil liability for neglect in all cases of special private damage. The nonliability of the public quasi corporation, unless liability is expressly declared, is usually placed upon these grounds: That the corporators are made such *volens volens*; that their powers are limited and specific; and that no corporate funds are provided which can, without express provision of law, be appropriated to private indemnification. Consequently, in such case the liability is one of imperfect obligation, and no civil action lies at the suit of an individual for non-performance of the duty imposed."

Without further discussing the proposition, or the other points raised by the demurrer, which, in the view I have taken of the right to sue the reclamation district in this and the other cases, is unnecessary, I shall sustain the demurrer; and it is so ordered.

In re WONG FOCK.

(District Court, N. D. California. May 10, 1897.)

No. 11,333.

1. UNITED STATES COMMISSIONERS—JURISDICTION UNDER CHINESE EXCLUSION ACT.

A United States commissioner is "a United States judge," within the meaning of section 6 of the Chinese exclusion act of May 5, 1892, which provides that a Chinese laborer within the limits of the United States who shall neglect to comply with its provisions may be arrested and taken before "a United States judge," whose duty it shall be to order that he be deported, as that section is to be read in connection with section 3 of the same act, which provides that a Chinese person may be adjudged to be unlawfully within the United States "by a justice, judge, or commissioner."

2. SAME—VALIDITY OF ORDER OF DEPORTATION.

A commissioner having made an order of deportation under that statute, his further order that the person to be deported "be forthwith taken before the nearest United States judge, that a review of these proceedings may be had and proper order of deportation made," being unnecessary, may be treated as surplusage.

E. S. Solomon, for petitioner.

H. S. Foote, U. S. Dist. Atty.

MORROW, District Judge. A petition for a writ of habeas corpus was filed in this court by Wong Sing on behalf of Wong Fock, the detained, in which it is alleged that Wong Fock is unlawfully imprisoned, detained, confined, and restrained of his liberty by L. Ezekiel, a deputy United States marshal of the territory of Arizona, in the county jail of the city and county of San Francisco, state and Northern district of California; that the illegality of the imprisonment consists in the fact that said deputy United States marshal holds and keeps said Wong Fock in confinement for the purpose of deporting him to China, for an alleged violation by said Wong Fock of an act of congress of May 5, 1892, in not procuring the certificate of residence required by said act. It is further alleged in said

petition that said deputy United States marshal has no authority to confine and imprison, nor deport, said Wong Fock, for the reason that the latter was never brought before any judge of any district of the United States; that the accusation that said Wong Fock was without a certificate of residence was never heard by a judge of the United States, and that no order of deportation to China, directing and ordering the deportation of said Wong Fock, was ever issued by any judge of any United States district court, or of any court whatever, as required by said act of congress. The return of the deputy United States marshal of the territory of Arizona, upon whom the writ was served, shows that he holds the detained, Wong Fock, in his custody for the purpose of deporting him to China, under and by virtue of an "order of deportation" made and issued by J. H. Carpenter, United States commissioner of the Third judicial district of the territory of Arizona, at Yuma, which order was approved by Hon. A. C. Baker, the United States judge for that judicial district. The order of deportation recites that a verified complaint was made before the United States commissioner for the Third judicial district of the territory of Arizona, at Yuma, charging Wong Fock with having violated section 6 of an act of congress approved May 5, 1892, entitled "An act to prohibit the coming of Chinese persons into the United States," as amended by the act of November 3, 1893, in failing to register and obtain a certificate of residence as required by said acts; that a warrant was issued by such commissioner; that Wong Fock was duly apprehended upon said warrant and brought before the commissioner on April 21, 1897; that a hearing was had upon the charge made by said complaint; that testimony was taken and proceedings had before such commissioner; and that said commissioner on April 21, 1897, found, from the testimony and proceedings had before him, that Wong Fock was, by race, color, dress, and appearance, a Chinese person; that he was a laborer by occupation; that he was a resident of the territory of Arizona at the time of the passage of the act of congress of May 5, 1892, and had since continued such residence; that he was after November 3, 1893, found to be a resident within the jurisdiction of the United States, and of the Third judicial district of the territory of Arizona, without the certificate of residence provided for in the act of congress referred to; that he had neglected, failed, and refused to comply with the provisions of said act; that he had not established to the satisfaction of said commissioner that by reason of accident, sickness, or unavoidable cause, he was unable to procure such certificate of residence; and that said Wong Fock was unlawfully within the United States. Following these findings, the commissioner ordered that Wong Fock be removed from the United States to China; that the deportation of said Wong Fock be made from the port of San Francisco, within the limits of the Northern district of California, and that he be committed to the custody of the United States marshal for the territory of Arizona to carry out the order of deportation; and it was further ordered that Wong Fock be forthwith taken before the nearest United States judge, that

a review of the proceedings might be had, and a proper order of deportation made. The only record showing that this last order was carried out is the indorsement upon the "order of deportation" itself of the following: "Approved. A. C. Baker, Judge."

Upon the return of the writ in this court, the matter was referred to E. H. Heacock, Esq., the special referee and examiner, to ascertain the facts and report his opinion thereon. It was contended before him that the commissioner of the Third judicial district of the territory of Arizona, who made and issued the order of deportation, had no jurisdiction to hear and determine the alleged violation of the acts of congress referred to, for the reason that it is provided by section 6 of the act of May 5, 1892 (27 Stat. 25), that Chinese laborers, within the limits of the United States, who shall neglect to comply with its provisions, may be arrested, etc., "and taken before a United States judge whose duty it shall be to order that he be deported," etc. It is contended by counsel for the petitioner that it necessarily follows that the judicial power so conferred by this section upon "a United States judge" is exclusive, and can be exercised by him alone, and that a United States commissioner is not "a United States judge." The special referee held that this contention was untenable, inasmuch as section 3 of the same act provides that a Chinese person may "be adjudged to be unlawfully within the United States * * * by a justice, judge, or commissioner," and that the expression, "a United States judge," found in section 6, must be read in connection with section 3. He held, therefore, that the commissioner had full jurisdiction and power to hear and determine the question whether or not Wong Fock was lawfully within the United States. He recommended that the writ be dismissed, and the detained remanded to the custody of the United States marshal of the territory of Arizona, to be by him deported to China in pursuance of said order of deportation. To this recommendation, exceptions have been taken by counsel for the petitioner.

It is unnecessary to consider at length the question involved. The whole matter was critically discussed and considered by the special referee in his opinion and findings filed May 3, 1897. I agree with him that section 3 of the act is to be read in connection with section 6. Section 2 of the same act is also consistent with and fortifies the interpretation to be given to the expression "a United States judge." That congress intended that United States commissioners should have the power to determine whether Chinese persons were lawfully within the United States, and to make the appropriate order of deportation, if they were found to be within the United States in violation of section 6 of the act, is, I think, patent from a reading of the act of May 5, 1892, as amended by the act of November 3, 1893, in its entirety, and also from previous acts upon the subject. See section 13 of the act of September 13, 1888 (25 Stat. 476); section 12 of the act of May 6, 1882, as amended by the act of July 5, 1884 (23 Stat. 117). The expression "a United States judge," found in section 6 of the act of May 5, 1892, is, in my opinion, a general one, and refers to those judicial officers

(viz. "justice, judge, or commissioner") previously and specifically enumerated in sections 2 and 3 of the same act. A United States commissioner is certainly a judicial officer, and exercises—it is true, within very narrow limits—the functions of a United States judge. In the case of *Fong Yue Ting v. U. S.*, 149 U. S. 698, 728, 13 Sup. Ct. 1016, 1028, the supreme court, in considering the meaning of the identical expression in section 6 involved in the case at bar, said:

"The designation of the judge, in general terms, as 'a United States judge,' is an apt and sufficient description of a judge of a court of the United States, and is equivalent to or synonymous with the designation in other statutes of the judges authorized to issue writs of habeas corpus, or warrants to arrest persons accused of crime;" citing sections 752 and 1014 of the Revised Statutes.

Section 1014 provides that:

"For any crime or offense against the United States, the offender may, by any justice or judge of the United States, or by any commissioner of a circuit court, * * * be arrested and imprisoned," etc.

While in the case above referred to the supreme court were considering the term "a United States judge" as applied to a district judge, still it would seem that the definition they then gave to the expression "a United States judge," in the sense in which it is used in the acts referred to, is broad enough to include United States commissioners, for they have the power to issue "warrants to arrest persons accused of crime." I come to the conclusion that United States commissioners not only have the power to adjudge whether a Chinese person is unlawfully in the United States, under sections 2 and 3 of the act, but that they have also the power to order a deportation, under section 6. I make this deduction, not alone by reason of the construction to which the several sections of the act in question seem to be reasonably susceptible, but because it would result, if judges of the district or circuit court only could take cognizance of this class of cases, that in many cases it would become almost impracticable to enforce the law, and certainly very expensive to do so, on account, as is very persuasively observed by the special referee in his opinion, of our extended territory, the limited number of our United States judges, and the great distance frequently intervening between the place of arrest and the place of trial. One of the strongest reasons for the appointment of United States commissioners in certain localities is because distance, or the difficulty of travel, render the court and the judge thereof difficult of access. It seems to me that congress must have had this in mind when it provided in sections 2 and 3 that United States commissioners, among other judicial officers, should adjudge whether persons of Chinese descent, arrested under the provisions of the act or the acts thereby extended, were or were not lawfully within the United States. In statutory construction, arguments of convenience often address themselves strongly to the court. As was aptly said by Mr. Chief Justice Marshall in *U. S. v. Fisher*, 2 Cranch, 386, "Where great inconvenience will result from a particular construction, that construction is to be avoided, unless the meaning of the legislature is plain, in which case it must be obeyed." In the case of *U. S. v. Wong Dep Ken*, 57 Fed. 203, it appeared that a Chinese person had been adjudged by a United States commission-

er to be unlawfully in the United States, and the commissioner had made an order directing the Chinese person to be imprisoned at hard labor in the state prison at San Quentin, and thereafter to be deported to China. The case came up before Judge Ross upon the question whether Wong Dep Ken had the right to appeal to a district court under section 13 of the act of September 13, 1888 (25 Stat. 476), and it was held by the learned judge that he had. While, it is true, the question involved in the case at bar did not arise, still the effect of the decision necessarily is to recognize the power of a United States commissioner to make an order of deportation; otherwise no right of appeal could lie from his order of deportation. I agree with the special referee that the order of the commissioner that "said Wong Fock be forthwith taken before the nearest United States judge, that a review of these proceedings may be had, and proper order of deportation made," and the approval thereof indorsed by the judge for that judicial district on the order of deportation, were all unnecessary and immaterial, and may be treated as mere surplusage, if the view taken by the court of the power and jurisdiction of the commissioner to make and issue an order for deportation for a violation of section 6 of the act in question is sound. The report and recommendation of the special referee and examiner will therefore be confirmed, the writ of habeas corpus will be dismissed, and the detained, Wong Fock, remanded to the custody of the Deputy United States marshal of the territory of Arizona, to be by him deported to China; and it is so ordered.

In re TSU TSE MEE.

(District Court, N. D. California. May 10, 1897.)

No. 11,338.

1. UNITED STATES COMMISSIONERS—JURISDICTION UNDER CHINESE EXCLUSION ACT.

A commissioner has jurisdiction to make an order of deportation under section 6 of the Chinese exclusion act of May 5, 1892, and also to order the deportation of Chinese persons who are adjudged, under section 12 of the act of July 5, 1884, to have unlawfully entered the United States. In re Wong Fock, 81 Fed. 558, followed.

2. SAME—SUFFICIENCY OF FINDINGS.

It is enough if the order of deportation shows that the person to be deported has been adjudged to be unlawfully within the United States, without a finding stating where he came from, as the specification of the country to which he is to be deported concludes any inquiry on that point.

3. SAME—COUNTRY TO WHICH DEPORTED—HABEAS CORPUS.

The person ordered to be deported cannot, on habeas corpus, claim that he was entitled to be deported to a country other than China, as provided by section 2 of the act; his remedy being by appeal, if dissatisfied with the commissioner's findings in that respect.

4. SAME—SUFFICIENCY OF ORDER OF DEPORTATION.

The order of deportation need not explicitly refer to the specific act of congress under which the person to be deported is adjudged to be unlawfully in the United States.

5. SAME—RIGHT TO JURY TRIAL.

The order of deportation may be made without a jury trial, as it is not a punishment for crime. And the fact that a plea of "not guilty" is entered does not change the character of the proceedings.

Wm. Hoff Cook, for petitioner.

Bert Schlessinger, Asst. U. S. Dist. Atty.

MORROW, District Judge. A petition for a writ of habeas corpus was sued out on behalf of Tsu Tse Mee, it being claimed that he is unlawfully imprisoned, detained, confined, and restrained of his liberty by a deputy United States marshal of Texas, on board the steamship the City of Peking, in the city and county of San Francisco, state and Northern district of California, previous to his being deported to China for an alleged violation, as averred in the petition, of an act of congress of May 5, 1892, for having failed to procure a certificate of residence as required by said act. It is further alleged in the petition that the accusation that he was without a certificate of residence was never legally heard by a judge of the United States, and that no legal or valid order of deportation to China was ever issued by any judge of the United States district court, or of any court whatever. The matter was referred to the special referee and examiner to ascertain the facts and report his opinion thereon. His report and recommendation, filed May 4, 1897, shows that a return was made to the writ that the United States marshal held and detained Tsu Tse Mee in pursuance of an order of the United States commissioner for the Western district of Texas, at El Paso, ordering the deportation of the petitioner. This order of deportation was offered in evidence as part of the return. It was also stipulated and agreed that the petitioner in this matter is the person described in the order of deportation, and is the same person mentioned in the return made by the United States marshal, and, further, that he is here under that order of deportation, and was about to be deported by the marshal when the writ of habeas corpus issued. Counsel for the petitioner demurred to the sufficiency of the order of deportation upon the grounds: (1) That the commissioner has no jurisdiction or authority to make such order. (2) That it does not appear from the order where or how the petitioner entered the United States; and, further, that the order charges him with having unlawfully entered, and also being in, the United States, in violation of the acts of congress, but does not designate what acts, if any, have been violated. (3) It was further objected that it appears affirmatively from the order that the commissioner made the order of deportation upon a plea of not guilty, which, under the laws and constitution of the United States, he had no right to do, because, if the party was charged upon a complaint, and called upon to plead, he was entitled to a trial by jury.

The special referee recommends that the demurrer be overruled, that judgment be entered dismissing the writ, and that the petitioner be remanded to the custody of the United States marshal of this district, to be by him deported to China in pursuance of said order of deportation. To this report and recommendation exceptions were

taken. The first ground of demurrer urged before the special referee may be dismissed with the observation that the commissioner has the jurisdiction and power to make an order of deportation where he finds that a Chinese person is unlawfully in the United States. I considered this question in *Re Wong Fock*, 81 Fed. 558, on habeas corpus, with reference to an order of deportation made by a commissioner for a violation of section 6 of the act of May 5, 1892, in an opinion handed down to-day. He also has the power of making an order of deportation of Chinese persons who are adjudged, under section 12 of the act of July 5, 1884, to have unlawfully entered the United States.

The second ground of demurrer urged is directed to the sufficiency of the findings of the commissioner as set out in the order of deportation. Findings should be mere statements of the ultimate facts in controversy, and the legal consequences from the facts admitted and proven. *Mathews v. Kinsell*, 41 Cal. 514; *Smith v. Mohn*, 87 Cal. 489, 25 Pac. 696. In my opinion the findings set out in the order of deportation are sufficient. It is enough if the order of deportation shows that the Chinese person has been adjudged to be unlawfully within the United States. It is immaterial how he unlawfully entered the United States. A finding, stating where the Chinese person came from, while it may be proper and save any possible question, still is not necessary, for that part of the order of deportation which specifies the country to which he is to be deported concludes any inquiry on that point. Section 2 of the act of May 5, 1892, provides:

"That any Chinese person or person of Chinese descent, when convicted and adjudged under any of said laws to be not lawfully entitled to be or remain in the United States, shall be removed from the United States to China, unless he or they shall make it appear to the justice, judge, or commissioner, before he or they are tried, that he or they are subjects or citizens of some other country, in which case he or they shall be removed from the United States to such country: provided, that in any case where such other country of which such Chinese person shall claim to be a citizen or subject shall demand any tax as a condition of the removal of the such person to that country, he or she shall be removed to China."

As the presumption is in favor of the regularity of the proceedings before the commissioner making the order of deportation, and that the law was complied with, the order that he be deported to China is sufficient for all purposes. Particularly so in the absence of any satisfactory showing that he should be removed to some country other than China. The Chinese person ordered to be deported in this matter had an opportunity to make this showing before the commissioner who adjudged him to be unlawfully within the United States. If dissatisfied with the findings of the commissioner in this respect, he certainly had the right to appeal to the district court for that district. *U. S. v. Wong Dep Ken*, 57 Fed. 203. He cannot do so now by means of a writ of habeas corpus. It is well settled that the writ of habeas corpus cannot be used as a writ of error or appeal. *Ex parte Crouch*, 112 U. S. 178, 5 Sup. Ct. 96; *Wales v. Whitney*, 114 U. S. 564, 5 Sup. Ct. 1050.

The fact that the specific act of congress under which the peti-

tioner was adjudged to be unlawfully in the United States is not explicitly referred to in the order of deportation is also unimportant. The broad statement is made in the order of deportation that the petitioner on the 16th day of February, 1897, unlawfully entered and was in the United States in violation of the acts of congress of the United States in such case made and provided, to wit, the Chinese exclusion acts. From a finding recited in the order of deportation, viz., "That the defendant * * * is guilty of having unlawfully entered the United States on the 16th day of February, A. D. 1897, as charged in bill of complaint," it is plain that he was adjudged unlawfully in the United States, and the order of deportation was made under and by virtue of section 12 of the act of July 5, 1884 (23 Stat. 115). In the petition to this court for a writ of habeas corpus it is alleged that Tsu Tse Mee was adjudged to be unlawfully in the United States because of his failure to obtain the certificate of residence required by section 6 of the act of May 5, 1892; but the special referee, in his opinion and findings, states that "the question of having a certificate of residence * * * does not arise in this case."

The last ground urged is that the petitioner was entitled to a jury trial before the commissioner who ordered his deportation, for the reason that he entered a plea of not guilty to the charge of being unlawfully within the United States. The order of deportation does not inflict any punishment in the way of imprisonment, as provided by section 4 of the act of May 5, 1892, but simply directs the deportation of the petitioner. The supreme court, in the case of *Wong Wing v. U. S.*, 16 Sup. Ct. 977, decided that the act of May 5, 1892, § 4, providing that a Chinese person adjudged to be not lawfully entitled to remain in the United States shall be imprisoned at hard labor for a period not exceeding one year, and thereafter removed from the United States, in effect provides for such imprisonment upon the adjudication of a justice, judge, or commissioner upon a summary hearing, and conflicts with the constitution of the United States (amendments 5 and 6), declaring that no person shall be held to answer for a capital or otherwise infamous crime unless upon presentment or indictment of a grand jury, and that the accused shall enjoy the right to a speedy and public trial by an impartial jury. See, also, *U. S. v. Wong Dep Ken*, supra. But in the present matter, while the petitioner was adjudged to be unlawfully in the country, the penalty of imprisonment was not visited upon him; he was simply ordered to be deported. This, so far as appears from the order of deportation, was the whole purpose, scope, and effect of the proceedings before the commissioner. In other words, he was not held to answer for an infamous offense, nor was he tried for the commission of any offense against the laws of the United States. As was said in *Fong Yue Ting v. U. S.*, 149 U. S. 698, 730, 13 Sup. Ct. 1016, 1029:

"The order of deportation is not a punishment for crime. It is not a banishment, in the sense in which that word is often applied to the expulsion of a citizen from his country by way of punishment. It is but a method of enforcing the return to his own country of an alien who has not complied with the con-

ditions upon the performance of which the government of the nation, acting within its constitutional authority, and through the proper departments, has determined that his continuing to reside here shall depend. He has not, therefore, been deprived of life, liberty, or property without due process of law; and the provisions of the constitution securing the right of trial by jury, and prohibiting unreasonable searches and seizures and cruel and unusual punishments, have no application."

The inquiry before the commissioner was confined to the simple fact as to whether or not the petitioner, Tsu Tse Mee, was lawfully within the United States. That, for the purpose of ascertaining and adjudging upon his status in this respect, he was not entitled to a jury trial, is well established. *Nishimura Ekiu v. U. S.*, 142 U. S. 657, 12 Sup. Ct. 336; *Fong Yue Ting v. U. S.*, supra; in re *Chow Goo Pooi*, 25 Fed. 77; *U. S. v. Wong Sing*, 51 Fed. 79; *U. S. v. Hing Quong Chow*, 53 Fed. 234. The power to pass upon the right of aliens to enter or remain in this country may, constitutionally, even be vested in executive officers. See cases cited above, particularly *Nishimura Ekiu v. U. S.*, 142 U. S. 657, 660, 12 Sup. Ct. 336. The mere fact that he entered a plea of not guilty is immaterial. It did not alter the real character of the proceedings before the commissioner, nor did it invest the petitioner with the privilege of a jury trial. At best, it can be considered but a mere irregularity, and simply tended to raise the issue to be heard and determined by the commissioner. The proceedings before him were, it is true, a trial; but they were not, and the law did not intend that they should be, a jury trial. I have carefully read the authorities cited by counsel for the petitioner, and find nothing inconsistent with the views herein announced. For these reasons, briefly stated, therefore, the exceptions to the report and recommendation of the special referee will be overruled, the report and recommendation adopted and confirmed, in so far as it overrules the demurrer to the return to the writ. As I understand that the petitioner desires to traverse the return to the writ, I will give him five days in which to do so, and let the matter be re-referred to the special examiner for further action thereon.

UNITED STATES v. GLASENER.

(District Court, S. D. California. May 10, 1897.)

No. 953.

1. FORGERY—NOTARY PUBLIC—FALSE JURAT TO AFFIDAVIT.

The making by a notary public of a jurat or certificate, containing false statements, to an affidavit in support of a pension claim, does not constitute an offense under Rev. St. § 5421, providing for the punishment of "every person who falsely makes, alters, forges or counterfeits * * * any deed, power of attorney, order, certificate, receipt or other writing for the purpose of obtaining or receiving, or enabling any other person, directly or indirectly, to obtain or receive from the United States, or any of their officers or agents, any sum of money * * *"; the offense defined by said section being the false making or forgery of the writings enumerated.

2. CRIMINAL LAW—FALSE AFFIDAVIT FOR PENSION—WHAT CONSTITUTES AFFIDAVIT.

An affidavit, within the meaning of Rev. St. § 4746, which provides for the punishment of "every person who knowingly or wilfully in any wise pro-

cures the making or presentation of any false or fraudulent affidavit concerning a claim for pension, * * * includes only the statements or declarations which purport to have been made under oath, and subscribed by the affiant; and the fact that the jurat of the notary attached contains false statements does not render it a "false affidavit."

George J. Denis, U. S. Atty.
M. W. Conkling, for defendant.

WELLBORN, District Judge. The indictment contains two counts. The first count alleges that the defendant, as a notary public, falsely made a certain jurat and certificate to a certain affidavit, to the effect that the affiant, one Henry Brechtel, had sworn and subscribed said affidavit before him, the defendant, as such notary public, and that he had read said affidavit to said Brechtel, and made him acquainted with the contents thereof, before its execution, and that said jurat and certificate were false, in this: that the said Brechtel never did personally appear before the defendant, and swear or subscribe to said pretended affidavit, and that defendant never did read said pretended affidavit to said Brechtel, or make him acquainted with the contents thereof, and that said affidavit or writing was made in support of a certain claim of one Francis Geis, for a pension, then pending before the commissioner of pensions.

Said count is framed under section 5421 of the Revised Statutes of the United States, which, so far as is material here, provides that:

"Every person who falsely makes, alters, forges or counterfeits, or causes or procures to be falsely made, altered, forged or counterfeited, * * * any deed, power of attorney, order, certificate, receipt, or other writing, for the purpose of obtaining or receiving, or enabling any other person, either directly or indirectly, to obtain or receive from the United States, or any of their officers or agents, any sum of money, * * *" shall be punished as prescribed in the section.

The cases, so far as my investigation extends, with one exception,—U. S. v. Hartman, 65 Fed. 490,—uniformly hold that the first part (which I have quoted) of section 5421 refers only to the false making—that is, forgery—of the writings therein enumerated. The cases so holding are numerous cited in U. S. v. Moore, 60 Fed. 738, which is the latest decision in line with the general current of authorities. To what is there said I may add that in California the forgery statute (section 470, Pen. Code) uses, in defining the offense, precisely the same words as those employed in section 5421, Rev. St. U. S., namely, that "every person who * * * falsely makes, alters, forges or counterfeits," etc.; while the making of an official certificate containing statements known to be untrue is made a distinct offense by section 167 of said Penal Code, which is as follows: "Every public officer authorized by law to make or give any certificate or other writing, who makes and delivers as true any such certificate or writing containing statements which he knows to be false, is guilty of a misdemeanor." Counsel for defendant states, in his brief, that the same is true in Wisconsin, Iowa, Alabama, Illinois, Mississippi, Missouri, and Texas. While I have not had an opportunity, by personal examination, to verify this statement, I am satisfied it is correct.

In the case at bar, forgery is not predicated of the notarial certifi-

cate made by the defendant, but it is simply charged that said certificate contains false statements. The making of such a certificate is not, in my opinion, within the provisions of said section 5421.

The second count alleges that the defendant knowingly and willfully procured the presentation to the United States commissioner of pensions of a certain false, forged, and counterfeited affidavit, in support of and concerning a claim of one Francis Geis for a pension from the United States. The affidavit and its alleged falsity, which are set forth in full in said count, are the same as described in the first count. The second count is drawn under section 4746 of the Revised Statutes of the United States, which provides, among other things, that "every person who knowingly or wilfully in any wise procures the making or presentation of any false or fraudulent affidavit concerning a claim for pension, or payment thereof, or pertaining to any other matter within the jurisdiction of the commissioner of pensions, * * * shall be punished" as prescribed in the section. It will be observed that the words employed in this section to designate the instrument denounced are very different from those used, for the same purpose, in section 5421, which, as I have hereinbefore held, applies only to forged instruments, the phraseology of the latter section being, "Every person who falsely makes, alters, forges, counterfeits," etc. Of this latter statute it was said, in *U. S. v. Moore*, supra, "It punishes one who falsely makes an affidavit, and not one who makes a false affidavit." Pursuing the same line of thought, the court, in *U. S. v. Cameron* (Dak.) 13 N. W. 565, say:

"To falsely make an affidavit is one thing; to make a false affidavit is another. A person may falsely make an affidavit every sentence of which may be true in fact; or he may actually make an affidavit every sentence of which shall be false. It is the false making which the statute makes an offense, and this is forgery, as described in all the elementary books."

Section 4746 refers, not to the falsely making of an affidavit, but to the making of a false affidavit, and would seem, therefore, to punish subornation of perjury, or the presentation of an affidavit in which perjury was committed. See *U. S. v. Kuentsler*, 74 Fed. 220. "Affidavit" is defined by Webster to be "a sworn statement in writing." Technically considered, the word is, doubtless, broad enough to include the jurat or certificate of the officer before whom the oath is taken. In common acceptation, however, as indicated by the above definition, it has a more restricted meaning, and refers to those statements sworn to and subscribed by the affiant, but does not include the notarial certificate. In the case at bar, the certificate made by the defendant, as a notary public, furnishes a fair illustration of what is ordinarily meant by "an affidavit," and is as follows: "Sworn to and subscribed before me this day, by the above-named affiants; and I certify that I read said affidavit to said affiant," etc. Here "affidavit" manifestly refers to the declarations or statements which purport to have been made under oath, and subscribed by the affiant. Such, I think, is the meaning of the word in said section 4746. I am confirmed in this opinion by an examination of the statute in which were originally enacted the provisions of said section. This was the act of congress, entitled "An act to revise, consolidate, and amend the laws

relating to pensions," approved March 3, 1873 (17 Stat. 567). Said section 4746 is section 33 of said act of congress. The preceding section (32) of said act provides, among other things, that the attorney of pensioner, before receiving the pension money, shall take and subscribe an oath that he has no interest in said money, and does not believe that the pensioner has disposed of the same to any other person, and that any person who shall falsely take said oath shall be guilty of perjury. Then follow, in section 33, the provisions of section 4746, Rev. St., denouncing it as a crime to procure the making or presentation of any false affidavit. In other words, section 32 is a perjury statute, and punishes the person who makes the false affidavit described, while section 33 punishes the suborner who procures the false affidavit to be made or presented.

Another objection urged to the second count, is its failure to allege that said affidavit was presented in support of a claim then pending. This objection also seems to be well taken. *U. S. v. Kessel*, 62 Fed. 59. Demurrer sustained.

BOWERS v. PACIFIC COAST DREDGING & RECLAMATION CO. et al.

(Circuit Court, N. D. California. June 7, 1897.)

1. PATENTS—PRELIMINARY INJUNCTION—PRIOR ADJUDICATION.

A preliminary injunction will be granted upon a patent which has been repeatedly sustained, after long, arduous, and expensive litigation, if infringement is shown, unless defendants produce new evidence of invalidity of such a conclusive character that, if introduced in the former cases, it would probably have led to a different conclusion. The burden of establishing this rests on the defendant, and every reasonable doubt will be resolved against him.

2. SAME—DREDGING MACHINES.

The Bowers patent, No. 318,859, for a dredging machine, *held* valid and infringed, on motion for preliminary injunction.

This was a bill in equity for infringement of letters patent No. 318,859 and No. 318,860. Motion for a preliminary injunction.

John H. Miller, for complainant.

R. Percy Wright, for defendants.

MORROW, Circuit Judge. This is a bill in equity brought by A. B. Bowers against the Pacific Coast Dredging & Reclamation Company and John Hackett, to restrain the defendants, their agents and employes, from infringing United States letters patent No. 318,859 and No. 318,860, granted in 1885 to the complainant, Alphonzo B. Bowers, for certain inventions, respectively, in a dredging machine, and in the art of dredging. It is objected on the part of the defendants that complainant's patents, alleged to have been infringed, have been anticipated by prior devices, and evidence in support of that contention has been introduced. The motion is directed chiefly to letters patent No. 318,859, which will be found fully and clearly described in the opinion of Judge McKenna in the case of *Bowers v. Von Schmidt*, 63 Fed. 572. The complainant, in his affidavit for a preliminary injunction, deposes, among other things, that a certain dredging ma-

chine operated by the defendants is "a direct and palpable infringement upon claims 2, 9, 11, 12, 16, 22, and 26 of letters patent No. 318,859, sued on in this case." The motion is, however, directed specifically against the infringement of claim 16, which is as follows:

"A dredge boat and oscillating section of a conduit discharge flexibly joined to a nonoscillating section, to allow said boat to feed forward, and said oscillating section to swing upon the flexible joint connecting said oscillating and nonoscillating sections."

The validity of letters patent No. 318,859 has been heretofore adjudicated upon. *Bowers v. Von Schmidt*, 63 Fed. 572, affirmed, on appeal, 25 C. C. A. 323, 80 Fed. 121; *Bowers Dredging Co. v. New York Dredging Co.*, 77 Fed. 980. The rule of law which applies to the issuance of a preliminary injunction where the validity of a patent has been repeatedly sustained by prior adjudications, and especially after a long, arduous, and expensive litigation, is that the only question open in a subsequent suit against another defendant is that of infringement. The consideration of other defenses is postponed to the final hearing. *Edison Electric Light Co. v. Beacon Vacuum Pump & Electrical Co.*, 54 Fed. 678, and cases there cited. The only exception to this general rule appears to be where the new evidence is of such conclusive character that, if it had been introduced in the former case, it probably would have led to a different conclusion. But the burden of establishing this rests on the defendant, and every reasonable doubt must be resolved against him. *Edison Electric Light Co. v. Beacon Vacuum Pump & Electrical Co.*, *supra*, and cases there cited. See, also, *Edison Electric Light Co. v. Electric Manuf'g Co.*, 57 Fed. 616, affirmed, on appeal, 10 C. C. A. 106, 61 Fed. 834. The same rule has been followed in this circuit. *Norton v. Can Co.*, 57 Fed. 929; *Earl v. Southern Pac. Co.*, 75 Fed. 609.

Such being the rule on motions for preliminary injunctions, we next inquire whether the evidence produced by the defendants is sufficient to come within the exception. The new evidence upon which the defendants rely is, substantially, that certain prior patents now offered in evidence either anticipate the Bowers patents, or so far modify them by construction that there is no infringement on the part of the defendants. The chief devices which, it is claimed, anticipate the Bowers patents, are: (1) The English patent of Schwartzkopff, No. 350, of 1856; (2) the English patent of Bodmer, No. 907, of 1858; and the American patent of Atkinson, No. 38,544, of 1863. It is contended that they anticipate the Bowers patents, and particularly claim 16 of patent No. 318,859, heretofore described. The evidence produced to support this contention does not convince me that the devices claimed to have been anticipatory of complainant's patents were, in fact, such. It would serve no useful purpose to enter into a minute discussion upon the subject. The time of the court will not permit, and it can be reserved just as well until the case is determined upon a complete and final hearing. The burden of proof is upon the defendants to establish the fact of anticipation beyond a reasonable doubt.

As was well said by Judge Jenkins in *Electric Manuf'g Co. v. Edison Electric Light Co.*, 10 C. C. A. 106, 61 Fed. 834:

"When the patent has been strenuously contested, and its validity determined by a competent tribunal, we think a strong presumption arises in favor of the patent, which imposes upon the contestant the burden of attack. Of course, such prior adjudication does not conclude the question of right, even as to the defenses passed upon, except as between the parties and privies. Such a judgment is not within the principle of *res adjudicata*. It is effective, however, to impress upon the patent such additional presumption of validity that demands of a contestant a quantum and force of evidence, beyond that passed upon in prior adjudication, sufficient to convince the court of the probability that, had such further evidence been presented and considered upon the former hearing, a different result would have been reached. In other words, in such a case the patentee may rightfully rest upon his patented right, confirmed to him by solemn adjudication of a competent judicial tribunal. He who attacks that right must overcome the legal presumption of right in the patentee."

With respect to the defense of anticipation, the same learned judge said:

"In the consideration of such new defense of anticipation, regard should be had to the rule that such a defense is an affirmative one; that the burden of proof is upon him who asserts it; and that the grant of letters patent is *prima facie* evidence that the patentee is the first inventor of the device described therein, and of its novelty. *Coffin v. Ogden*, 18 Wall. 120; *Smith v. Vulcanite Co.*, 93 U. S. 486; *Lehnbeuter v. Holthaus*, 105 U. S. 94; *Cantrell v. Wallick*, 117 U. S. 689, 6 Sup. Ct. 970; *Barbed-Wire Patent*, 143 U. S. 275, 12 Sup. Ct. 443, 450. The propriety of this rule is enforced by the consideration that an adjudication in the case of a patent is not only a judgment *inter partes*, but is a judicial construction of a grant by the government, and, in a broad sense, deals with and determines the rights of the public. A patent is *sui generis*. By it, the public, through its authorized representatives, grants a monopoly for a term of years, in consideration of the surrender of the invention to public use upon expiration of the term. When, upon judicial contest, a competent court has sanctioned the grant, and determined the right thereunder, the monopoly thereby granted ought not to be permitted to be invaded except upon a clear showing that the decision invoked in its favor was wrong. It is true that the prior adjudication does not deal with the supposed new defense, and does not affect the merits of that defense upon final hearing; but the fact that it was not presented, especially where the existence of the claim was known to and considered by counsel, is a circumstance to be considered by the court in passing judgment upon the merits upon the hearing for an interlocutory injunction."

This reasoning is persuasive upon the court, with reference to the application of complainant for a preliminary injunction to protect his rights under his patents. I am not satisfied beyond a reasonable doubt, from the evidence thus far presented, that the various devices produced by defendants were, in fact, anticipatory of complainant's patents, and the fact that these devices were not called to the attention of the court in the *Von Schmidt Case*, for the reason, as stated, that in that controversy each party claimed to be the first inventor, is not, in my judgment, sufficient to justify this court in determining, at this stage of the proceedings, that the Bowers patents have been anticipated. It may be that, upon a full and final hearing upon the merits, the defendants will be able to satisfactorily explain and establish the anticipation of some of the devices for dredging introduced by them; but for the present purpose, upon this application for a preliminary injunction, I must yield to the convincing authority of the repeated adjudications upholding the validity of the Bowers patents involved in this suit. The letters patent were issued in 1885. His rights, under these patents, are therefore fast running, and will

soon expire. Manifestly, it is of the highest importance, after so much litigation, and when the adjudications have thus far been all in favor of the validity of the patents, that complainant's rights thereunder should be fully and effectually protected from further infringement. This can only be done by granting the injunction prayed for.

It is further objected that the Bowers patent is void, because it was issued on a renewal application, and was made to contain claims which were not allowed originally. The same point, however, was passed upon in the Von Schmidt Case, adversely to the contention.

That the defendants have infringed is satisfactorily established by the affidavits, and I so find. With reference to the use, by the defendants, of the dredging boat called the "Oakland," the same dredger was involved in the case of Bowers Dredging Co. v. New York Dredging Co., supra; and Judge Hanford, in granting the motion for a preliminary injunction, said, with respect to the infringing operations of the dredger Oakland:

"The circuit court of appeals gave to the Bowers patent a broad construction, and held machinery constructed according to the specifications of the Von Schmidt patents to be infringements. In comparing the different machines, it is very difficult for me to find infringements in the Von Schmidt machine, and not in the dredger Oakland."

The motion for a preliminary injunction will be granted, upon the complainant's giving a bond in the sum of \$10,000; and it is so ordered.

WESTERN ELECTRIC CO. v. WESTERN TELEPHONE CONSTRUCTION CO. et al.

(Circuit Court, N. D. Illinois. February 10, 1897.)

PATENTS—NOVELTY AND INVENTION—TELEPHONE SWITCHES.

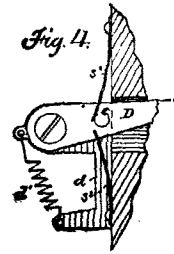
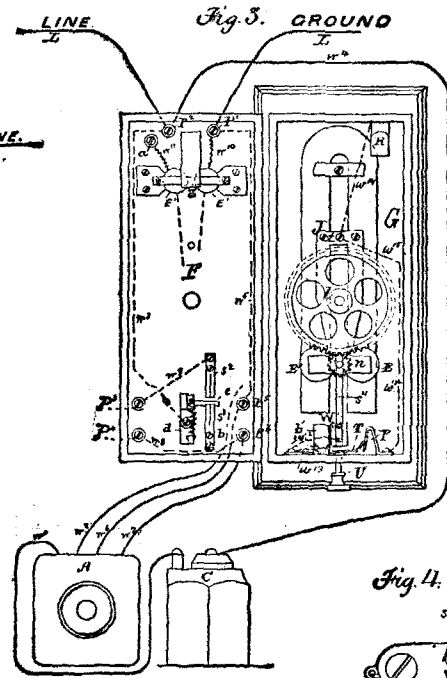
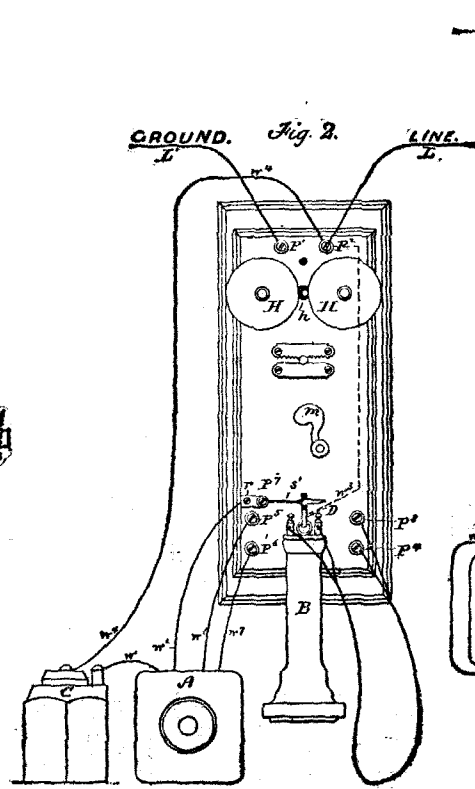
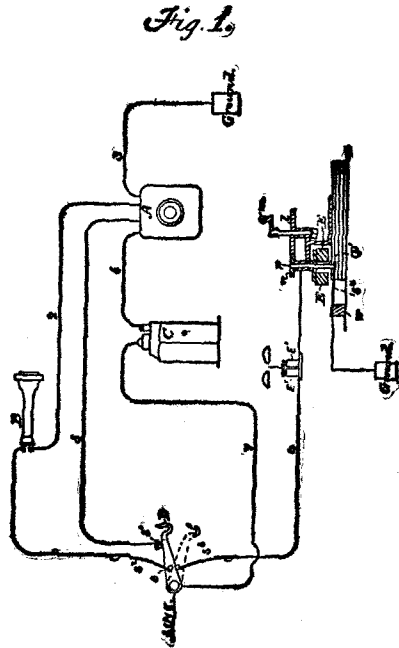
The Watson patent, No. 270,522, for an improvement in telephone switches, is void as to all its claims, in view of the prior state of the art, as involving only clever mechanical expedients in arranging a subscriber's outfit.

This was a suit in equity by the Western Electric Company against the Western Telephone Construction Company, James E. Keelyn, Madison B. Kennedy, and Isador Baumgartl, for alleged infringement of a patent for an improved telephone switch. On final hearing.

F. P. Fish and Barton & Brown, for complainant.
Stanley S. Stout, for defendants.

SHOWALTER, Circuit Judge. The complainant sues for the infringement of letters patent of the United States, No. 270,522, issued January 9, 1883, to the American Bell Telephone Company, assignee of the applicant, one Thomas A. Watson. As stated in the specification, the subject-matter of the invention is "An Improvement in Telephone Switches." I quote further from the specification:

"The invention consists in the use of a single lever in connection with a telephone and a call circuit and proper contact points, in such manner that a movement of the lever in one direction disconnects the call circuit from the main line, brings in the hand telephone and secondary circuit of the transmitter, and at the same time completes the primary local circuit of the transmitter, while a move-



ment of the lever in the other direction cuts out the hand telephone and secondary circuit of the transmitter, and restores the call circuit. The invention consists further in making the lever operative as a switch, as aforesaid, in the form of a hook supporting the hand telephone, and combining therewith a spring, in such manner that taking the hand telephone from the hook causes the lever automatically to disconnect the call circuit, bring in the hand telephone, and secondary circuit of the transmitter, and complete the local primary circuit; while hanging the hand telephone upon the hook causes the lever to automatically cut out the hand telephone and secondary circuit of the transmitter, and restore the call circuit."

The patent contains eight claims, and it is insisted that each claim is valid, and has been infringed. The fourth claim is as follows:

"In combination with a magneto-generator, a main line telephone circuit and a shunt circuit passing through the magneto generator, the push button, U, to break the shunt circuit, substantially as described."

As shown by the specification and diagrams, when a signal call is sent to the office of a subscriber, the current passing over the main line, coming to the stud, t, in the instrument, passes around the magneto-generator through the contact point, T. When a subscriber desires to signal, he breaks the contact at T, by means of a push button, and the current is then sent through the call circuit by means of the magneto-generator, its coils being then in line. If the generator were operated without breaking the contact at T, I suppose there would be a short circuit around the magneto-generator from the point T, through the coils of the magneto-generator to t, thence, by wire w¹⁶ to T. By pressing the push button, U, the current generated by the magneto-generator is necessarily sent through the line. The function of the press button, U, is thus to bring the coils of the magneto-generator into line when the subscriber desires to signal a distant station, and to leave these coils out of line, and so get rid of the resistance which would otherwise be offered by them when a signal is sent to his office. The expedient here shown, as I understand from the evidence, is common and well known to electricians. In the patent, for instance, to T. A. Edison, No. 203,017, the secondary coil is short circuited when the instrument at the subscriber's office is in condition to receive a signal. If this long coil were left in circuit, the resistance would be too great. It is therefore shut out of the circuit when the instrument is not in use, and is in condition for receiving a signal. The movement of the handle, S, away from the point 2, where it ordinarily rests, breaks the short circuit in the Edison patent, and brings the secondary coil into line. In that patent the secondary coil, acted on inductively by the primary coil, is used in the place of a magneto-generator. By throwing the handle, S, to the contact point, 3, a subscriber gives the signal when he wants to communicate with a distant station. The breaking of the short circuit, when the magneto-generator is to be used in the patent in suit, is accomplished substantially in the same way in the Edison patent, and the same purpose is in view in both cases, namely, to keep the long wires of the magneto-generator in the one case, and of the secondary coil in the other, out of the circuit, in order to get rid of the increased resistance.

In view of the evidence here, and of the patents introduced, I see no novelty in the combination of the fourth claim; nor, for substantially the same reasons, is there any novelty in the fifth claim. I may add, also, as respects the fifth claim, that it is rather an aggregation than a patentable combination. The push button, in connection with the call circuit, serves to bring into line and shut out of line the magneto-generator; but the switch lever and its contacts serve to combine the three circuits,—the call circuit, the local circuit, and the telephone circuit; that is, to break the call circuit, and put it out of use, when the other two circuits are in use. These three circuits are made and broken by means of the switch lever, but the push button has nothing to do with the operation of that lever. No modified result follows from any combination of the push button in the call circuit with the switch lever. When the subscriber wishes to give a signal at a distant station, he does not touch the switch lever or hook; nor, when a signal is sent to him from a distant station, is the switch lever or hook in that operation manipulated in any way at either station. The switch lever, so far as the signal or call circuit is concerned, is simply part of the circuit. That circuit could be used merely for signaling purposes independently of the rest of the machine. For that purpose, the switch lever or hook has no function whatever, as already said, except as a mere part of the circuit. The function of the shunt circuit, push button, and magneto-generator is limited to the call circuit, and the hook or switch lever serves no function as a hook or switch lever in connection with the push-button, the magneto-generator, and the shunt circuit. The claim, therefore, joining the switch lever with its contact points (whereby, according to the position of the switch lever, it completes either the call circuit or the telephone circuit), with the magneto-generator, the shunt circuit, and the push button in the call circuit, is an aggregation, rather than a patentable combination. But, at all events, my opinion is that there is no novelty in either the fourth or the fifth claim, in view of the evidence shown in the record.

The first claim is in words following:

"In combination with suitable contact points and springs electrically connected with the call circuit and the primary and secondary circuits of the transmitter, the latter circuit including the hand telephone, a lever electrically connected with the main line in a telephone circuit, substantially as described, to bring in the hand telephone and transmitter, and break the call circuit, or to cut out the hand telephone or transmitter, and establish the call circuit, according as the lever is moved in one direction or the other."

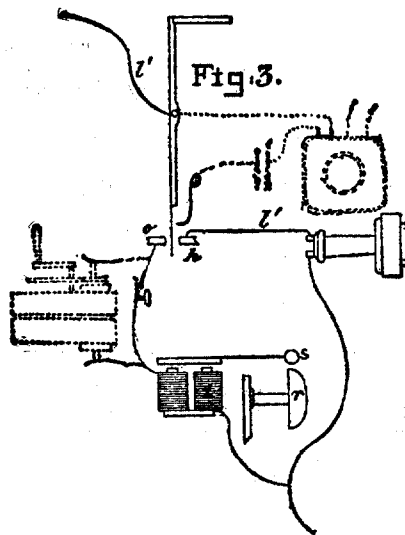
The second and third claims show, in addition to what is set forth in the first, the hook and the spring by which it is thrown up when relieved of the weight of the hand telephone. The sixth, seventh, and eighth claims are apparently covered by the first, second, and third.

On the showing of the drawings and specification, when a subscriber is not using his telephone, it hangs on a movable hook, which is the end of the lever. The hook then rests in such a position that the call circuit is complete. By removing the weight of the telephone from the hook, a spring throws the hook up, and, by means of two contact points, two electrical circuits are established,—one, the

local, and the other, the circuit to line. The function of the local circuit is to create the electrical current in the telephone circuit by induction. This special use of a local current, in connection with a transmitter, for inducing the current in the main line, is not of itself claimed in this patent. The patentee Watson was not the inventor of the same. What he does in the patent in suit is to utilize these two currents in connection with the call circuit. Prior to the times when a separate transmitter was made use of, the telephone was used both as a receiver and as a transmitter, and, instead of the three circuits, there was only the call circuit and the telephone circuit. While the art was in this condition, patent No. 209,592 was issued to the same T. A. Watson, and patent No. 215,837 to one Hilborne L. Roosevelt. In the last-named patent there was a spring, S, fixed horizontally, with one end swinging between two contact points. On a hook attached to this spring the telephone was suspended. Its weight kept the end of the spring on the lower contact point. When it was taken up for use, the end of the spring, being relieved of its weight, passed to the other contact point, and the call circuit was completed. The signal being given, and the weight of the telephone at the remote station being then taken from the spring, the call circuit was broken, and the telephone circuit was established. Instead of the spring, S, a lever pivoted at the fulcrum and with a coiled spring, to antagonize the weight of the telephone, might have been made use of in such a way that, when the telephone was hung up, one end of such lever would be pulled down to the contact point, A, and, when the telephone was taken down for use, the spring would throw the lever end away from the contact point A to the contact point B. It may also be suggested, in connection with the device of the Roosevelt patent, that either the line for the call circuit, or that for the telephone circuit, might, by means of a local circuit, have been supplied with current by induction, and two contacts above or two below might have been made use of in connection with the lever already suggested to break and complete these circuits as required. In other words, the patent to Roosevelt shows a switch, S, swinging between contact points, whereby the subscriber himself, by taking up the telephone for use, unconsciously causes said switch to leave one contact point, and pass to another. For this switch, S, as suggested, a lever might have been substituted, and another contact point might have been added. The idea of using the weight of the telephone to keep the instrument in readiness for a signal, and of making all necessary connections, by simply taking down the telephone for use in answer to the signal, is found in the Roosevelt patent.

In patent No. 209,592, a lever was suspended vertically on a pivot, with its lower end swinging between two contact points. From its upper end horizontal arms were extended, and between these the telephone, when not in use, was hung. The weight of the telephone kept the lower end of the lever in connection with the contact point, whereby the call circuit to the subscriber's office was completed when the telephone at a distant station was taken down. When the telephone at the subscriber's office was lifted from its position for use, the lower half of the lever, by means of a spring, was thrown towards

the other contact point; and, by that means, first a signal was made at the distant station, and then, the telephone being also taken down at the latter station, the telephone circuit was established. In the patent in suit a separate transmitter, involving a local circuit, in connection with a telephone circuit, is made use of. Instead of the two contact points of patent No. 209,592, three contact points are required; and when the lever swings from the call circuit, by means of the two contact points, both the local circuit and the transmitter circuit are completed. The witness Bain has made a diagram in connection with Fig. 3 of the patent No. 209,592, whereby he has added the two contact points, and has arranged the three circuits, including the magneto-generator with its push button in the call circuit.



It is said on behalf of complainant that the ends of the wires of the secondary coil of the transmitter were left in the air. It is obvious that by bringing these two wires down below the telephone in that figure, cutting the telephone wire, and inserting their ends, the secondary coil of the transmitter is brought into line with the telephone; and, in my judgment, Fig. 3, as amended by the witness Bain, shows all of the elements of claim 1 of the patent.

In view of the state of the art, as indicated in this record, and which I deem it needless to further enlarge upon, my judgment is that there is no novelty or invention in any one of the eight claims; nothing more than the use of clever mechanical expedients in arranging a subscriber's outfit. The bill is therefore dismissed for want of equity.

THE JOSEPH B. THOMAS.

JENSEN v. THE JOSEPH B. THOMAS.

(District Court, N. D. California. April 26, 1897.)

1. EVIDENCE—PRESUMPTIONS—FAILURE TO CALL WITNESS.

Failure of defendant to call as witnesses employes, who, as shown by other evidence, may probably have committed an act of negligence resulting in the injury complained of, raises a presumption that their testimony, if produced, would be unfavorable.

2. NEGLIGENCE—PERSONAL INJURIES—PROXIMATE OR EFFICIENT CAUSE.

It is no defense to an action for a negligent injury that the negligence of a third person, or an inevitable accident, or an inanimate thing, contributed to the injury, if the prior negligence of the defendant was the efficient cause of the injury.

3. SAME—MASTER AND SERVANT.

An employer is liable for the concurring negligence of himself and a fellow servant of the injured employe to the same extent as if the injury had been caused entirely by his own negligence. This rule prevails in admiralty as well as at common law.

4. SHIPPING—INJURY TO STEVEDORE—LIABILITY OF VESSEL.

The owners of a vessel owe a personal duty to the members of a stevedore's gang to provide reasonable security against dangers to life or limb.

5. SAME.

The placing by one of the crew of an empty water keg upon the loose hatch covers at the side of the hatch, to dry after painting, in a position where an accidental shock or jarring of the covers may tip it into the hatch while stevedores are working in the hold, is such negligence as renders the vessel liable for injury so caused to a stevedore.

6. NEGLIGENCE—PERSONAL INJURIES—PRESUMPTION FROM OCCURRENCE OF ACCIDENT.

The occurrence of an injury may itself, in connection with other circumstances, sufficiently show negligence to justify a judgment for damages, when the thing causing the injury is under the management of defendant, and the accident is such as, in the ordinary course of things, does not happen if ordinary care is used by those having the management.

Libel in rem to recover \$10,000 as damages for personal injuries alleged to have been sustained in consequence of the negligence of the master of the vessel, and of those intrusted by the owners of said vessel with its care and management.

Frank P. Prichard and Walter G. Holmes, for libellant.

Andros & Frank, for claimants.

MORROW, District Judge. This is a libel in rem against the ship Joseph B. Thomas to recover the sum of \$10,000 as damages for personal injuries alleged to have been sustained in consequence of the negligence of the master of the vessel, and of those intrusted by the owners of said vessel with its care and management. The libellant was one of a gang of stevedores engaged in loading the ship Joseph B. Thomas at the port of Philadelphia, and was injured on the afternoon of April 11, 1892, while at work in the lower hold of the vessel, under the forward hatch. The gang of stevedores, including the foreman, consisted of 14 men. They had been engaged in loading case oil. At the time of the accident most of the men, including the

libelant, were at work in the lower hold, under or near the forward hatch, engaged for the most part in tearing up a stage which had been put up in the hold in order to render the work of loading more easy. The testimony indicates that 9 of the gang of 14 men were located in the place just referred to; that the foreman and 2 other men were in the between-decks, at the forward hatch; that the burden tender was at the main hatch, some 50 feet away; and that the engineer was on the wharf. The hatch covers, consisting of three pieces, had been taken off that morning, presumably by the stevedore's gang, although it does not appear which of the men performed that service. They were piled one on top of the other, forward of the forward hatch on the main deck, and, so far as the evidence discloses, were piled in the usual and proper manner. It is true that the second mate, who testified on behalf of the claimants, stated that he noticed that day that the hatch covers were improperly piled up, but I am unable to accept this testimony, uncorroborated by any other witness, as I seriously doubt the credibility of the testimony of the second mate in other material respects. These hatch covers were somewhat curved. The hatch combings were about 9 or 10 inches high, and the covers, piled one on top of the other, were nearly flush with the hatch combings. A keg belonging to the ship, which had been freshly painted, was placed by some one on these hatch covers to dry. This keg was knocked over into the hatchway, and, in its fall, struck the libelant on the head, inflicting some very severe injuries. Before referring to the testimony on both sides as to the manner and the cause of libelant's injuries, it is proper to say that no question of contributory negligence is raised in the case. The libelant was in the lower hold, under the forward hatch, where he had a right to be, and was then in the discharge of his duties as one of the gang of stevedores. The libelant contends that he was injured by reason of the negligence of those then in charge of the vessel in placing the keg on the hatch covers at too close proximity to the hatchway, into which, if accidentally jarred or moved, it was liable to roll or fall, to the danger of those of the stevedore's gang who were working below under the hatchway. It is further claimed in this connection that the keg was knocked over by some one connected with the vessel, while hastening to assist the second mate to climb up out of the forward hatch from the between-decks to the main deck. On the other hand, the claimants contend that the person who knocked the keg over was one of the stevedore's gang, and a fellow servant of the libelant, and that, therefore, the vessel is not responsible in law for any injuries sustained to the libelant thereby. The testimony is irreconcilably conflicting. In this connection the evidence of two witnesses, not connected with the ship nor with the stevedore's gang, who happened casually to be on board the vessel at the time the libelant was injured, is of great importance in enabling the court to arrive substantially at the real state of facts. These two witnesses, so far as the evidence discloses, appear to be disinterested. It may also be observed at the outset that the testimony of the libelant himself is of little value in determining how and through whose fault the injury arose. All that

he knows about the accident is that he was at work in the lower hold, under the fore hatchway, when a keg fell and struck him on the head, rendering him unconscious. The testimony of the two witnesses just referred to is as follows: John F. Fitzgerald testified: That he was employed along the wharf by the Pennsylvania Railroad Company. That on the 11th of April, 1892, he went on board the ship Joseph B. Thomas. That he went on board with a young man who desired to obtain a piece of rope. That at the time of the accident he was standing right over the hatch. That "the mate was between-decks, and he started to come up to get on the main deck. Mr. O'Donnell was helping him up, to get up on the main deck. A young fellow on the ship started to run around to help the mate to get him up on the main deck, and he tread on that hatch, and that hatch upset the barrel, and the barrel fell down in the hold. It wasn't a barrel. It was a keg." That the keg was standing "right on the corner of the hatch. The hatches were taken off, and then put one on top of the other, and the keg set over; and, when you tread on that corner of the hatch, that turned the keg over, and it rolled down the hatch before anybody could get hold of it." He stated that the person who trod on the hatch was "a young man belonging to the ship." On cross-examination he reaffirmed several times the answer that it was a young man belonging to the ship who stepped on the hatch covers, and that he had seen him several times before that on deck, having had, previously, occasion to go on board the vessel. He frankly admitted, however, that he did not know the young man's name, and he did not know in what capacity he was employed on board the vessel. He did not know "whether he lived there or not. Sometimes they live ashore. Sometimes they sleep aboard and eat ashore." William B. Gray, the person who accompanied the witness Fitzgerald on board the vessel, and was present when the accident occurred, testified:

"I went aboard for a piece of rope. I asked Mr. O'Donnell, the boss of the stevedores, and he said he hadn't any, and called to the mate. The mate said he would get me a piece. The mate was about climbing up the forward stanchion of the ship to the main deck. The hatching was laying there (that is, the covering of the hatch was laying forward of the hatch), and the cask sitting on the covering of the hatch; and, as the mate came up to get hold of the combings, Mr. O'Donnell gave him a lift, and one of the men helping him there (I supposed him to be a sailor) tread on the end of the hatch, and threw the cask up in the air, and it went down in the hold. Mr. O'Donnell was helping the mate."

On cross-examination he states that he was standing aft of the forward hatch; that he cannot swear with any certainty who it was that stepped on the hatch covering; that he would not swear that the person who did step on the covering was a sailor connected with the ship. On redirect examination he states that he could not tell whether the man who upset the cask was a full-grown man, as, from where he was standing, he could not see him at all. This version of the accident given by these two witnesses is corroborated by the testimony of the foreman of the stevedore's gang, and at least two of the stevedores themselves. O'Donnell, the foreman, thus describes the accident:

"After I got the stage up, I used short wood to chock it, and the second mate of the ship jumped down to see how much short wood I was using. He came down to see whether I was using too much. He stood there a minute, and said it was all right. He started to climb up the forward stanchion of the forward hatch. He got up as far as the combings, when he put his hand over, and sung out to a boy, to the best of my knowledge, to give him a hand to pull him over, and that's all I could see of it. I gave him my hand, put it under his foot to help him over, and I heard somebody halloo, 'Under!' and when I looked down the hatch I saw this man laying on the floor of the ship; that is, Jensen."

On cross-examination he reaffirmed the statement that the mate (meaning the second mate) was in the between-decks. He was unable, however, to say who it was that went forward to help the mate up, as he was in the between-decks. Martin Ryan, one of the stevedores, testified that he was in the lower hold, tearing up the oil stage, and he relates what he saw of the accident as follows:

"All I saw, I saw the second mate climbing up from between-decks on the upper deck, under the gallant forecastle. The next I heard was, 'Look out below!' I jumped into the wing of the vessel to get out of the way, and I looked around; and I saw the keg laying there, and Jensen laying down."

Chris. Nelson, another of the stevedores, stated that he was in the between-decks, helping O'Donnell, the foreman. In answer to the question, "State all that you know of the accident," he replied:

"There was no ladder in the hatch. The second mate came down the stanchion, sliding down on the stanchion, and he went up the same way, and as he went up this keg came down. He hallooed to one of the boys or young men belonging to the ship to help him out of the hatch, and Mr. O'Donnell, the foreman, helped him up, and the keg came down, and that's all I know."

He admits on cross-examination that he didn't see who it was that came to the assistance of the second mate. In reply to the question put to him on cross-examination, "Did you see that keg before?" he replied:

"Yes, sir; I saw it that forenoon. A young man was sitting, painting it, and set it there to dry on the hatches. Q. Which end was it on? A. On the forward part of the hatch covering,—on the port side."

This constitutes the testimony on the part of the libellant indicating how the accident happened. As against this evidence, the second and third mates testified substantially as follows: Edward Peterson stated that he was the second officer of the vessel at the time; that when the libellant was injured he (the second mate) "was up alongside the hatch combing on the main deck"; that the third mate was a little away from him. He thus describes the accident:

"There was a little keg standing on one corner of the hatch cover,—on the port corner of the hatch cover; and one of the men happened to touch the top hatch cover on the starboard side, and through that it started the keg off the hatch cover, and the keg went down through the hatch and struck the man. * * * Q. Who was the man that trod on this hatch cover? A. One of the stevedore's men. Which one it was, I cannot say. Q. It was one of the stevedore's men, but you do not know his name? A. No, sir; I did not take particular notice which one it was. Q. Were any others of the stevedore's men underneath the topgallant forecastle, except this one that trod on the hatch? A. I don't think there was. Q. What was this stevedore's man doing when he trod upon the hatch cover? A. I don't know exactly what he was doing. He just happened to come along and touch the hatch cover. Either he was going down the hatch, or what he was going to do I don't know. I know he just happened to touch the hatch cover the least mite."

On cross-examination he testified as follows:

"Q. What were you doing at the forward hatch at that time? A. I was not doing anything. I was doing something under the top forecandle, and stopped to look down in the hatch to see what they were doing. We were taking in cargo, and I looked down occasionally while they were taking in cargo. * * * Q. What were you doing under the forecandle head? A. I don't exactly recollect what I was doing. I had underneath there two boys and the third mate, finishing something I was doing. I cannot recollect now what I was doing. There is always something."

Henry Hannum testified that he was the third mate of the vessel; that at the time the libelant was injured he was standing under the topgallant forecandle, about three feet away from the forward hatch, and that he was looking right over the hatch; that one of them trod on the hatch, and the hatch tilted, and the keg rolled off and fell down; that one of the stevedore's men trod on the hatch; that he thinks one of the boys connected with the ship was also under the topgallant forecandle, besides the second mate and himself; that he thinks that the man who trod on the hatch came out of the water-closet; that he does not know the name of this man. This witness was subsequently recalled, and deposed as follows:

"Q. Just at and immediately before the time that the cask fell into the hold, by which Jensen was injured, had the second mate come up from the between-decks? A. No, sir. Q. If, just at the time that the cask fell into the hold, by which Jensen was injured, the second mate came up from the between-decks through the fore hatch, could you have seen him? A. Yes, sir. Q. If any stranger from the shore had come in on the main deck under the topgallant forecandle, and had asked the second mate to give him a piece of rope, in your opinion, would you have heard him? A. Yes, sir. Q. Did any person from the shore come on board the ship just before the accident happened, under the topgallant forecandle, and request the second mate, or any other person there, to give him a piece of rope? A. No; I didn't see anybody, and there was nobody there. Q. Did any person belonging to the ship, as one of the company of the ship, tread on the hatch covers, by reason of which the cask by which Jensen was injured was precipitated into the hold? A. No, sir. * * * Q. A witness by the name of John F. Fitzgerald has testified in this case as follows: 'That at the time of the accident the mate was between-decks, and he started to come up to get on the main deck. Mr. O'Donnell was helping him up to get on the main deck. A young fellow on the ship started to run around to help the mate to get him up on the main deck, and he trod on that hatch.' Is that true? A. No, sir."

It is clear from the testimony of this last witness, and that of the second mate, that either the testimony of the witness Fitzgerald and of the person who accompanied him on board the vessel, as well as the corroboratory testimony of the foreman, O'Donnell, and of the two stevedores, is false, or else the testimony of the second and third mates is absolutely untrue. After a careful consideration of the evidence in the whole case, I prefer to accept the testimony of the witness Fitzgerald, corroborated as it is by that of Gray, O'Donnell, Ryan, and Nelson, as presenting the real state of facts. I reach this conclusion, not for the reason alone that the number of witnesses on the part of the libelant is greater than that for the claimants, but largely from the inherent probabilities and improbabilities of the two stories. In the first place, every one connected with the stevedore's gang on that day was called by the libelant, and not one of them stated that he was the person who trod on the hatch cover. On

the contrary, each one of them related where he was working at the time of the accident, and not one of them was on the main deck except the burden tender, John F. Davidson; and he testified that he was at the main hatch, not the fore hatch, some 50 feet away, thereby precluding any inference that it might have been one of the stevedores who stepped on the hatch covers. On the other hand, it is a significant fact that the two young men, or "boys," so called, who, it was testified to by the second and third mates, were on board at the time, and were connected with the vessel, were not called by the claimants; nor does it appear that any particular effort has been made to obtain their depositions, although they remained with the vessel until she reached San Francisco, where the depositions of the second and third mates were taken. The captain himself admits that they remained by the ship some three or four days; that they were paid off the third day after the ship arrived. Their testimony would have been most important in dissipating any doubt as to who it was that stepped on the hatch cover; particularly in view of the fact that the testimony of the witnesses called for libellant, while it fails to identify specifically who it was that trod on the hatch cover, indicates that the person who did so was a young man. The very strong inference which naturally arises from this testimony, in view of the testimony produced on behalf of the claimants themselves, that two young men were attached to the vessel and were then on board, and at the time of the accident were quite close to the fore hatch, is that this person must have been one of the two young men referred to. The failure of the claimants to call these two young men, and the explanation sought to account for this failure, are unsatisfactory, and do not dispel the presumption raised against the claimants, that the testimony of these witnesses, if produced, would have been unfavorable. This is a well-settled rule of evidence, not only in civil, but also in criminal, cases. As was well said by Lord Mansfield in *Blatch v. Archer*, Cowp. 63, 65:

"It is certainly a maxim that all evidence is to be weighed according to the proof which it was in the power of one side to have produced, and in the power of the other side to have contradicted."

Mr. Starkie, in his work on Evidence (volume 1, p. 54), thus lays down the rule:

"The conduct of the party in omitting to produce that evidence in elucidation of the subject-matter in dispute which is within his power, and which rests peculiarly within his own knowledge, frequently affords occasion for presumptions against him, since it raises strong suspicion that such evidence, if added, would operate to his prejudice."

See, also, *Com. v. Webster*, 5 Cush. 295, 316; *People v. McWhorter*, 4 Barb. 438; *Railway Co. v. Ellis*, 10 U. S. App. 640, 4 C. C. A. 454, and 54 Fed. 481.

In the last case it was held that the failure to produce an engineer as a witness to rebut the inferences raised by the circumstantial evidence would justify the jury in assuming that his evidence, instead of rebutting such inferences, would support them. The failure of the claimants to obtain the testimony of these two young men confirms my conviction that the person who ran to the assistance of

the second mate, and stepped upon the hatch cover, was one of the young men, or "boys," so called, who belonged to the vessel, and were on board at the time. It seems but natural that, when the mate called for help, one of the young men who were under the topgallant forecandle, not very far away from the fore hatch, should respond with such alacrity to his superior's call. I conclude, therefore, that it was one of these young men, and not one of the stevedores, who stepped on the hatch covers, upsetting the keg, and that in no view of the case can the act of tipping the hatch cover, and causing the keg to roll into the hatchway, be construed as the act of a fellow servant.

But it is immaterial, in my opinion, whether the person who stepped on the hatch cover was one of the young men connected with the vessel, or whether it was one of the stevedores, if the act of placing the keg on the hatch cover to dry was a failure to observe ordinary care, or, in other words, was culpable negligence, on the part of those connected with the vessel; for it is well settled that it is no defense in an action for a negligent injury that the negligence of a third person, or an inevitable accident, or an inanimate thing, contributed to cause the injury of the plaintiff, if the negligence of the defendant was the efficient cause of the injury. 16 Am. & Eng. Enc. Law, p. 440, and cases there cited. Shearman & Redfield, in their work on Negligence (3 Ed., § 10), give the general rule as follows:

"Negligence may, however, be the proximate cause of an injury of which it is not the sole or immediate cause. If the defendant's negligence concurred with some other event (other than the plaintiff's fault) to produce the plaintiff's injury, so that it clearly appears that but for such negligence the injury would not have happened, and both circumstances are closely connected with the injury in the order of events, the defendant is responsible, even though his negligent act was not the nearest cause in the order of time."

Thompson, in his work on Negligence (volume 2, p. 1085), says:

"Where an injury is the combined result of the negligence of the defendant and an accident for which neither the plaintiff nor the defendant is responsible, the defendant must pay damages, unless the injury would have happened if he had not been negligent;" citing a number of cases in a note.

It is also another rule of the law of negligence that the employer is liable for the concurring negligence of himself and a fellow servant of the injured employé to the same extent as if the injury had been caused entirely by his own negligence. *Railway Co. v. Cummings*, 106 U. S. 700, 1 Sup. Ct. 493; *Railway Co. v. Sutton*, 11 C. C. A. 251, 63 Fed. 394; *Railway Co. v. Chambers*, 15 C. C. A. 327, 68 Fed. 148, 153, and cases there cited. The same rule prevails in admiralty. *The Phoenix*, 34 Fed. 760. In the case of *City of Clay Centre v. Jevons*, 44 Pac. 745, 2 Kan. App. 568, it was decided that where the plaintiff had not been guilty of contributory negligence, and the injury complained of would not have resulted but for the negligence of the defendant, a recovery may be had, notwithstanding the primary cause of the injury may have been an accident for which the defendant was not responsible. In *Benjamin v. Railway Co.* (Mo. Sup.) 34 S. W. 590, it was held that, where the plaintiff was injured by the tilting of the cover of a manhole maintained by the defendant

in the sidewalk in front of his premises, the fact that an independent contractor, who delivered coal to the defendant, negligently failed to replace the cover properly, will not relieve defendant from liability, if the negligent construction of the cover directly contributed to plaintiff's injury. Under these rules of law, the important inquiry, manifestly, is whether the act, by those in charge of the vessel, in placing the keg on the hatch covers to dry at such close proximity to the hatchway, was negligence, and whether such negligence concurred with the accidental tipping of the hatch covers to produce the injury to the libellant. The claimants owed a duty to libellant, as one of the stevedore's gang, to provide reasonable security against danger to life or limb. *The Kate Cann*, 2 Fed. 241, 245; *The Helios*, 12 Fed. 732; *The Max Morris*, 24 Fed. 860; *The Guillermo*, 26 Fed. 921; *The Phoenix*, 34 Fed. 760; *Crawford v. The Wells City*, 38 Fed. 47; *The Nebo*, 40 Fed. 31; *The Terrier*, 73 Fed. 265; *Leathers v. Blessing*, 105 U. S. 626. See, also, *The Frank*, 45 Fed. 494, where many of the authorities are cited. This duty is a personal one. *Railroad Co. v. Baugh*, 149 U. S. 368, 386, 13 Sup. Ct. 914; *The Pioneer*, 78 Fed. 600, 608. In *Clark & L. Torts*, pp. 370-376, it is stated that:

"The owner of premises owes a duty towards those whom he invites there, to take care to see that the premises are in a fit state of repair; and if, owing to his omission to exercise care in this respect, bricks or tiles, or other portions of the structure of a building, fall upon them, he is liable. Similarly will he be liable if he negligently leaves some chattel, such as a bale of goods, delicately poised in such a position as to be likely to fall and injure them. * * * To establish the defendant's liability, his negligence need not necessarily have been the immediate cause of the injury. Provided it be a substantial part of the cause, he will be none the less liable because the injury may have been contributed to by the intervening negligence of a third person. *Abbott v. Macfie*, 2 Hurl. & C. 744; *Clark v. Chambers*, 3 Q. B. Div. 327."

While there is no direct testimony that the keg was placed on the hatch covers at such close and dangerous proximity to the hatchway by some one connected with the vessel, still the strong probabilities of the situation, and the natural and reasonable inference to be drawn therefrom, convince me that it was placed there by some person connected with the vessel. It is difficult to imagine how else it could have got there; for, although every one of the stevedore's gang was called as a witness, not one of them deposed that he had placed it there. In fact, it did not belong to them. It was the property of the vessel, and was used to contain drinking water. Nelson, one of the stevedores, testified that he saw a young man painting this identical keg the morning of the accident, "and set it there to dry on the hatches." The failure to call these two young men not only leaves us without their testimony on this point, but, under the rule of evidence heretofore referred to, raises a presumption against the claimants that their testimony, if produced, would have been unfavorable. As the witness Nelson has not been contradicted, I think it may safely be assumed that the keg was placed on the hatch covers to dry by the same "young man" who was engaged in painting it the morning of the accident, and who was connected with the ship. Perhaps the most significant circumstance is the fact that

it belonged to the ship. That this, under the circumstances of the case, was such negligence as to render the claimants liable for the consequential injury to libelant, is, I think, clearly established by the testimony. It was certainly a dangerous place to put the keg to dry. It was dangerous to those working under the hatchway. The event itself demonstrates this feature of the case. The mere fact that loading was going on should have been sufficient to indicate to those in charge of the vessel the danger of placing and leaving a small, empty keg, liable to be easily knocked over, on the hatch covers, at such close proximity to the hatchway. The testimony shows that the hatch covers, three in number, were laid one on top of each other, and the topmost one was nearly level with the hatch combings. The risk, therefore, of the keg being tipped or knocked into the hatchway, should have been apparent. And the negligence was all the more culpable, in that the hatch covers were somewhat curved,—that is, there was “a little crown to the hatch” (testimony of the second mate),—making the liability of a small, empty keg being tipped or overturned all the more imminent, and dangerous to those working under the fore hatch. It was this negligence which was the real, efficient cause of the accident; and it was, in my estimation, such negligence that a man of ordinary experience and intelligence could and should have foreseen the results that probably might ensue. *Shear. & R. Neg.* (3d Ed.) § 10.

Counsel for the claimants contends that there is not sufficient evidence of negligence to justify fastening any responsibility upon the claimants for the injury to the libelant, and that the latter has failed to prove any negligence on the part of those in charge of the vessel. It is undoubtedly true that, in actions for injury resulting from the negligent acts of others, the burden is on the plaintiff to make out a *prima facie* case of negligence; but it is also true that there is a class of cases where the act of injury itself, in connection with other facts and circumstances, sufficiently establishes that there was negligence to justify a judgment for damages. The general rule is well stated in *Scott v. Docks Co.*, 3 Hurl. & C. 596, 601, by Erle, C. J., as follows:

“There must be reasonable evidence of negligence. But where the thing is shown to be under the management of the defendant or his servants, and the accident is such as, in the ordinary course of things, does not happen if those who have the management use proper care, it affords reasonable evidence, in the absence of explanation by the defendants, that the accident arose from want of care.”

The case was on appeal in the exchequer chamber from a decision in the court of exchequer in making absolute a rule to set aside the verdict for the defendants and for a new trial. It appeared that the plaintiff, in an action against the dock company for an injury to him by the alleged negligence of the dock company, proved that he was an officer of customs, and that while passing, in the discharge of his duty, in front of a warehouse in the dock, six bags of sugar fell upon him. It was held that this afforded reasonable evidence of negligence to be left to the jury.

In *Byrne v. Boadle*, 2 Hurl. & C. 722, it appeared that plaintiff

was walking in a public street, past the defendant's shop, when a barrel of flour fell upon him from a window above the shop, and seriously injured him. It was held that this was sufficient *prima facie* evidence of negligence for the jury to cast on the defendant the burden of proving that the accident was not caused by his negligence. Pollock, C. B., in delivering the opinion, said:

"The learned counsel was quite right in saying that there are many accidents from which no presumption of negligence can arise, but I think it would be wrong to lay down as a rule that in no case can presumption of negligence arise from the fact of an accident. Suppose, in this case, the barrel had rolled out of the warehouse and fallen on the plaintiff; how could he possibly ascertain from what cause it occurred? It is the duty of persons who keep barrels in a warehouse to take care that they do not roll out, and I think that such a case would, beyond all doubt, afford *prima facie* evidence of negligence. * * * Or if an article calculated to cause damage is put in a wrong place, and does mischief, I think that those whose duty it was to put it in the right place are *prima facie* responsible; and, if there is any state of facts to rebut the presumption of negligence, they must prove them. The present case, upon the evidence, comes to this: A man is passing in front of the premises of a dealer in flour, and there falls down upon him a barrel of flour. I think it apparent that the barrel was in the custody of the defendant, who occupied the premises, and who is responsible for the acts of his servants who had control of it; and in my opinion the fact of its falling is *prima facie* evidence of negligence, and the plaintiff, who was injured by it, is not bound to show that it could not fall without negligence, but, if there are any facts inconsistent with negligence, it is for the defendant to prove them."

In the case of *White v. France*, 2 C. P. Div. 308, it appeared that a bale of goods was left nicely balanced on the edge of a trap-door, and fell upon a passer-by. The occupier of the premises was held liable for negligence in this respect. In *Briggs v. Oliver*, 4 Hurl. & C. 403, the plaintiff, going to a doorway of a house in which the defendant had offices, was pushed out of the way by his servant, who was watching a packing case belonging to his master, and was leaning against the wall of the house. The plaintiff fell, and the packing case fell on his foot and injured him. There was no evidence as to who placed the packing case against the wall, or who caused it to fall. The court held that there was a *prima facie* case against the defendant, to go to the jury. The same doctrine is thoroughly discussed and enunciated in the leading English case of *Kearney v. Railway Co.*, L. R. 5 Q. B. 411, affirmed L. R. 6 Q. B. 759. The rule is the same in this country. An excellent statement of the law, as deduced both from the English and American cases, will be found in the case of *Howser v. Railroad Co.*, 80 Md. 146, 30 Atl. 906. All the leading cases on the subject are reviewed or referred to by the court. There it appeared that the plaintiff, while walking in a footpath along the roadbed of the defendant, but not upon its right of way, was injured by half a dozen cross-ties which fell upon him from a gondola car attached to a train passing on defendant's road. It was held that these facts gave rise to a presumption of negligence on the part of the defendant; and the ruling of the trial court, that upon the pleadings, and the evidence given to the jury by the plaintiff (the defendant not having given any evidence), he was not entitled to recover, was reversed, and a new trial ordered. In the course of a learned opinion, Roberts, J., said:

"Whilst the general rule undoubtedly is that the burden of proof that the injury resulted from negligence on the part of the defendant is upon the plaintiff, yet in some cases 'the very nature of the action may, of itself, and through the presumption it carries, supply the requisite proof.' Whart. Neg. par. 421. Thus, when the circumstances are, as in this case, of such a nature that it may fairly be inferred from them that the reasonable probability is that the accident was occasioned by the failure of the appellee to exercise proper caution, which it readily could and should have done, and in the absence of satisfactory explanation on the part of the appellee, a presumption of negligence arises against it."

The supreme court of California has also enunciated the same doctrine. *Pastene v. Adams*, 49 Cal. 87; *Dixon v. Pluns*, 98 Cal. 384, 389, 33 Pac. 268. In *Pastene v. Adams* it appeared that the defendants were lumber dealers, and that they had piled lumber carelessly, so that the ends of some of the timbers projected more than others into the gangway. While the plaintiff was walking close to the timbers, a stranger drove a team from the yard through the gangway to the street, and in so doing the wheel caught the end of one of the timbers and threw it down, and the plaintiff was injured thereby. In an action brought to recover damages caused by the falling of the lumber, it was held, substantially, that, if the lumber was thus carelessly piled up, the facts that it remained in that condition a long time before the injury, and that the lumber was caused to fall by the negligence of a stranger, were no defense; that the negligence of the defendant concurring with the negligence of a stranger was the direct and proximate cause of the injury. This case is directly in point, not only on the general proposition of the claimants' liability for their negligence concurring with the accidental tipping of the keg, but also upon the point sought to be made by counsel for claimants, that, as the keg had lain on the hatch covers for some hours before the accident, and nothing had happened, its presence there was not dangerous, and was not negligence. In the case cited it appeared that the lumber had been piled up and had lain in a dangerous condition for several months, yet the court held that this would make no difference.

The case of *McCauley v. Norcross*, 155 Mass. 584, 30 N. E. 464, appears to be directly in point. The defendants were erecting a building. The plaintiff, a laborer employed by them, was working on the second floor of this building. On the third floor, some iron beams were so placed near an open hole in the floor that, when the superintendent was passing by, he inadvertently pushed one of the beams with his foot, which fell through the hole, onto the plaintiff below. It was admitted that the plaintiff was engaged in his regular occupation at the time, and that he was in the exercise of due care. The defendants requested the trial court to rule that, upon all the evidence, the plaintiff could not recover. This the court refused to do, and submitted the case to the jury, which returned a verdict for the plaintiff. The only question presented by the bill of exceptions was whether, in any aspect of the case, there was sufficient evidence to go to the jury. The appellate court held that there was sufficient evidence of negligence to go to the jury, and said:

"Upon these facts the jury might find that the iron beams were negligently so placed and left that one of them would be liable, from a slight, inadvertent

push of the foot of a passer-by, to fall through the hole. Being left in this condition for two or three days, the jury might infer a lack of due and proper superintendence. Allowing such things to be negligently left for so long a time in a position where they were likely or liable to be toppled over, and one of them to fall through the hole in the floor, would warrant a finding of negligence on the part of the superintendent in exercising superintendence. * * * If the beams were so left that one of them would be liable, as a natural consequence, from some intervening cause or agency, to be so moved that it might fall through the floor, the fact that an intervening act or agency occurred, which directly produced the injurious result, would not necessarily exonerate the defendants from responsibility. Superintendence is necessary in order to guard against injuries from such intervening and inadvertent acts of careless persons as are likely to happen, and ought to be guarded against. The question is whether the moving of a beam was so likely to occur that it ought to have been provided against by the superintendent. It might be found that the beams were negligently left near the hole in the floor, where they were likely or liable to be toppled over so that one of them might fall through the hole, and thus injure some one below, and that this was the proximate cause of the plaintiff's injury, although some careless person came along and toppled them over;" citing several cases.

See, also, *Johnson v. Bank* (Wis.) 48 N. W. 712.

But it is unnecessary to elaborate further on this feature of the case. The whole proposition upon the burden of proof is thus summed up in *Shear. & R. Neg.* (3d Ed.) § 13:

"The plaintiff is not bound to prove more than enough to raise a fair presumption of negligence on the part of the defendant, and of resulting injury to himself. Having done this, he is entitled to recover, unless the defendant produces evidence sufficient to rebut this presumption. Though it is not every accident that will warrant an inference of negligence, yet it is not true that no accident will suffice for this purpose. If the plaintiff proves that he has been injured by an act of the defendant, of such a nature that in similar cases, where due care has been taken, no injury is known to ensue, he raises a presumption against the defendant, which the latter must overcome by evidence either of his carefulness in the performance of the act, or of some unusual circumstance which makes it at least as probable that the injury was caused by some circumstance with which he had nothing to do as by his negligence."

Under the facts and circumstances of this case, and the authorities referred to, it is my opinion that the act of placing and of leaving the keg, previously described, on the hatch covers, so close to the hatchway that it was liable to be knocked into the hold, and was in fact tipped over and did roll into the hatchway through an intervening cause or agency, was such negligence as to render the claimants, in view of the duty they owed the libellant as a stevedore on board the vessel, liable in damages for the injuries suffered thereby.

It is strenuously contended by counsel for claimants that the injury should be attributed to an inevitable accident, as the stepping upon and tipping of the hatch covers, which caused the keg to roll into the hatchway, was purely accidental, the injurious results of which to libellant could not be reasonably foreseen or apprehended. But this defense cannot be allowed where the negligence of the claimants has concurred with the accident which caused the injury to libellant. "In order to prove that an accident was inevitable, it is not always enough to show that, under the circumstances existing at the time, it could not be avoided. It must also be the fact that the defendant was not in fault in bringing about any of those circumstances." *Shear. & R. Neg.* (3d Ed.) § 5. As was said in *Austin v. Steam-*

boat Co., 43 N. Y. 75: "A party cannot avail himself of the defense of 'inevitable accident,' who by his own negligence gets into a position which renders the accident inevitable." Under the facts of this case, the defense of inevitable accident cannot avail the claimants. *Bridges v. Railway Co.*, L. R. 6 Q. B. 377, 391.

We next take up the question of damages. That the libelant was very seriously injured is clearly established by his own testimony, and that of the physicians who testified. The severity of his injuries is not disputed. His skull was fractured by the blow, resulting in paralysis and permanent injury of a very grave character. It was testified that there was also a possibility of imbecility or insanity supervening as a consequence of the injuries he had sustained, and that his earning capacity had been entirely destroyed, with no prospect of recovery. When injured, he was 29 years of age, and in good health. He was unmarried, and his earnings amounted to \$3 a day as stevedore and longshoreman. I think that, under all the circumstances of the case, and, particularly, in view of the fact that his earning capacity has been destroyed, the libelant should be allowed the gross sum of \$6,000. A decree in that amount will be entered in favor of the libelant, with costs.

THE W. H. GRATWICK.

SCHEELE v. THE W. H. GRATWICK.

(District Court, N. D. Illinois. June 1, 1897.)

COLLISION—MUTUAL FAULT—TOW AND SAIL—Fog.

A schooner collided in Lake Michigan, during a fog, with a barge towed by a steamer. The barge did not ring a bell so as to be heard on the other vessels, and the schooner might have avoided the collision by porting her helm after hearing the steamer's whistle. *Held*, that the damages should be divided between the barge and the schooner, both being to blame.

Libel by Henry Scheele, Jr., against the steamer W. H. Gratwick, and Barge 133, to recover damages resulting from a collision.

Schuyler & Kremer, for libelant.

Goulder & Holding, for claimants.

Hoyt, Dustin & Kelley, for Barge 133.

GROSSCUP, District Judge (orally). The libel is to recover damages growing out of a collision between the schooner Sunrise and Barge 133, in tow of the steamer Gratwick, occurring in the middle of Lake Michigan, nearly opposite the city of Racine, on the morning of May 21, 1896. The Sunrise, a three-masted schooner, was bound to the Straits of Mackinaw, and at the time of the collision was taking a course N. N. W., carrying all her lower sails. The wind was S. S. W., and of sufficient force to drive the Sunrise at from four to five miles per hour. The barge was of the whale-back pattern, without engines for locomotion, and was bound to South Chicago in tow of the steamer Gratwick. The weather was foggy, a fog having set in during the night preceding. The course of the schooner

at the time of the collision was such that it crossed that of the steamer and its tow at an angle of from 3 to 3½ points. The schooner struck the tow line about 75 feet in advance of the barge, and was struck, in turn, on her starboard bow, by the nose of the barge; the stroke being hard enough to carry away the schooner's bow and cause her, within a short time, to sink. The evidence satisfies me that the steamer, before and at the time of the collision, was blowing regularly, at intervals of about one minute, her fog whistle. I am not at liberty to believe from the evidence that the schooner failed to blow her horn. The evidence of the crew all concurs to that effect, and the crew on the steamer and the barge heard at about that time fog signals, which they now say belonged to a schooner that passed them and went astern. The crew on the barge all testify that the bell was rung, each stroke following immediately after the dying out of the steamer's whistle, and that this occurred up to the moment of the collision. None of the three vessels were ever in sight of each other, although the tow line was only 900 feet long, until the barge and the schooner were immediately upon each other. It is singular that the steamer's whistle was not heard earlier by those on the schooner, though the wind being from the south would have a tendency to retard its transmission, and equally singular that the schooner's fog horn was not heard earlier by the steamer, for the wind was in its favor. But a great deal of allowance must be made for the bias of the witnesses in respect to these details, each crew doubtless thinking that an earlier apprehension of the other's signals would be detrimental to the cause of their vessel. There may have been atmospheric conditions at that time and place that interfered with the transmission of sound, but my best belief is that the respective crews, or those on the lookout, heard these signals earlier, and when they were still further apart, than the testimony now indicates.

Taking this for granted, there is no phase of the situation that required the steamer to turn from her course. She was running as slowly as the rules required, and she had no reason to know that the course of the schooner would cross her course. Had she known that, I know of nothing she could have done, except to stop, and that would have exposed her, and the schooner as well, to as much danger as a continuance of her course. I dismiss, therefore, the steamer from all fault.

The only maneuver that would, under all the circumstances, have avoided the collision, was a change in the course of the schooner from N. N. W. to a more northerly course, by putting her helm hard a-port. This maneuver would have been impressed upon her as an urgent necessity if, after having heard the steamer's whistle at a short distance on her port beam, she had heard also a bell on the barge in the steamer's wake. She would then have fully realized that the steamer had a barge in tow, and that she was crossing their line in dangerous proximity to the barge. The failure of the schooner to hear the bell, therefore, is a potent element in the causes leading to the collision. While the crew on the barge testify to having rung the bell, it was heard neither on the schooner nor the steamer. This

latter fact, coming as it does from a disinterested source, is of controlling importance. The bell was hung on the forward turret, immediately behind it, and near its top, and was 15 inches across the mouth and 12 inches deep. It is said to have been hung at the usual place for bells on such vessels. The object of the regulation requiring a bell on a barge to be rung is that it should be heard. This bell was not heard on the steamer for six or seven hours preceding the collision, and either it was not rung, or else it was, by reason of its location or its quality, inefficient for the purposes of a signal, or else the atmospheric conditions then prevailing were so abnormal as to interfere with the successful working of an efficient bell. While there are in the books well-authenticated instances of atmospheric area impervious to sound, none have been called to my attention that covered more than a few miles in distance, or a little while in time. The abnormal character of the condition relied upon by the barge here must have extended over a space from 20 to 40 miles in length, and through a time covering 7 hours, for the bell had not been heard on board the steamer since a quarter before 1 of the afternoon preceding the collision. Such abnormal atmospheric condition, both as to space and time, may not be impossible; but, it is certainly among the high improbabilities, and I do not feel justified in admitting it as one of the facts in this case. I hold, therefore, the barge to have been at fault, either in not having had an efficient bell, or in having failed to ring it at and preceding the collision.

But the schooner herself was not without fault. Her course when she heard the steamer on her starboard beam was N. N. W.,—a course that in ordinary practice lay directly across the usual course of steamers going down the Lakes. She ought, in the exercise of high prudence, to have realized this fact, as well as its consequences in bringing her dangerously close to anything that might be in tow of the unseen steamer, and have accordingly ported her helm, thus turning her course to the northeastward; for she knew that the steamer was south-bound, and to her port side. She could not by this maneuver have injured her situation, and, on the contrary, stood many more than a majority of chances of improving it. For failing to do this, I hold her guilty of a fault. In consequence of these holdings, the damages will be divided between the barge and the schooner.

SMITHSON v. HUBBELL et al.

(Circuit Court, D. Washington, E. D. June 25, 1897.)

1. FEDERAL COURTS—JURISDICTION OF SUITS AGAINST NATIONAL BANK RECEIVERS.

The federal courts have no jurisdiction of a suit in equity against a national bank receiver, appointed by the comptroller, unless the amount in controversy exceeds \$2,000.

2. SAME—JURISDICTIONAL AMOUNT.

In a suit by a creditor of an insolvent national bank, in behalf of himself and all other creditors, to enjoin the receiver and the comptroller from paying dividends on an alleged fraudulent claim which has been allowed by them, the jurisdictional amount is to be determined solely by the amount of complainant's own claim, and not by the aggregate of all the claims of those whom he assumes to represent, or by the amount of the dividends, payment of which is sought to be enjoined.

Graves & Englehart and Crowley & Grosscup, for complainant.
William Henry Effinger, for defendants.

HANFORD, District Judge. The complainant is a creditor of the Kittitas Valley National Bank, an insolvent national banking association, in the hands of a receiver appointed by the comptroller of the currency, having proved and established his claim for the amount of \$1,764.05, no part of which has been paid; and the object of this suit is to obtain an injunction to prevent the payment of dividends on a claim of the defendant Catlin, as receiver of the Oregon National Bank, on the ground that said claim is fraudulent as to other creditors, for the reason that the same has been allowed by the receiver of the Kittitas Valley National Bank and the comptroller of the currency, in an amount largely in excess of the true amount of all indebtedness from the Kittitas Valley National Bank to the Oregon National Bank; so that the payment of dividends on the claim as allowed will absorb so much of the assets of the Kittitas Valley National Bank that other creditors will inevitably suffer loss. The bill of complaint shows that there are other creditors having claims against the Kittitas Valley National Bank, amounting to over \$20,000, exclusive of said claim represented by the defendant Catlin; and this suit was commenced and is being prosecuted by the complainant in behalf of himself and all others having an interest in the assets of the Kittitas Valley National Bank to be protected. The defendants have answered, denying the equities of the bill, and they also dispute the jurisdiction of the court to entertain the same. The case has been argued and submitted upon the complainant's application for an injunction pendente lite.

The several statutes defining the jurisdiction of the United States circuit courts do not, in my opinion, confer jurisdiction upon a circuit court of a bill in equity against a receiver of a national bank, appointed by the comptroller of the currency, if the amount in controversy is less than \$2,000. *Hallam v. Tillinghast*, 75 Fed. 849. Therefore the question whether this case is within the jurisdiction of this court depends upon the determination of the question as to what is to be deemed as the amount in controversy. In behalf of the com-

plainant, it is contended that as he sues in behalf of himself and others having claims amounting in the aggregate to more than \$2,000, to protect the interests of all in the assets of the Kittitas Valley National Bank, which amounts to more than \$2,000, and an injunction is sought to prevent the payment of dividends amounting to more than \$2,000, by any test that may be applied, the sum or value involved in this particular suit exceeds the amount of the jurisdictional limit. I am constrained, however, by the decisions of the supreme court of the United States to hold that the amount of indebtedness to the complainant, which is less than \$2,000, must be taken as the amount involved, for the purpose of determining the question of jurisdiction. In suing as a representative of a class of persons similarly situated, and having similar rights, the complainant brings into the case only the questions to be determined; and he is not to be considered as bringing into the case the separate claims and demands of other creditors. The law does not confer upon him the authority of an agent of other creditors for that purpose, nor authorize him to augment his own distinct claim for the purpose of making a claim within the jurisdiction of the United States circuit court. The rule in such cases laid down by the supreme court of the United States in the case of *Clay v. Field*, 138 U. S. 464-483, 11 Sup. Ct. 419, 425, is as follows:

"The general principle observed in all is that if several persons be joined in a suit in equity or admiralty, and have a common and undivided interest, though separable as between themselves, the amount of their joint claim or liability will be the test of jurisdiction; but where their interests are distinct, and they are joined for the sake of convenience only, and because they form a class of parties whose rights or liabilities arose out of the same transaction, or have relation to a common fund or mass of property sought to be administered, such distinct demands or liabilities cannot be aggregated together for the purpose of giving this court jurisdiction by appeal, but each must stand or fall by itself alone."

In that case the question was as to the jurisdiction of the supreme court, but the same principle governs in cases where the jurisdiction depends upon the amount in controversy, whether the question is as to the jurisdiction of the supreme court or of a circuit court. This is made clear by the opinion of Mr. Justice Brown in the case of *Walter v. Railroad Co.*, 147 U. S. 370-374, 13 Sup. Ct. 349. The following excerpt bears directly upon the point:

"It is well settled in this court that when two or more plaintiffs, having several interests, unite, for the convenience of litigation, in a single suit, it can only be sustained in the court of original jurisdiction, or on appeal in this court, as to those whose claims exceed the jurisdictional amount; and that, when two or more defendants are sued by the same plaintiff in one suit, the test of jurisdiction is the joint or several character of the liability to the plaintiff. This was the distinct ruling of this court in *Seaver v. Bigelows*, 5 Wall. 208; *Russell v. Stansell*, 105 U. S. 303; *Trust Co. v. Waterman*, 106 U. S. 265, 1 Sup. Ct. 131; *Hawley v. Fairbanks*, 108 U. S. 543, 2 Sup. Ct. 846; *Stewart v. Dunham*, 115 U. S. 61, 5 Sup. Ct. 1163; *Gibson v. Shufeldt*, 122 U. S. 27, 7 Sup. Ct. 1066; *Clay v. Field*, 138 U. S. 464, 11 Sup. Ct. 419."

The application for an injunction will be denied, and the case dismissed, for the reason that the case is not within the jurisdiction of this court.

SOUTHERN RY. CO. v. NORTH CAROLINA R. CO. et al.

(Circuit Court, W. D. North Carolina. June 29, 1897.)

No. 130.

1. EQUITY JURISDICTION—ADEQUATE REMEDY AT LAW.

In a suit whose issues involve the setting aside of a recorded deed, the invalidity of which does not appear on its face, and must be established by matters dehors the deed, there is no such plain, adequate, and complete remedy at law as will oust the jurisdiction of the court.

2. SAME—SUIT TO ESTABLISH VALIDITY OF RAILROAD LEASE.

A bill in equity may be maintained by a railroad lessee against the lessor company and its controlling officers to establish the validity of the lease, as against threatened attacks thereon, and to enjoin such attacks by the defendants, where the lessee company is in possession, and the leased road forms a vital, connecting link, necessary to the integrity and prosperity of its railroad system.

3. JURISDICTION OF FEDERAL COURTS—STATE RAILROADS.

When a state becomes the owner of part of the stock in a railroad corporation, it lays down its character as a sovereign, and places itself on an equality with private stockholders; and hence the corporation and its directors and controlling officers, though in part appointed by the state, and specially representing its interests, may be sued in the federal courts, in respect to contracts entered into by the corporation, to the same extent as a corporation wholly owned and controlled by private individuals.

4. SAME—PARTIES.

Where a state owns stock in a railroad company, and the governor and attorney general are invested by law with the control of all suits in relation to the property of the state therein, they are proper parties defendant to a suit in equity to establish the validity of a lease of the property, and enjoin threatened attacks thereon.

5. RAILROAD COMPANIES—POWER TO LEASE—STATE AS STOCKHOLDER.

The North Carolina Railroad Company, in which the state of North Carolina owns three-fourths of the capital stock, and is represented by directors appointed by the governor, has full power, under the decision of the state courts (which are controlling in the federal courts), to execute a valid lease of its road and franchises for a term of 99 years.

This was a suit in equity by the Southern Railway Company against the North Carolina Railroad Company and others to establish the validity of a lease of the defendant's road, and to enjoin threatened attacks thereon.

Henry Crawford and John G. Carlisle, for plaintiff.

J. C. McRae and A. C. Avery, for the governor.

W. H. Day, for defendants.

J. E. Shephard, for the attorney general.

J. S. Manning and Burwell Olmstead, for the old board.

SIMONTON, Circuit Judge. The Southern Railway Company, complainant, became the purchaser, at sundry sales for foreclosure under order of this court, of the property of the Richmond & Danville Railroad Company. Among other assets of the debtor company was a lease of the North Carolina Railroad, dated 11th September, 1871, for the term of 30 years. This lease was purchased by, and became the property of, the complainant. In August, 1895, as the result of negotiations between the Southern Railway Company and the North Carolina Railroad Company, a new lease was executed by the last-

named company to the Southern Railway Company, of all its property and franchises, for a new term of 99 years, upon an increased rental, and certain other provisions, more beneficial to the lessor than in the former lease; and by the provision of this new lease the termination of the former lease was anticipated, and it was declared to be at an end on 31st December, 1895, the new lease taking its place. The North Carolina Railroad Company is a corporation of the state of North Carolina. Three-fourths of its capital stock, represented by certificates of shares, are owned by the state. One-fourth of the capital stock is owned by private persons. Its affairs are managed by a board of directors. Of these, eight represent the state's interest, and they are appointed by the governor of the state, by and with the consent of the council, and are removable at pleasure by the same method. Four of the directors are elected by the private stockholders exclusively. All the directors appointed or elected represent and control the corporation, subject to the approval of the stockholders in meeting assembled. At such meeting the shares held by the state are represented by a proxy, appointed and removable in the same way as the directors on the part of the state are appointed and removed. This lease for 99 years, having been executed by the board of directors, by the unanimous vote of the entire body, and having been approved by the like vote of a meeting of stockholders, created a great deal of discussion in the state of North Carolina, on the hustings and elsewhere. Its legality and expediency both were challenged, and threats were made by men of influence and position to break the lease. Efforts were made to obtain action upon the part of the legislature to this end. And, although these efforts did not meet with success, it was manifest that there was a fixed determination to obtain, if possible, the end in view, by suit and other means. Under the laws of North Carolina the right to bring suits with regard to the property and claims of property of the state rests wholly with the governor and the attorney general. Under these circumstances the Southern Railway Company filed its bill in this court, setting forth substantially the facts stated; insisting on its rights under this lease; declaring it to be an important and essential link of its line of intercommunication between the states on the Atlantic Coast and the Gulf; praying that these be investigated, and that its rights and equities be adjudicated and established and put at rest. To this end, it made the North Carolina Railroad Company, the corporation, a defendant, as representative of its stockholders. It made also defendants Hon. D. L. Russell, the governor of North Carolina, and Hon. Zebulon Vance Walser, attorney general of North Carolina,—the officers selected and designated by the general assembly as in charge of all suits connected with the property and right of property of the state, the dominant stockholder in the corporation. It added the proxy of the state, authorized to cast its vote on all questions determining the action of the corporation. And it included as defendants S. B. Alexander and others, who were the president and directors under whose administration the lease was made. The bill prayed the establishment of the rights of complainant in its lease, and the injunction necessary to protect them therein. Upon the filing of the bill, recogniz-

ing the large interests and very grave questions involved,—questions, the solution of which, one way or other, could only be reached by exhaustive discussion and careful determination, requiring the aid of learned counsel,—the usual rule to show cause was issued, and the temporary restraining order was entered. Soon after these were done, his excellency the governor of North Carolina, in the exercise of powers claimed to be conferred on him and the council of state, which claim this court will not question, removed the directors theretofore acting in the corporation on the part of the state, as well as the proxy who had cast the vote of the state at stockholders' meetings, and appointed in the place of the directors Messrs. H. U. Butters, William Gilchrist, John S. Armstrong, John Graham, Virgil S. Lusk, Charles A. Cook, R. H. Norments, and A. W. Graham. These gentlemen last named came into this court, setting forth the fact of the removal of the state members on the old board, and their appointment in their place, and prayed leave to intervene and answer as parties. This was granted. Cause has been shown by all parties named in the original bill and in this amendment as defendants, the Honorable D. L. Russell and the Honorable Z. V. Walser, protesting against and denying the right of the court to compel them to answer in their official capacity, and putting in their responses as individuals.

Necessarily, the questions first to be met and decided are those affecting the jurisdiction of the court. Has it jurisdiction over the subject-matter of the suit? Are there questions arising or to arise in the effort to exercise jurisdiction, growing out of the character of the parties to the controversy, which will force it to stay its hand, and forbear any other interference in the suit? As the issues in this case involve the setting aside of a deed executed and recorded, whose invalidity does not appear on the face of the deed, and must be established by matters dehors the deed, there is not such a plain, adequate, and complete remedy at law as will oust the jurisdiction of this court. *Rich v. Braxton*, 158 U. S. 375, 15 Sup. Ct. 1006.

The main question is between the Southern Railway, a corporation created under the laws of Virginia, and the North Carolina Railroad Company, a corporation under the laws of North Carolina,—both of them private corporations. The Southern Railway Company claims to be the lessee of the North Carolina Railroad Company, for value, of all of its franchises and property, for 99 years; that the lease under which it holds was executed by the rightful authority, in the prescribed method, with full power; that, being thus clothed with vested rights under its lease, it finds these rights questioned, its property attacked, its enjoyment and use of it threatened, in influential quarters, and its peaceful administration of it put in extreme danger; and that these questions, attacks, threats, and damaging results originate within the lessor corporation itself, or with persons who have the power of controlling its action. In this age, and in this state, the validity of these attacks, the force of these threats, the real existence of this danger, and the solution of these questions, can only be had in the courts. The complainant thereupon comes into this court, in which, by reason of its citizenship, it has standing, and prays the aid of the court in its adjudication of these matters, invoking the protection of

the constitution of the United States. Can a bill of this character be maintained in a court of equity?

The jurisdiction to entertain applications for relief against attacks upon the title to property, either by suit or threats of suit, has been exercised by courts of equity, and sometimes by courts of law, from time immemorial. In equity this relief is afforded by bills *quia timet* and by bills of peace. Mr. Justice Story (Eq. Jur. § 825), commenting upon the first class of these bills, says that they are in close analogy to suits at common law of the nature mentioned by Lord Coke (Co. Litt. 100a, and note). Says Coke, "That there be six writs in law that may be maintained *quia timet* before any molestation, distress, or impleading." Of those, the sixth is styled "*Ne Injuste Vexes*." These are called "*Brevia Anticipationis*,"—writs of prevention. "Now," adds Mr. Story, "bills in equity, *quia timet*, answer precisely to this latter description. They are in the nature of writs of prevention,—to accomplish the ends of precautionary justice. They are ordinarily applied to prevent wrongs or anticipated mischiefs, and not merely to redress them when done. The party seeks the aid of a court of equity because he fears some future probable injury to his rights and interests, and not because an injury has occurred which requires any compensation or other relief." Courts of equity have constantly enlarged and liberalized this relief. And the legislation of many of the states has extended it yet further. Under the general principles of equity, the relief could not be afforded except to one in actual possession. The statutes of many of the states have dispensed with this requisite, and have enlarged the relief. The courts of the United States have, within their jurisdiction, recognized and enforced the relief thus given by state statutes. *Holland v. Challen*, 110 U. S. 20, 3 Sup. Ct. 495.

In the case at bar, the complainant alleges: That it is in possession and in actual enjoyment of a lease of the North Carolina Railroad for a long term. It first held as purchaser from the Richmond & Danville Railroad Company, which had been in quiet and uninterrupted possession as lessee of the leased premises since 1871. That, being in possession as alienee of the lease, a new lease was executed to it by the North Carolina Railroad Corporation, and that a part of the consideration of the new lease, or perhaps a necessary incident of its execution, was the extinguishment of the old lease. The possession, however, was continuous and uninterrupted. That this leased property is of the last importance, perhaps vitally important, to the existence, certainly to the prosperity, of its great system of interstate railway. That their right to the lease, their possession under it, the continuance of their enjoyment of it, are not only questioned, but are threatened with serious attack in high and influential quarters from without, and with denial of their right, with action to defeat it, and with suit to this end, within, the board of directors of the lessor corporation. That by reason of this action upon the part of those persons the complainant is threatened with irremediable disaster. Under these circumstances, if the complainant can maintain and prove that the lease under which it holds was executed to it by its lessor in the full exercise of its powers under its charter, in a proper and orderly way, according to the terms of its charter, and in good faith, without

fraud, covin, or malpractice, the case would present a strong and irresistible appeal for the exercise of the preventive remedies of this court. And this remedy must include an injunction against the North Carolina Railroad Company, its officers and agents, and all persons connected with it, from molesting, disturbing, or disputing the rights of the complainant in said lease. Compare *Orton v. Smith*, 18 How. 263. As between two private corporations, therefore, a bill of this nature can be entertained in this court, and, upon proper proof of the character indicated, relief could be given. How is the jurisdiction affected by the fact that the state of North Carolina is the owner of three-fourths of the capital stock in the lessor company? Under the charter of this company, the state of North Carolina, by virtue of its ownership of three-fourths of the stock, names 8 out of the 12 directors. The private stockholders owning the remaining fourth of the stock name four directors. But when they have been thus selected the board of directors meet as a body, and act as a unit. Their action is reviewable by a meeting of stockholders in which the stock of the state is represented by a proxy in her behalf, who sits and votes with the private stockholders, and forms with them one body. Each director in the one instance sits as the equal of every other director, by whomsoever appointed, and each stockholder acts on equal terms with every other stockholder. The state, as sovereign, does not meet with either body. When the state entered into this enterprise with private persons, she did not carry into it her functions of sovereignty, but stripped herself of them.

Whenever there has been waste or misapplication of corporate funds, or abuse of its interests, by officers or agents of a corporation; whenever contracts of a corporation are to be enforced, or claims against it resisted,—the action to secure its interests must be in the name of the corporation. It is only when the directors of the corporation neglect or refuse to protect its interests, or are in collusion with the wrongdoers, or are still under their control, that the stockholders, or any of them, can act. *Robinson v. Smith*, 3 Paige, 222; *U. S. v. Union Pac. R. Co.*, Fed. Cas. No. 16,598; *Heath v. Railway Co.*, Fed. Cas. No. 6,306. This rule is absolute. It was held in *U. S. v. Union Pac. R. Co.*, just quoted (affirmed in 98 U. S. 569), that the United States, the sovereign, could not interfere in such a case, and that the relief was through the corporation, or, in exceptional cases, by the stockholder. In the case at bar the newly-appointed board of directors, made parties at their own request, who answer for themselves and for the corporation, do not come within any one of this category of objections, and give no reasons for the interposition of the stockholders. So far as respects the transactions of the corporation, its contracts, or its torts, the state exercises no power, enjoys no privilege, with regard to them, not derived from the charter, or differing in any way with the power or privilege enjoyed by any other stockholder. The corporation, within its chartered power, acts for and binds its stockholder, the state, equally and to the same extent as it acts for and binds every private stockholder. This has been repeatedly decided by the supreme court of the United States, and is established law. *Bank of U. S. v. Planters' Bank*, 9 Wheat. 904; *Bank of Kentucky v. Wistar*,

3 Pet. 431; *Briscoe v. Bank*, 11 Pet. 324; *Darrington v. Bank*, 13 How. 12; *Davis v. Gray*, 16 Wall. 221; *Newton v. Commissioners*, 100 U. S. 557; *McComb v. Board*, 2 Woods 48, Fed. Cas. No. 8,707. In *Curran v. State of Arkansas*, 15 How. 309, which was a suit against a corporation in which the state was the only stockholder, this doctrine was recognized and enforced. In that case the court says:

"By the charter of the bank, the state of Arkansas became its stockholder. But the bank was a distinct trading corporation, having a complete, separate existence, enabled to enter into valid contracts binding itself alone. The obligation of its contracts, the funds provided for their performance, and the equitable rights of its creditors were in no way affected by the fact that a sovereign state paid in its capital, and consequently became entitled to its profits."

The supreme court of North Carolina, in *Marshall v. Railroad Co.*, 92 N. C. 322, declares:

"When the state is a stockholder in a railroad company, it is bound by the provisions of the charter, in the same manner as an individual stockholder. It has no advantage as a stockholder on account of its sovereignty; for by becoming such it lays down its character as a sovereign, and places itself on a footing of equality with the individual stockholders."

This being so, as every contract of the corporation not ultra vires, and not made in fraud, binds every stockholder, such contracts bind the stockholder, the state. As such contracts can be enforced against the corporation without making any individual stockholder a party, so they can be enforced against the corporation without making the state a party. And the present action can be maintained by complainants against the North Carolina Railroad Company, seeking to maintain, enforce, and protect its contract, and the cause will proceed, and the relief, if any, be given, without being in any way affected by the fact that among the stockholders of the corporation is the state of North Carolina. The state of North Carolina, having thus laid down her sovereignty when she entered into this enterprise with the private stockholders, so far as respects the transactions of the corporation, exercises no power and enjoys no privilege in respect to these transactions not derived from the charter. Her interest, therefore, in this contract which has been assaulted is not a sovereign interest, nor are her functions with regard to them functions of sovereignty. She stands exactly as any other stockholder would stand. The state as well as they is bound by the charter. And if this lease was made bona fide, without fraud of any kind, within the powers and according to the requirement of the charter, the action of the corporation will bind every stockholder. This is the question at issue in this case. And having assumed jurisdiction of the question, with all proper parties before it, the decision of this court, subject to review by an appellate court, is final. In this point of view, the governor of the state and the attorney general are proper parties to this case. In them alone is vested the right to bring suits in the name of the state, and it is alleged that the threats of suit and of the destruction of this contract come from one or both of them. Now, as the interests of the state, as a stockholder in this corporation, are not sovereign, if these two defendants seek to use the name of the state, as a stockholder, to set aside the act of the corporation, they are not discharging the functions of sovereignty, but are simply seeking to represent a stockholder

in a private corporation. And if the state, as shareholder, is bound by the terms of the charter, and this lease is within the powers of the charter, these two defendants cannot, in the name of the state, do what she herself, as stockholder, cannot do. To this extent only has this court jurisdiction over them. In the discharge of the executive functions devolving upon them under the constitution and laws of North Carolina, in all matters within the executive discretion, in the exercise of that control over all domestic corporations which belongs to the state as the visitor of them, in the issue of any of the great prerogative writs against a corporation, this court cannot—no court can—interfere. But in bringing such a suit as is threatened, to destroy this lease, these two defendants would represent, not the sovereign state of North Carolina, but only a shareholder in a private corporation, and in this respect they come within the jurisdiction of this court. They are high public officers. They are entitled to, and they have, the profound respect of the court. But no one in this country, however exalted in station or illustrious in character, is above the law. No state official can, in assuming the name of the state, shelter himself behind her sovereign immunity, if he attempt any act which the state herself, being a shareholder, cannot do. *Pennoyer v. McConnaughy*, 140 U. S. 1, 11 Sup. Ct. 699; *Reagan v. Trust Co.*, 154 U. S. 362, 14 Sup. Ct. 1047.

It being clear that this case is within the jurisdiction of this court, its merits can be inquired into. The parties to the suit are the complainant and the defendants, the North Carolina Railroad Company, the board of directors who made the lease in question, and the board appointed by the governor upon the removal of the old board. This removal was effected after this suit was brought, but the new board have come in, and have fully presented their side of the case. Besides these, Hon. D. L. Russell, who is the governor of North Carolina, and Hon. Zebulon V. Walser, who is the attorney general of North Carolina, are parties. Besides questioning the jurisdiction of the court, the answers of Messrs. Russell and Walser, who protest that they answer only in their individual capacity, and of the new board of directors, make up clear and distinct issues upon the merits. If the jurisdiction of the court over the controversy is established, it can come to a clear and definite conclusion on these issues, and settle the controversy once for all. These issues are three in number. First. Was the North Carolina Railroad Company authorized by its charter to make the lease of its roadbed and franchises claimed by complainant? Second. Was this lease executed in conformity with the requirements of the charter? Third. Was it executed bona fide, without fraud, misrepresentation, or malpractice in any respect?

The first of these issues is a question of law. It involves the right of the North Carolina Railroad Company to farm out its franchise and property. It has no relation whatever to the policy or motives which led up to it. These belong probably to the third issue. As has been seen, a lease was executed of its property and franchises by the North Carolina Railroad Company to the Richmond & Danville Railroad Company in 1871, and for 30 years. The right of the lessor company to make such a lease has been before the supreme court of the state

in *State v. Richmond & D. R. Co.*, 72 N. C. 634, 73 N. C. 529, and the validity of the lease was sustained. In *Logan v. Railroad Co.*, 116 N. C. 940, 21 S. E. 959, the court says, "The question of the authority of the lessor company to farm out its franchise and property is no longer an open one." These decisions of the court of last resort of North Carolina as to the construction of a state statute bind the federal courts, apart from the very high authority of that court itself. *Norton v. Shelby Co.*, 118 U. S. 425, 6 Sup. Ct. 1121; *Union Bank v. Kansas City Bank*, 136 U. S. 223, 10 Sup. Ct. 1013; *Gormley v. Clark*, 134 U. S. 338, 10 Sup. Ct. 554. And these decisions being of force, unquestioned, when this contract of lease was made, the law entered into, and was a part of, the contract, whose obligation cannot now be impaired. *Olcott v. Supervisors*, 16 Wall. 678; *Douglass v. Pike Co.*, 101 U. S. 677; *Darlington v. Jackson Co.*, Id. 688; *Anderson v. Santa Anna Tp.*, 116 U. S. 356, 6 Sup. Ct. 413.

2. Was this lease executed in conformity with the requirements of the charter? On this point it has not been denied that the lease was executed after an unanimous vote of all of the directors, confirmed and approved by unanimous vote in a regular stockholders' meeting.

3. Was the lease executed bona fide, without fraud, covin, misrepresentation, or malpractice of any sort? This is a question wholly of fact. The charge is made by the defendants Messrs. Russell and Walser, and of the new board of directors, and in the answer of the lessor filed by them. Let this third issue be referred to Kerr Craige, Esq., of Rowan county, as special master, under the following instructions: That he take such testimony as may be produced before him touching all matters relating to, or incidental with, this question, holding reference at such time and place as may be most convenient; that upon this issue the defendants the new board of directors and Messrs. Russell and Walser have the affirmative of this issue, and the opening and reply in the testimony, and that they be allowed 60 days, if so long be necessary, within which to produce testimony, dating from the service of this order; that the complainant and the old board of directors have the negative of this issue, and that they be allowed 60 days, if so long be necessary, after the opposite party announce their evidence closed, and that 20 days, if so long be necessary, be allowed for reply, beginning when respondents announce that they have closed; and that said special master report the evidence with all convenient speed thereafter. In the meantime the restraining order heretofore issued is continued until further order.

MONTAGU et al. v. PACIFIC BANK et al.
(Circuit Court, N. D. California. June 24, 1897.)

No. 12,108.

BANKS AND BANKING—SPECIAL DEPOSITS—INSOLVENCY.

Money deposited in one bank to the account of another, with directions to the latter to pay the amount thereof by telegram to a third bank, is a specific deposit, which may be recovered in full, as against general creditors, where the bank to whose credit the money is deposited receives the same, but suspends before making payment as directed.

E. S. Pillsbury, for complainants.
Sawyer & Burnett, for defendants.

MORROW, Circuit Judge. This is a bill in equity against an insolvent banking corporation to declare a trust, and recover the sum of \$5,000 as a special deposit. The facts are these:

Samuel Montagu & Co., London bankers, cabled the Pacific Bank, in San Francisco, June 20, 1893, as follows:

"Pay by telegram to Puget Sound National Bank, Seattle, Washington, five thousand dollars, a/c of William Cochrane. We remit by cable to National Bank of Commerce, N. York, for your a/c, \$5,000."

The money was deposited in the National Bank of Commerce, in New York, on the same day, but was never transmitted by the Pacific Bank to the Puget Sound National Bank, at Seattle, state of Washington. On the 22d day of June, 1893, the Pacific Bank suspended payment and closed its doors, and thereafter refused to pay its depositors or other creditors except in the pro rata distribution of the property and assets of the corporation in the process of liquidation, under the management of the board of directors, in accordance with the laws of the state. It is admitted that there was more than \$5,000 in the vaults of the Pacific Bank, belonging to the bank, from June 19, 1893, until the doors were closed, on the 22d of June, 1893. It is contended, on the part of the complainants, that the money involved in this transaction was received by the Pacific Bank for a specific purpose, and not to be checked out or loaned or otherwise used by the bank; that the money constituted a trust fund, and did not become a part of the general assets of the bank, and, not having been applied to the purpose for which it was received, it should be returned to the depositor. The defendants contend that the money remitted by complainants was placed to the account of the Pacific Bank in the National Bank of Commerce, at New York; that it was not sent directly to the Pacific Bank, but became a part of the account between the two banks, and the identity of the deposit was lost; and that, therefore, the complainants should be admitted to share only with the other creditors in the pro rata distribution of the assets of the bank. The National Bank of Commerce was the correspondent, in New York, of the Pacific Bank. It appears from the evidence that Wells, Fargo & Co., in San Francisco, received a cablegram from the complainants on July 10, 1893, as follows:

"London, July 10th, '93.

"On June 20th we telegraphed Pacific Bank to pay by telegram to Puget Sound National Bank, Seattle, Washington, five thousand dollars. William Cochrane. We deposited five thousand dollars with National Bank Commerce in payment. Pacific did not pay. We claim that it was specific payment against deposit, and money therefore ours. Please claim return from Pacific, who had not then suspended, and who now offer no explanation. Write."

Henry Wadsworth, the cashier of Wells, Fargo & Co. at San Francisco, took this cablegram, immediately after its receipt, to the Pacific Bank, and exhibited it to McDonald, the acting president, who acknowledged the receipt of complainant's cablegram of June 20th, and gave as a reason for the failure of the bank to make the payment as directed that they had not received the confirmation from the agent

of the bank in New York; but he admitted that it was customary, on receipt of such a telegraphic transfer draft, to make the disbursement in accordance with the directions of the order, without waiting for the agent's confirmation of the deposit. Subsequently Wells, Fargo & Co. received a letter from complainants, dated London, July 13, 1893, containing, among other things, the following:

"As explained to you in our cable, we asked this bank, on June 20, to pay by telegram to the Puget Sound Nat. Bank, Seattle, Washington, \$5,000, for a/c William Cochrane, depositing to meet it the same amount with the Nat. Bk. of Commerce, New York, same as on previous occasions. Upon investigation, we find that this money was not paid to the Puget Sound Nat. Bank, altho' the amount was withdrawn from New York. Our object is now to point out to the Pacific Bank that this amount of \$5,000 cannot be looked upon as part of our balance with them in account, but that it was to be used for the specific purpose indicated by us, and consequently repayable in full, especially since the transaction took place some days before the bank failed."

This letter was also shown to McDonald by Wadsworth, who testified that McDonald made no denial as to anything therein set forth. Wadsworth testified further that he had several conversations with the officers of the bank respecting complainant's claim, and it was not denied by them that the Pacific Bank had received the \$5,000 from the complainants, to be remitted to the Puget Sound National Bank, at Seattle, Wash. It appears that the complainants had a deposit account with the Pacific Bank at this time, and that there was a balance to their credit in this account amounting to \$3,902.15. In a statement received by Wadsworth from the officers of the bank, showing the state of complainants' account with the bank, this balance was shown as of the date of June 22, 1893, when the bank suspended. Then followed an entry, under date of July 14th, showing the deposit in New York on June 21st of \$5,000.

It is clear from this evidence that the bank had received, through its agent in New York, prior to its suspension, the deposit in question for transmittal to the Puget Sound National Bank, and that it was a special deposit, made for a specific purpose, and in the nature of a bailment. All deposits made with bankers may be divided into two classes, namely, those in which the bank becomes bailee of the depositor, the title to the thing deposited remaining with the latter; and the other kind of deposit, of money peculiar to banking business, in which the depositor, for his own convenience, parts with the title to his money, and loans it to the banker. *Marine Bank v. Fulton Bank*, 2 Wall. 252, 256. In *Peak v. Ellicott*, 30 Kan. 156, 1 Pac. 499, a bank received money from the maker of a note originally given to the bank, before it was due, to pay it to the holder and return the note, but appropriated the money and failed to pay the note. It was held that, upon the subsequent failure of the bank, the maker could reclaim the money from the bank's assignee in trust for creditors. *Horton, C. J.*, thus stated the facts and the law:

"The question in this case is whether a trust in favor of the plaintiff is impressed upon the \$782.50 delivered to the cashier of the Riley County Bank on November 22, 1881, for the purpose of paying the note of plaintiff executed to the bank, but at that time owned and held by the Harrison National Bank of Cadiz, in Ohio. When the bank, through its cashier, accepted the \$782.50, it was not paid by the plaintiff as a deposit, nor accepted by the latter as a deposit,

nor was the relation of debtor and creditor between the bank and the plaintiff created by the transaction. On the other hand, as respects this specific sum, the relation between the plaintiff and the bank must be regarded as that of principal and agent. After the bank received this sum to satisfy the note of the plaintiff, the bank held the money in a fiduciary capacity. If the money was not applied, according to the understanding of the parties, to the satisfaction of the note, it should have been returned to the plaintiff. It was not deposited to be checked out or to be loaned or otherwise used by the bank. In law, the bank held it as a trust fund, and not as the assets of the bank. The defendant, as assignee of the bank, succeeds to all the rights of the bank; but as such assignee he has no lawful authority to retain a trust fund in his hands belonging to the plaintiff, and which the bank, at the time of receiving the same, promised and agreed to apply in payment of plaintiff's note. As the money was a trust fund, and never belonged to the bank, its creditors will not be injured if it is turned over by the assignee to its owner. Even if the trust fund has been mixed with other funds of the bank, this cannot prevent the plaintiff from following and reclaiming the fund, because, if a trust fund is mixed with other funds, the person equitably entitled thereto may follow it, and has a charge on the whole fund for the amount due. *Frith v. Cartland*, 2 Hem. & M. 417, 420."

In *People v. City Bank of Rochester*, 96 N. Y. 32, the principal facts were these: The City Bank of Rochester had discounted certain notes for the firm of Sartwell, Hough & Ford, a depositor with it, and that firm, wishing to anticipate the payment of these notes, gave to the bank its checks for the amount of the notes, less rebate of interest, which checks the bank received, and charged in the firm account, and entries were made in the bank books to the effect that the notes were paid. The firm at the time supposed that the bank held the notes, but they had in fact been previously sold by it. Before the notes became due, the bank failed; and in an action brought by the attorney general in the name of the people a receiver was appointed of its property and effects. The firm made an application to the court, requiring the receiver to pay the notes out of the funds in his hands. This was finally granted, and an appeal was thereupon taken. Danforth, J., after stating the facts as above, said:

"The transaction in question was not between the bank and Sartwell, Hough & Ford in their relation of debtor and creditor, nor in their relation of bank and depositor. The object of the latter was to provide a fund for the payment of specific notes, and the engagement of the former was to apply that fund to such payment. Thus, a trust was created, the violation of which constituted a fraud by which the bank could not profit, and to the benefit of which the receiver is not entitled. [Citing *Libby v. Hopkins*, 104 U. S. 303; *In re Le Blanc*, 14 Hun, 8, affirmed 75 N. Y. 598.] * * * The checks of the petitioner were money assets in the hands of the bank, and were so treated by all parties. They were delivered to it with explicit directions to apply the proceeds on payment of the notes. Those directions were assented to by the bank officer, and the checks collected from the general fund. From that moment the bank was bound to hold the money for, and apply it to, that purpose, and no other, or, failing to do so, return it to the petitioner. As to it, the bank was bailee or trustee, but never owner. It is estopped from saying that all this is a matter of bookkeeping. It assumed a duty, and the receiver, as its representative, is bound by it. Nor does this obligation at all depend, as the appellant seems to suppose, upon the question when, where, and to whom the notes were to be paid. Whether presently or in the future is immaterial. The specific object for which the fund was created was the payment of the notes, and its character does not depend upon those incidental circumstances. The checks were impressed with a trust, and no change of them into any other shape could de-

vest it so as to give the bank or its receiver any different or more valid claim in respect to them than the bank had before the conversion. [Citing *Van Alen v. Bank*, 52 N. Y. 1; *Dows v. Kidder*, 84 N. Y. 121.]”

It will be observed that in the case just cited the court held that the fund had been created for a specific purpose, although the firm was a regular depositor with the bank. The case of *Massey v. Fisher*, 62 Fed. 958, involved facts substantially similar to those in the cases of *Peak v. Ellicott* and *People v. City Bank of Rochester*, *supra*. In that case it was held that where an indorser pays a note to a bank, and takes a receipt containing an order for a surrender of the note on return of the receipt, the relation between the bank and the indorser is not that of debtor and creditor, but is a fiduciary relation, entitling the indorser, on the bank becoming insolvent without applying the money on the note, or procuring its surrender, to have the assets in the hands of its receiver applied in payment thereof. With respect to the contention made in this case, that the money, by mingling it with other funds of the bank, had lost its identity, and therefore could not be recovered, the court said:

“The bank hawing failed to apply the money to the note, can it be recovered from the receiver? His counsel thinks not, because the bank placed the money in its vaults with other money of its own, whereby its identity was lost. Why should this wrongful act defeat the plaintiffs’ right? Nobody is injured by allowing the plaintiffs to take the amount from the deposit. The receiver and creditors stand on no higher plane than the bank, and can no more assert that it was the bank’s money than the bank could. It is true, they are entitled to all the bank’s property, but this is not its property. It is not important that the plaintiffs’ money bore no mark, and cannot be identified. It is sufficient to trace it into the bank’s vaults, and find a sum equal to it, and presumably representing it, continuously remained there until the receiver took it. The modern rules of equity require no more. *Knatchbull v. Hallett*, 13 Ch. Div. 696; *National Bank v. Insurance Co.*, 104 U. S. 54; *Bank v. King*, 57 Pa. St. 202; *Stoller v. Coates*, 88 Mo. 514; *McLeod v. Evans*, 66 Wis. 401, 28 N. W. 173, 214; *People v. City Bank of Rochester*, 96 N. Y. 32; *Bank v. Weems* (Tex. Sup.) 6 S. W. 802; *Harrison v. Smith*, 83 Mo. 210; *Beach*, Eq. Jur. § 285; *Fisher v. Knight*, 9 C. C. A. 582, 61 Fed. 491.”

In the case of *Anderson v. Pacific Bank*, 112 Cal. 598, 44 Pac. 1063, which was a suit against the same defendant as in the case at bar, a special deposit of money was made with the bank as a pledge, to secure it from loss for the furnishing of bail; and it was held, in an action by *Anderson* to recover from the *Pacific Bank* the amount of the money so deposited, that the deposit remained in the pledgor, and, after cessation of the liability to secure which the pledge was given, the pledgor could recover the sum deposited, and that in the case of the insolvency of the bank the pledgor was not remitted to the rights of a general creditor, but might recover the entire sum deposited out of the assets of the bank. It was further held that the bank could not plead its wrongdoing to its own advantage, and the fact that moneys specially deposited in the bank by way of pledge were afterwards wrongfully commingled and used as funds of the bank, without the knowledge or consent of the pledgor, could not be urged by the bank, in defense, as effecting any change in the contractual relations and rights of the parties. In the course of the opinion, Mr. Justice Henshaw said:

"It is unquestionably true that one making a general deposit with a bank in the usual course of business parts with title to the moneys deposited. In the case of a special deposit, however, which is a mere bailment, the rule is the same with banking institutions as with individuals. Whether the special deposit be under a contract of bailment for the better protection of the bailor's property, or under a contract of pledge as security for some specific obligation of the pledgor, title does not pass to the bailee or pledgee, but remains in the pledgor."

The case of *Farley v. Turner*, 26 Law J. Ch. 710, is, so far as the facts are concerned, more directly in point than any other case that I have been able to find. The principal facts were these: The customer of a country bank, having a sum of £924 standing on his account, paid in a further sum of £707, with a written direction that £500 of that sum should be forwarded to another bank to meet a bill to become due. A sum of £500 was sent as directed, but before the bill became due the country bank ceased to carry on business. It was held that the £500 was specifically appropriated, and belonged to the customer of the bank, and not to the general creditors, the bank having been closed. *Kindersley, V. C.*, delivered the opinion, which is as follows:

"I think that the claimant is entitled to the £500 specifically. I am fearful lest I should be influenced in my decision by this being a hard case, since hard cases often make bad law, but still I feel a strong conviction that it will be in accordance with the law to allow the claim. The matter stands in this way: Goodwin, having to pay a bill which he had accepted, payable at Robarts & Co., thought fit to pay into the hands of his bankers, Messrs. Farley, Turner & Jones, a sum of £707 in addition to the balance then standing to his credit. According to the statement in the case, it appears that, at the time of paying in the £707, Goodwin told the clerk that £500 of this money was to be applied for the specific purpose of meeting an acceptance, payable at Robarts & Co.'s, to become due on the 14th. Goodwin at the same time signed the notice before stated. Now, what was the effect of this direction to the bankers? Goodwin, in effect, said: 'There is a bill which I want paid at Robarts & Co. Therefore send them £500 of this money, and advise them to apply it in payment of this bill.' The direction is accepted by the bankers, or by their clerk, which amounts to the same thing, and the clerk did what appears to be usual. There was no negligence on his part. At the same time he placed the whole amount of £707 to Mr. Goodwin's general banking account. He might certainly have sent up a check for £500 to Messrs. Robarts & Co., and placed the remaining sum to Mr. Goodwin's account; but he took the ordinary course, and sent up the £500, debiting Mr. Goodwin's banking account with that sum, and they informed Robarts & Co. that such a bill would be presented. Now, it so happened that the Kidderminster Bank had other bills, more or less under similar circumstances, which they wanted paid at Robarts' bank, and they sent up a batch of bills to Messrs. Overend & Gurney for them to discount, and directed them to pay the amount into Robarts & Co.'s bank for the purpose of meeting other bills, as well as that for £500. It appears to me that the course pursued was the same as it, having no occasion to pay more than the £500 bill, they had simply sent up the specific amount, with a direction to pay that particular bill. It is true that the money was not earmarked as if it had been locked up in a box, but it is a portion of the £707 which had been paid in expressly for the purpose of meeting the bill for £500. The facts of this case differ, I think, from the cases cited. I admit that the money is not a particular deposit with the bankers, but it is money placed in their hands to be applied in a particular way. What I now decide will not trench upon the authorities which decide that money paid into a banker's is not a deposit which you may receive back in the identical notes and sovereigns, but that it is a debt. That is quite a different case. Under the circumstances, I am of opinion that the £500 belongs specifically to Goodwin, and not to the general creditors of Mr. Turner."

From these authorities, it is plain that the deposit in this case should be treated as a special deposit made for a particular purpose, and not as a general deposit. It was therefore in the nature of a bailment, the complainants never having parted with their title to the money. Consequently a trust was impressed upon this \$5,000 in favor of complainants, and it does not belong to the general creditors of the bank. A decree will therefore be entered declaring that the defendants hold \$5,000 in trust for complainants, and that they recover the same, with costs, and it is so ordered.

CAREY v. ROOSEVELT et al.

(Circuit Court, S. D. New York. June 28, 1897.)

1. JUDGMENT AGAINST ADMINISTRATORS—PRIVITY OF LEGATEES.

While, in general, a judgment against executors or administrators *c. t. a.* is binding on legatees, yet it is not so binding when the suit is commenced or revived after the administrators' accounts have been settled, and all the property in their hands paid over to the legatees and trustees under the will, pursuant to a decree of the proper court; for the trust is then practically terminated, the administrators are divested of all control over the property, and the privity between them and the legatees and trustees terminated.

2. SAME.

A judgment against persons in their capacity as administrators *c. t. a.* is not rendered binding on them as legatees, merely because of their personal identity.

This was a suit in equity by George C. Carey, as trustee, etc., against John E. Roosevelt and others, as trustees and legatees under the will of Amos Cotting, deceased, to enforce payment of a judgment previously rendered against the administrators *c. t. a.* of said Cotting's estate. The cause was heard on demurrer to the bill.

Burton N. Harrison, Arthur H. Masten, and Henry M. Ward, for complainant.

George H. Yeaman, George C. Kobbé, and James A. Speer, for defendants.

COXE, Circuit Judge. The complainant is trustee for the benefit of the creditors of the National Express & Transportation Company. On December 13, 1886, John Glenn, the complainant's predecessor in such trust, began an action at law in this court against Amos Cotting to recover \$4,000 and interest. Cotting appeared in the action. On the 12th of May, 1889, he died leaving a will, which was duly probated. The executors named in the will having died, letters of administration with the will annexed were issued to John E. Roosevelt and Katie T. Schermerhorn, two of the defendants herein. On the 6th of September, 1893, the action against Cotting was revived against his administrators, and judgment was, on the 28th of February, 1895, recovered against them for \$6,221.90. Leave to issue execution upon this judgment was denied. On the 8th of April, 1892, a decree was entered settling the accounts of the administrators and deceased executors of Cotting's estate, and di-

recting the administrators to pay over the property in their hands as directed by the terms of the will. This transfer was made on the same day and the principal sum has since been held by the trustees created by the will. The income has been paid over to the beneficiaries named in the will. The prayer of the bill is that the defendants, who are the trustees and beneficiaries of Amos Cotting's will, be directed to account for and pay to the complainant the amount of the judgment of February 28, 1895, namely \$6,221.90. In brief, then, this is an action against the trustees, legatees and beneficiaries of Amos Cotting's will, founded upon a judgment recovered in a suit against his administrators.

The principal question debated is as follows: Is a judgment so obtained against an administrator with the will annexed conclusive evidence against a legatee? The defendants cite a number of cases holding that a judgment against an executor is not evidence against the heir or devisee. *Ingle v. Jones*, 9 Wall. 486, 495; *Sharpe v. Freeman*, 45 N. Y. 802; *Moss v. McCullough*, 5 Hill, 131, 135; *Dale v. Roosevelt*, 1 Paige, 35; *Platt v. Platt*, 105 N. Y. 488, 497, 498, 12 N. E. 22; *Mathews v. Springer*, 2 Abb. (U. S.) 283, 301, Fed. Cas. No. 9,277. This proposition is firmly established, and, indeed, is not disputed. The reason is plain; the devisee is not in privity with the executor. The title of the devisee does not come through the executor but directly from the testator. The executor takes no title to the real estate. It is manifest that these cases do not touch the point in controversy. No authority has been cited by counsel, or found by the court after diligent search, where the courts of New York have passed directly upon the question involved. In other jurisdictions, however, the rule is clearly established that a legatee is in privity with the executor and bound by a judgment against him.

In the case of *First Baptist Church v. Syms*, 51 N. J. Eq. 363, 28 Atl. 461, the court said (page 366, 51 N. J. Eq., and page 462, 28 Atl.):

"If the judgment is ultimately allowed to stand and be enforced, it will be conclusive upon the executor and also upon the legatees under the will, who are the executor's privies so far as the personalty coming to him, the primary fund for the payment of debts and legacies, is concerned (*Castellaw v. Guilmarin*, 54 Ga. 299; *Redmond v. Coffin*, 2 Dev. Eq. 437; *Hooper v. Hooper*, 32 W. Va. 526, 9 S. E. 937); and the entire personal estate may at once be applied to its payment, to the complete exhaustion of the personalty, leaving yet unpaid a portion of the judgment and the entire amount of the indisputable debts, the payment of which will be thrown upon the real estate. The judgment against the executor is not conclusive upon the heirs and devisees, who are not in privity with him (*Birely v. Staley*, 5 Gill & J. 432, 453; *Collinson v. Owens*, 6 Gill & J. 4; *McCoy v. Nichols*, 4 How. (Miss.) 31, 39; *Beckett v. Selover*, 7 Cal. 215; *Stone v. Wood*, 16 Ill. 177, 179; *Robertson v. Wright*, 17 Grat. 534), because they do not claim under him, and are not parties to the suit, and are not in position to adduce evidence in opposition to recovery, controvert the testimony offered in support of the plaintiff's case or appeal from the judgment when rendered, and, for the same reason, it is not conclusive upon the legatees, so far as their legacies are charged upon and payable out of the realty; and when, therefore, the executor seeks the realty for the payment of that judgment, those who are entitled to interest in the real estate are not bound by the judgment, but may question the claim which underlies it and its foundation. It thus appearing that the judgment is conclusive upon the legatees as to the personalty, and is not conclusive as to the realty, it would seem to follow that, if it stands and may be used as a shield to the executor, it will

protect him in applying at least the personality in its payment, and estop the legatees from questioning such application, and their right of ultimate contest will be limited to the remnant of it which comes over upon the realty unpaid."

In *Fraser v. City Council*, 19 S. C. 385, 400, the court says:

"The executor being bound, the legatees, his privies in estate, are also bound. unless there is something in the extraordinary circumstances of the case which makes it exceptional. A judgment against an administrator, or executor, is binding on the creditors and legatees of the estate.' *Freem. Judgm.* § 163; *Mauldin v. Gossett*, 15 S. C. 578, and authorities. This is admitted to be the general rule. * * * To the action at law the legatees had no right to be made parties; the regularly qualified executor was the proper representative of the estate, and was the only party to be sued. *Winstanley v. Savage*, 2 McCord, Eq. 435; *Fretwell v. Neal*, 11 Rich. Eq. 571."

See, also, *Bell v. Bell*, 25 S. C. 149; *Ward v. Durham*, 134 Ill. 195, 25 N. E. 745; *Dandridge v. Washington's Ex'rs*, 2 Pet. 370, 377; *Pickens v. Yarborough*, 30 Ala. 408.

Many other authorities to the same effect might be cited, and nothing to the contrary appears in the New York decisions. It is probable that the logic of the situation will require a similar holding whenever the question is squarely presented to the courts of this state.

In *Blood v. Kane*, 130 N. Y. 519, 29 N. E. 994, the court of appeals says:

"An executor, as such, takes the unqualified legal title of all personality not specifically bequeathed, and a qualified title to that which is so bequeathed. He holds not in his own right, but as trustee, for the benefit (1) of the creditors of the testator, and (2) of those entitled to distribution under the will, or, if not all bequeathed, under the statute of distributions."

It would seem that while this relation exists, a judgment against the executor will bind the legatee. The statutes of New York have made such careful provision for the collection of debts against decedents' estates that it is not surprising that complications like the present seldom occur.

Conceding the general principle that a judgment against the executor binds the legatee, the next question is: Do not the peculiar circumstances surrounding the case in hand take it out of the general rule? The process which resulted in the judgment was served on Cotting in 1886, but the suit was not revived until 1893, and judgment was not entered against the administrators until February, 1895. The defendants here were not parties to that action, unless it can be said that John E. Roosevelt and Katie T. Schermerhorn, who were there sued as administrators, and are here sued as trustee and legatee, respectively, are exceptions. The defendants in their present capacities have never had an opportunity to dispute the debt upon which the judgment is based. They have never had their day in court. The action is on the judgment pure and simple. The parties against whom it is sought to be enforced obtained title long before it was rendered. The accounts of the administrators had been settled, and the property in their hands paid over, pursuant to the judgment of the court before the suit against them was commenced, or, what in legal contemplation is the same thing, revived against them. They had been practically discharged; they had no interest in defending the suit; they were administrators only

in name. There was no property in their hands upon which the judgment was a lien. In no way could it have been enforced against them. The administrators acted in all respects pursuant to law. During the four years succeeding Cotting's death, neither they nor their predecessors had notice of complainant's claim. After the trust had been fully performed, the court duly settled their accounts and directed them to pay over the amount in their hands to the defendants. When notice of this claim was first brought to their attention they had nothing belonging to the estate or to these defendants, and the defendants had been in undisturbed possession of the property for nearly 18 months. There is no allegation that the administrators had actual notice of the claim. The fact that the suit had been commenced against the testator in 1886 was not constructive notice to them. The statute provides how claims against the estate must be proved, and, not having received that notice, the administrators were justified in distributing the estate pursuant to law and the terms of the will. Was there any existing privity when the suit was commenced and the judgment recovered against the administrators? If so, a judgment recovered 50 years hence will be equally binding. "It is well understood that no one is a privy to a judgment whose succession to the rights of property thereby affected occurred previously to the institution of the suit." *Freem. Judgm.* § 162.

There must be a time when privity by representation ceases. If such a time ever comes it would seem to be when the property passes from the executor by operation of law and vests in the legatee. When this occurs the executor is divested of all title to and control over the estate. The relations between him and the legatee terminate. There is no longer any res upon which the rule can operate. Every feature which combined to produce privity has disappeared. The ghost of the old relationship only remains. Every equitable consideration would seem to demand that those who, in such circumstances, present claims for the first time, should pursue the estate in the hands of those who hold the possession and the right of possession and whose title the executor has no power to divest. They are interested in defeating unfounded claims. He is not. He is no longer in a position to bind the estate by word or deed. The fact that a party succeeds in obtaining judgment at such a time should not preclude the real parties in interest from demanding proof of the claim. The court understands that the complainant does not contend that this action can be maintained under the New York Code (sections 1837-1841). There is no provision of these sections making such a judgment *res judicata*. On the contrary, all applicable provisions relate to "a debt of the decedent," permitting the legatee, apparently, to interpose any available defense.

The contention that the judgment is binding because two of the defendants here were defendants in the original suit, in entirely different capacities, is met by the authority of *Sharpe v. Freeman*, *supra*, where the precise point is decided (page 807). See, also, 2 *Phil. Ev.* (4th Am. Ed.) p. 11; *Gaines v. Hennen*, 24 *How.* 553, 578, 579; *Freem. Judgm.* § 156.

In conclusion it is thought that these defendants should not be deprived of their property without an opportunity to be heard. A contrary doctrine would seem manifestly unjust, and, where the delay has been as great as in the present case, might open wide the door to fraud. The question presented is most interesting and has been discussed in the briefs with great learning and ability. The court only regrets that a conclusion which is believed to be manifestly equitable should not be enforced by an authority directly in point. If such an authority exists, the court, after the most careful examination, has been unable to discover it.

Other grounds of demurrer are presented, but it is unnecessary to consider them in view of the conclusion reached upon the main proposition. The demurrer is sustained, but the complainant, if so advised, may amend his bill within 20 days on the payment of costs.

WESLEY v. TINDAL et al.

Ex parte VANCE.

(Circuit Court, D. South Carolina. July 2, 1897.)

1. EJECTMENT AGAINST STATE OFFICERS—ENFORCEMENT OF EXECUTION.

When final judgment in ejectment has been rendered against persons in possession as officers of the state, execution will be enforced, as against a stranger who also claims to be in possession as a state officer, though he asserts that his possession was not acquired through or under the defendants.

2. SAME—LIS PENDENS.

One who obtains possession of premises after entry of final judgment in ejectment against a prior possessor cannot rely on the failure to file a lis pendens, under Code Civ. Proc. S. C. § 153, as the suit was merged in the judgment, which became notice to all the world, before he obtained possession.

3. LIS PENDENS—PARTIES PROTECTED.

Failure to file notice of lis pendens, under Code Civ. Proc. S. C. § 153, protects only subsequent purchasers or incumbrancers.

Samuel W. Melton (Wm. A. Barber, Atty. Gen., of counsel), for petitioner.

Wm. H. Lyles, for respondents.

SIMONTON, Circuit Judge. This is a case at law. The plaintiff in an action of ejectment against the defendants on the record obtained a verdict on 7th April, 1894, entered judgment thereon, and issued execution. Upon appeal to the circuit court of appeals of the Fourth circuit the judgment below was affirmed. 13 C. C. A. 160, 65 Fed. 731. The cause having been removed by certiorari into the supreme court of the United States, the whole record was reviewed in that court, and the judgment below again affirmed. 17 Sup. Ct. 770.

Proceeding to enforce his execution, the plaintiff is met with the petition of this petitioner. This petitioner sets out that he is the state commissioner under the dispensary law; that he is now, as such commissioner, in the possession of the real estate known as the

"Agricultural Hall," the subject of the action at law in this case; that he was not a party to that action; that he did not acquire possession under said defendants, but as the successor of J. T. Gaston, acting commissioner; that Tindal, the defendant, at the time of the commencement of the action, was secretary of state for the state of South Carolina, having, as such, control and custody of the property; that the other defendant was a watchman appointed to take care of the property; that Tindal's term of office expired January, 1895, and that the employment of Boyles also terminated, and that he is now dead; that neither at the time of the commencement of said action, nor during its progress, was notice of *lis pendens* filed anywhere; that the possession of the petitioner was not acquired through or under Tindal or Boyles. Then follow a number of paragraphs attacking the validity of the sale of this property in dispute, and of the title of plaintiff. He claims to be in possession of the property as a tenant, occupying the same in the conduct of the business of the state dispensary. The prayers are: First. For the judgment of the court whether the execution issued in this case will authorize any officer of this court to dispossess the petitioner. Second. If the court should so hold, then that judgment herein be stayed until the right of possession claimed, and now enjoyed by petitioner, be determined according to the forms and procedure of this court. Third. That the judgment be opened, and that the petitioner be let in as a party defendant, to answer his defense to this action as he may be advised, to be tried and determined in due course of procedure in said cause at law. Fourth. And for general relief.

As has been seen, the plaintiff in this case brought his action of ejectment. Under this action, he was compelled to sustain his title against the world, to stand upon the strength of that title alone. After a trial in this court, it was determined upon such proof that he was the owner of the property. In that action the defendants set up the defense that they were state agents, holding the property, not in their own right, but solely for the state; one of them, Mr. Tindal, being in possession, *virtute officii*, as secretary of state. This defense was overruled in the face of the proof of title in plaintiff. Now, we have another state officer alleging that he is in possession, and claiming that, because he is a state officer, he should not be disturbed, nor called upon to recognize the title of plaintiff. To aid him, he makes precisely the same questions which were made and overruled in the trial of Wesley against Tindal. It will be noted that the petitioner does not show by what authority he occupies this building, whether by an act of the legislature, or by any other authority. He simply says that he is a tenant. There is no reason why the prayer of his petition should be granted. Wesley against Tindal may not be *res adjudicata* as to this petitioner; but it is of the highest authority for this court upon the position that the title of Wesley is good as against any one who assumes the right to the possession of this property solely because he is a state officer. There is abroad a misapprehension upon this point. It seems to be supposed that one has only to say that he is acting for or by the authority of the state, and at once he secures for himself the rights

and immunities of the state. The state speaks authoritatively in her constitution, and through her legislature, and the legislature can speak with authority only through a concurrent resolution or a joint resolution, or an act, and these last two must be approved by the governor.

In the present case the legislature has spoken. All the property of the state not in public use was placed under the control of the sinking fund commission, who are authorized to sell the same, and the proceeds of such sale or sales are appropriated to the sinking fund of the state. Gen. St. 1882, §§ 60-63, and Acts Assem. 1883 (18 St. at Large, p. 380). In 1890 the commissioners of the sinking fund were authorized, empowered, and required to sell that certain building in the city of Columbia, with the lot on which it stands, known as the "Agricultural Hall," and the proceeds of the sale, it was directed, should be turned over to the trustees of Clemson College. 20 St. at Large, p. 707. Thus, the state, by its legislature, not only required the sale of this property, but also disposed of the proceeds of sale. Under this authority, solemnly adjudicated upon in this court, and decided to be ample, this property was sold, and, by the same adjudication, held rightfully sold to the plaintiff in this case. Where, then, is there room for any pretense that the petitioner or any one else is tenant of this building, and where is the authority to any one to lease it?

The petitioner, however, alleging that he does not claim through either the plaintiff or defendant, relies upon the fact that no notice of *lis pendens* was filed in this case. According to the petition, Mr. Tindal was in possession by authority of law in 1893, and his right of possession, under the operation of the act of the legislature, ceased when he went out of office, in 1895. The judgment of the court was entered on 7th May, 1894. That judgment was notice to all the world of the fact that it declared Wesley the owner of the property. When it was entered, the suit was no longer pending. The *lis* was merged in the judgment. Besides this, under section 153 of the Code of Civil Procedure, the failure to file notice of *lis pendens* protects only some subsequent purchaser or incumbrancer. The petitioner is neither a purchaser nor an incumbrancer; nor has he averred or shown that the party for whom he is tenant is either such purchaser or incumbrancer. The prayer of the petitioner is denied, and his petition dismissed.

UNITED STATES v. 164 $\frac{8}{100}$ PROOF GALLONS OF DISTILLED SPIRITS.

(District Court, S. D. Ohio. W. D. June 30, 1897.)

INTERNAL REVENUE—FORFEITURE PROCEEDINGS—PRODUCTION OF BOOKS AND PAPERS.

In a proceeding for forfeiture, based on a charge of fraud in violation of the internal revenue laws, the government will not be required, on motion of an intervening claimant, to produce, for the inspection of such claimant, all books and writings in its possession containing evidence pertinent to the issues; nor to produce or furnish copies of the original measurements of the packages containing the goods in question, such measurements being

on file in the office of a collector of internal revenue outside the district where the proceeding is pending.

Harlan Cleveland, for the United States.
Sidney G. Stricker, for claimant.

SAGE, District Judge. This case is before the court on motion to require the government, before trial, to produce to the attorney for the intervening petitioner any and all books or writings in its possession or power, which contain: First, evidence pertinent to the issues,—that is to say, any and all reports or returns of the gaugers who gauged and inspected the brandy in question; second, any and all reports or returns made by the distillers or wholesale liquor dealers in whose possession or control said brandy has ever been; third, any and all writings or correspondence or copies thereof between any of the parties who may have had any connection with the removal or shipment of said brandy. The demand is as sweeping and comprehensive as it could be made, and, if sanctioned by the order of the court, would compel the government to submit its entire evidence to the inspection and examination of counsel for the defendant in advance of the trial, which, in a proceeding for forfeiture based upon a charge of fraud in violation of the internal revenue laws of the United States, ought not to be allowed. But in the brief of counsel for the intervener the demand is modified to “seeking a discovery of the original measurements of the packages, the only existing evidence of which is the return of the gauger under form 59½ as made to the revenue department, which is in its exclusive possession and control, and which can be reached by no other process than this motion.” The intervener is a wholesale liquor dealer, who claims to have purchased the packages from the distillers. But the United States attorney has not in his possession these original measurements. They are technically, it is true, in the possession of the government, that is to say, of the internal revenue department, but they are on file in the state and district where the brandy was distilled, and the intervener is entitled, upon application, to an inspection, or to a certified copy of them. It is not the duty or province of the government to transport the originals here for the convenience of the intervener and his counsel, or to procure certified copies for that purpose. The originals are in the proper custody directed by the law, but not within this jurisdiction. If the intervener wishes to inspect them, he will have to make his application there, or procure from the collector of the proper district certified copies. The motion will be overruled.

PRIEST v. COATES CLIPPER MANUF'G CO.
(Circuit Court, D. Massachusetts. June 25, 1897.)

No. 475.

PATENTS—INVENTION—HAIR CLIPPERS.

The Priest reissue, No. 11,411 (original No. 478,461), for an improvement in hair clippers, involves, in substance, merely a rearrangement of parts and change of proportions, resulting in no new function, and no new advantages of a striking character, and is therefore void for want of invention.

This was a suit in equity by Joseph K. Priest against the Coates Clipper Manufacturing Company for alleged infringement of reissued letters patent No. 11,411, granted April 10, 1894, to the complainant, for an improvement in hair clippers. The original patent (No. 478,461) was issued July 5, 1892.

C. C. Morgan and John S. Richardson, for complainant.

Fish, Richardson & Storrow and A. D. Salinger, for defendant.

PUTNAM, Circuit Judge. The only real issue in this case is that of patentable invention. As presented here, this raises a pure question of fact, as to which different minds might, perhaps, be differently impressed, but which seems to the court to offer an easy and clear solution. On a question so purely one of fact as this, it is sufficient to state the general considerations which lead to the result we have reached, without discussing all the details pro and con confirming it, or apparently controverting it. The patent relates to improvements in hair clippers and shears, and the claims in issue are as follows:

"(1) In a clipper, a movable cutter, operating handles, a comb plate, and a spring connected to said handles, and arranged in a space or chamber below the highest portion of the inner end of the pivotally movable handle, whereby compactness is secured, and provision is made for the removal of the spring in a downward direction after the comb plate is removed, without changing the relation of the handles to each other, substantially as described.

"(2) In a clipper, the combination of the cutter operating handle, formed with an arched or bowed portion, and with a pendent, hollow, cylindrical bearing; the stationary handle having a housing portion, and a hollow-shouldered, cylindrical bearing projecting from said housing portion, and passing through the cylindrical bearing of the movable handle; the coupling and spring-tension key bolt, the comb plate, the cutter plate, and a spring arranged in a space between the arched portion of the movable handle and the upper surface of the comb plate, and made removable in a downward direction when the comb plate is removed,—substantially as described."

"(4) In a clipper, a reciprocating cutter and vibrating operating handle, in combination with an axial portion, a stationary handle, comb plate, and a power spring connected to said handles; said operating, vibrating handle, and the other parts named, being constructed to allow of the spring being arranged about said axial portion, and below the forward portion of the movable handle, whereby compactness is secured, and the spring can be removed downwardly when the comb plate is removed,—substantially as described."

All the elements in this combination are generic, and the combination itself is old, except only the provision for the removal of the spring in a downward direction, or downwardly; and, on any fair construction of the claims, this is the only novel feature which they seek to cover. Our conclusion as to this is made quite certain by the following statement in the application:

"The object of my invention is, while greatly simplifying and increasing the durability of hair clippers, to afford room below the movable handle, and between it and the comb plate, for the location of the spring by which the cutter is enabled to shear or clip the hair on the return stroke of the movable handle, and by so locating it render the clipper more compact, and of less height between the spring pressure regulating nut and the comb plate, and also afford great convenience in applying the spring to the handles, and also afford convenience for the removal of the spring and separation of the parts of the clipper, either for sharpening the cutter, repairing, removing an old and putting in a new spring, cleaning, oiling, or for other operations; it being simply necessary to remove the nut, bolt, comb, and cutter plates, and invert the clipper,

to have the parts exposed so that either or all of the above-mentioned operations can be performed."

The specification describes other mechanical improvements which may be of value, but which clearly were not claimed, and which, therefore, we need not notice. The substance of the device, as patented, is only a rearrangement of the parts, and a change of the proportions, of what was otherwise old, each of which is of that common class ordinarily involving no invention; resulting also, in the case at bar, in no new function, and in no new advantages of any striking or extraordinary character. We cannot, therefore, hold that the device was patentable. The complainant urges on us the salability of the improved cutter, but in this respect the case falls within the rules of *Manufacturing Co. v. Holtzer*, 15 C. C. A. 63, 67 Fed. 907, and of *Codman v. Amia*, 70 Fed. 710. Moreover, for aught that appears, the salability of the cutter came from the improved features which are not covered by the patent. Let the respondent file a draft decree dismissing the bill, with costs, on or before June 30, 1897; and the complainant corrections thereof on or before July 1, 1897.

KELLY et al. v. SPRINGFIELD RY. CO. et al.

(Circuit Court, S. D. Ohio, W. D. June 29, 1897.)

PATENTS—INFRINGEMENT—ELECTRIC RAILWAYS.

The Green patents, Nos. 465,407 and 465,432, for improvements in electric railways; in which the electrical current was conducted along insulated track rails, the car wheels serving as contact devices, if valid at all, are not infringed by the overhead trolley electric railway system now in use.

This was a suit in equity by Oliver S. Kelly and the General Electric Company against the Springfield Railway Company and others for alleged infringement of certain patents for electric railways. On final hearing.

Butterworth & Dowell and F. P. Fish, for complainants.

Paul A. Staley, Kerr & Curtis, and James H. Hoyt, for respondents.

SAGE, District Judge. This suit is for the infringement of letters patent Nos. 465,407 and 465,432, issued December 15, 1891, to George F. Green, assignor to complainant Oliver S. Kelly, for improvements in electric railways, upon applications filed, respectively, August 19, 1879, and May 15, 1886, the latter application being a division or continuation of the former.

The record covers over 1,500 pages of printed matter, and the briefs over 350 pages. It would be impossible, within the proper limits of an opinion, to consider the evidence or the arguments in detail. I shall not attempt to do more than state conclusions in general terms.

The gist of the inventions set forth and claimed in the patents consists in the use of a stationary source or generator of electricity, connected through conductors extending along the line of travel, and

composed wholly or in part of the track rails, to an electro-dynamic motor so fixed upon the car as to impart motion thereto. The wheels of the car serve as contact devices to maintain continuous electrical connection between the source or generator and the motor on the car. All the claims of the patents are conceded to be for combinations, none of the elements of which were invented or discovered by the patentee. The claims of patent No. 465,407 are as follows:

"(1) The combination, substantially as set forth, of a railway track, one or more stationary means of electric supply, electrical conductors extending from said means of electric supply along the lines of said track, and consisting wholly or in part of the rails thereof, vehicles moving along said track, electro-dynamic motors, whose coils are constantly excited so long as the poles of said motors are in circuit with the means of electric supply fixed upon said vehicles for imparting motion thereto, and wheels supporting said vehicles upon the track, and also serving to maintain continuous electrical connection between said means of electric supply and motors, substantially as described.

"(2) The combination, substantially as set forth, of a railway track, one or more stationary electric batteries, electrical conductors extending from said batteries along the lines of said track, and consisting wholly or in part of the rails thereof, vehicles moving along said track, electro-dynamic motors, whose coils are constantly excited so long as the poles of said motors are in circuit with the electric batteries fixed upon said vehicles for imparting motion thereto, and wheels supporting said vehicles upon the track, and also serving to maintain continuous electrical connection between said batteries and motors, substantially as described.

"(3) The combination, substantially as set forth, of a railway track, one or more stationary means of electric supply, electrical conductors extending from said means of electric supply along the lines of said track, and consisting wholly or in part of the rails thereof, vehicles movable along said track, electro-dynamic motors fixed upon said vehicles for imparting motion thereto, and wheels supporting said vehicles upon the track, and also serving to maintain continuous electrical connection between said means of electric supply and said motors, substantially as described.

"(4) The combination of a railway track, one or more stationary means of electric supply, electrical conductors extending from said means of electric supply along the lines of said track, and consisting wholly or in part of the rails thereof, vehicles moving along said track, rotating electro-dynamic motors fixed upon said vehicles for imparting motion thereto, and wheels supporting said vehicles upon the track, and also serving to maintain continuous electrical connection between said means of electric supply and said rotating motors, substantially as described."

The claims in patent No. 465,432 are as follows:

"(1) The combination of one or more stationary sources of electric current, a conducting circuit formed wholly or in part of an insulated line of rails of a railway track, a wheeled vehicle movable upon or along said line of rails, one or more rotating electric dynamic motors mounted upon said vehicle for propelling the same, and included in said circuit of conductors, and a circuit controller placed on said vehicle, and also included in said line of conductors, substantially as described.

"(2) The combination of one or more stationary sources of electric current, the conducting circuit formed wholly or in part of an insulated line of rails of a railway track, a wheeled vehicle movable upon or along said lines of rails, one or more rotating electric dynamic motors, whose coils are continuously excited so long as the poles of said motors are in circuit with the means of electric supply, mounted upon said vehicle for propelling the same, and included in said circuit of conductors, and a circuit controller placed on said vehicle, and also included in said line of conductors, substantially as described.

"(3) The combination of one or more sources of electric supply, a railway track, a wheeled vehicle moving upon or along said track, a conducting circuit com-

posed wholly or in part of insulated conductors extending along the line of travel of said vehicle, one or more rotating electric motors mounted upon said vehicle for propelling the same, and included in said circuit of conductors, and a circuit controller placed on said vehicle, and also included in said circuit of conductors, substantially as described."

The construction and mode of operation of defendants' electric railway is shown in the following stipulation:

"It is hereby stipulated, for the purposes of this case, by counsel for the respective parties, as follows:

"First. That the defendants have operated, for regular commercial purposes, an electric street railway in the city of Springfield, in the Southern district of Ohio, subsequent to the grant of letters patent of the United States, Nos. 465,432 and 465,407, mentioned in the bill of complaint herein, and prior to the filing of the said bill of complaint. The defendants have continued to operate, and are still operating, the said electric railway.

"Second. That the said electric railway, operated as aforesaid by the defendants, is constructed in accordance with the diagram put in evidence, and marked 'Complainants' Exhibit Diagram of Defendants' Electric Railway,' wherein A indicates a stationary source of electric supply, consisting of a dynamo-electric machine of the ordinary Westinghouse type. The positive pole of the dynamo is connected electrically with an insulated trolley wire, B, extending along the line of the road, and insulated and suspended over the street in the customary manner. The cars, one of which is shown in the diagram at C, are equipped with a trolley of the ordinary so-called 'Nuttall type,' making a traveling under-neath contact with the trolley wire, B. From the trolley the electrical circuit passes through a rheostat, D, a reversing switch, E, the armature, a, field magnets, m, of the electro-dynamic motor, M, and thence, through the wheels of the car, to the track rails, which are connected electrically with the negative pole of the dynamo, A. The motor is of the ordinary Westinghouse type series wound and comprising field magnets and a rotating armature, which drives the car by gearing between the armature and axle. The circuit is indicated on the diagram by arrows, and may be traced from part to part in detail as follows: From the positive pole of the dynamo to the trolley wire, the trolley, the rheostat, one member of the reversing switch, the armature of the motor, the second member of the reversing switch, the field-magnet coils, and thence, through truck-frame and wheels of the car, to the rails and the negative pole of the dynamo.

"By throwing the reversing switch into the dotted-line position, the direction of the current in the armature of the motor is reversed relatively to that in the field magnets, so that, by operating the reversing switch, the rotation of the armature and the movement of the car may be reversed at will."

The specification of Green's first patent states that independent conductors may be used, but the claims describe conductors consisting wholly or in part of the rails of the track, and extending from the means of electrical supply along the lines of the track. The rails are mounted on string pieces insulated to prevent the escape of the electric charge. The insulators are shown in the drawings. The car wheels are the only contact devices shown or described in either patent. All the railways built by Green had elevated tracks. The stipulation as to the construction and mode of operation of defendants' railway is sufficiently clear without the diagram. The defendants' railway has a track, but not the insulated track of the Green patents. It has conductors connecting the stationary generator with the moving car, but they do not consist wholly or in part of the track as described in the patents. One of the defendants' conductors is entirely separate from the track rails, and is located, not along the lines of the rails, but overhead, and away from both rails. The wheels of de-

defendants' car do not and cannot serve to maintain continuous electrical connection between the generator and the motors, as specified in the claims. A drawing of the motor with overhead conductor is shown in complainants' record. Green testifies that it was made as early as 1874. It is attested by the signatures of five witnesses, three of whom make circumstantial statements, one purporting to have been made October 1, 1874, another June 4, 1883, and still another without a date, but made according to Green's testimony previous to 1875. All of these refer to statements made by Green respecting his invention. No one of them, however, refers to the overhead conductor. It does not appear that Green ever constructed or attempted to construct an electric railroad, or even a model, having an overhead conductor and separate contact device, such as is shown in this drawing. There is no explanation of the contact device, which, as shown in the drawing, is altogether crude and imperfect, and not such as to furnish any idea of how it was to be connected with the motor, or operated. In his application for a patent filed some five years after the date which he fixes for the making of this drawing, he made no mention of an overhead wire, or of any contact device separate from the wheels. This significant fact, taken in connection with the very careful attestations shown, is calculated to awaken a strong suspicion as to the truth of Green's testimony relating to the drawing, although he is corroborated by one of the attesting witnesses. But, without questioning the genuineness of the drawing or the authenticity of the attestations, the fact that the device which it represents was not even alluded to in the subsequent application for a patent raises a strong, if not conclusive, inference that Green had abandoned the idea of an overhead conductor, and fallen back to the use of the rails and wheels exclusively. Certainly, there is nothing in the drawing itself which would suggest the principle of the trolley now in universal use. That was the invention of Van Depoele, whose application for a patent therefor was filed March 12, 1887. The patent was granted April 1, 1890. Judge Coxe, in his opinion filed June 19, 1895, in the case of Thomson-Houston Electric Co. v. Elmira & H. Ry. Co., 69 Fed., at page 261, said:

"Even after the necessities of the situation had evolved the fundamental principle of taking the electricity from an overhead conductor, the difficulties in finding suitable contact and switching devices for a long time prevented commercial success, and the solution of the problem taxed the ingenuity of a large number of inventors. Although the electric road of to-day is a composite organism, to which many ingenious and able men have contributed, yet it cannot be denied that to Van Depoele, more than to any other man, belongs the credit of having made it a practical working success. His contributions to the art rapidly supplanted the crude and tentative prior structures, and have continued in use until the present time."

This is a clear and correct statement of the state of the art prior and up to the date of the Van Depoele invention, and of its importance and value. All of Green's electric railway constructions were experimental. They were no more practical than was Colton's device, which is relied upon by defendants as an anticipation, and scouted by counsel for complainants as only a toy, intended

to amuse the audiences to which Colton lectured. Such an electric railway as is described in the Green patents is impracticable for actual use. The track, insulated and elevated as shown in the drawings, would be such an obstacle to ordinary travel, and to crossing by vehicles, as to be a nuisance in the streets of any city. The insulation of the rails would be, if not impossible, so expensive as to be burdensome beyond endurance. His theory of conducting electricity along one of the rails, or by means of an independent conductor placed parallel with one of the rails, and up through the wheels of the cars to the motor, using the other rail for the return circuit, has never been in commercial use, and cannot be made to operate for such use, although it may be in a measure successful in an experimental way. With the top of the rail placed flush with the surface of the street, as is the construction with the best rail in use, or so nearly flush as to permit the free crossing by vehicles, insulation would be simply impossible. Any attempt to use it in whole or in part as a conductor of electricity to the motor would be like undertaking to make such conductor of a wire continuously grounded. It would be utterly impracticable. By no proper construction can anything described or claimed in either of his patents be held to include the overhead wire and the trolley system used by the defendants. It follows that the defendants do not infringe the Green patents, even if they are valid. It is not necessary, therefore, to consider the question of their validity. The bill will be dismissed, at the costs of the complainants.

TYLER et al. v. T. E. RICH CO.

(Circuit Court, D. Massachusetts. June 9, 1897.)

No. 393.

PATENTS—VALIDITY AND CONSTRUCTION—INFRINGEMENT.

In the Tyler patent, No. 389,826, for improvements in machines for smoothing and finishing blind slats, the "wedges for regulating the pressure of the springs" held to be an essential element of the third claim; and said claim held valid and infringed.

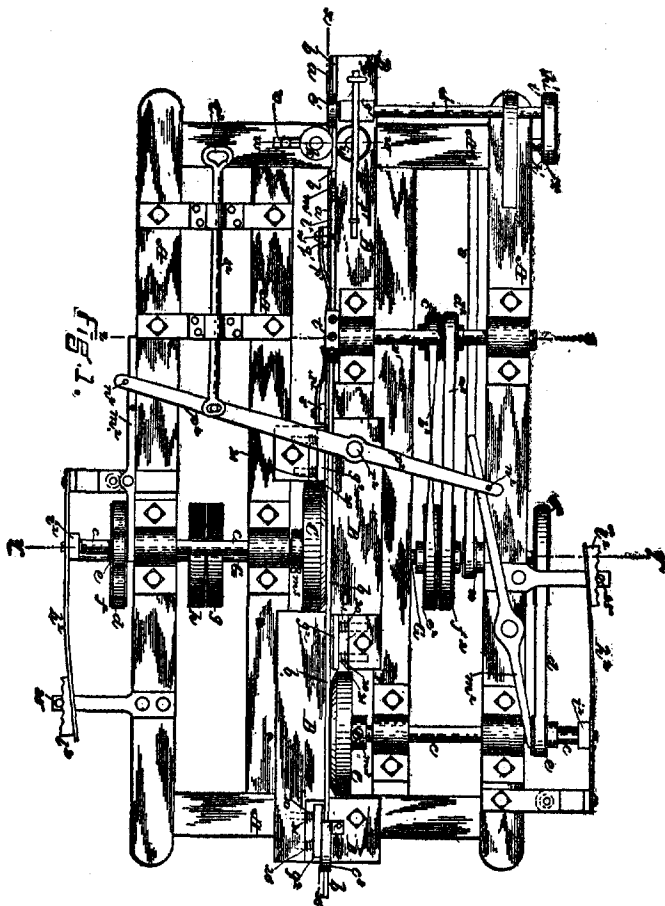
This was a suit in equity by Arthur F. Tyler and others, trustees, against the T. E. Rich Company, for alleged infringement of letters patent No. 389,826, to Arthur F. Tyler, for improvements in machines for smoothing and finishing blind slats. On final hearing.

Chas. C. Morgan and John S. Richardson, for complainants.
William S. B. Hopkins, for defendant.

COLT, Circuit Judge. The bill in this case is brought for the infringement of a patent granted to Arthur F. Tyler, September 18, 1888, for improvements in machines for smoothing and finishing blind slats. The patentee declares that his "invention consists in certain novel combinations of parts and details of construction." The charge of infringement is confined to the third claim, which reads as follows:

"(3) In a machine for smoothing and finishing blind slats, the combination, with the shafts, c, c, and the abrading disks, C, C, of the pressure springs,

h^2 , h^2 , pivoted at one end, and adapted to be swung back out of the way of said shafts, said springs being provided with wedges for regulating the pressure of the springs, substantially as and for the purpose set forth."



With respect to this claim, the questions in controversy are—First, whether the wedges are a material element of the claim; and, second, whether the defendant, in its machine, uses wedges or an equivalent therefor.

Upon the first point, it seems to me that from the language of the claim, taken in connection with the proceedings in the patent office, the "wedges for regulating the pressure of the springs" must be considered a material element of the combination.

Upon the second point, we find that in place of the notched wedges with fixed pins, contained in the Tyler device, the defendant uses movable stop pins adjustable in holes. In mode of operation, and in the result produced, the movable pin adjustable in holes is plainly an equivalent of the stationary pin and notched wedge of the Tyler machine.

It is also contended that the Tyler machine was in public use for more than two years prior to the application for the patent. Upon careful examination of the testimony, I am of the opinion that although the patented machine was in process of development, or in an experimental stage, for a number of years, the machine was not perfected until within a few months prior to the application for the patent. The defendant's machine infringes the third claim of the Tyler patent, and a decree may be drawn accordingly. Decree for complainants.

THE JOHN R. PENROSE v. THE WILLIAM J. LIPSETT.

(District Court, E. D. Pennsylvania. June 28, 1897.)

COLLISION IN CHANNEL—SAIL GETTING UNDER WAY.

A schooner going down Delaware Bay under sail, and colliding with another schooner, which, having been anchored on the west side of the channel, heading northeast, was getting under way, paying off southward to go to sea, held solely in fault, in that, being bound to keep out of the way, she attempted to pass to the east across the other's bow, when it was uncertain how far east the latter would go in making the turn, instead of taking the safe course to the westward, under her stern.

This was a libel in rem in behalf of the owners of the schooner John R. Penrose against the schooner William J. Lipsett to recover damages resulting from a collision between the two vessels in Delaware Bay.

The following questions were submitted to Capt. Jarvis Call:

(1) Are you a member of the board of survey in admiralty at the port of Philadelphia?

(2) How much experience have you had as a master of sailing vessels?

(3) Supposing the situation of the Penrose to have been such as her officers described in their testimony, could she have come about southward conveniently, within less space than she covered in doing so? If she could, state about how much less.

(4) Could the Lipsett have safely turned westward at the time she shifted eastward and thus have avoided the threatened danger?

Jarvis Call, master, will please read the testimony of the officers above named and answer the foregoing questions in writing.

Wm. Butler, J.

June 22, 1897.

To the Honorable William Butler, Judge of the District Court of the United States for the Eastern District of Pennsylvania:

A. 1. I am a member of the board of surveyors in admiralty at the port of Philadelphia.

A. 2. I have been master of sailing vessels for thirty years.

A. 3. After carefully considering the positions of the Penrose and the state of the tide and wind at the time, it would be difficult to say just what distance it would take to wear said vessel around. Under favorable circumstances where there was no tide, and in smooth water she ought to go around in three or four times her length when the anchor is off the bottom.

In a strong tideway it is not an unfrequent occurrence for a vessel to fall off until she gets the tide on her beam and stops, still continuing to forge ahead. I have known instances of vessels in a strong tideway to go for miles before paying off, the vessel being under the influence of the tide and not her helm.

A. 4. Considering all the circumstances, the state of the tide, the direction of the wind, the management of the helm and sails of the Penrose, it is my judgment that she did everything practicable to wear around as soon as possible. The state of the tide did not aid her, striking her side it tended to stop her from falling off. She was more under its influence than of her helm and would thus be retarded in getting around.

It is my opinion that a vessel getting under way has the right of way, while a vessel under way with all sail set is under control and can luff to, or keep off as the case may require. The Lipsett even at a mile distance might easily have changed her course westward and gone under the stern of the Penrose. A change of one or two points would have been sufficient. In her condition she ought to have had complete control of her movements.

(Signed) Jarvis Call.

Philadelphia, June 24th, 1897.

Horace L. Cheyney and John F. Lewis, for libellant.
Curtis Tilton, for respondent.

BUTLER, District Judge. When the vessels came within view they were from three to five miles apart. The libellant was down the bay, on the western side of the channel, getting under way from her anchorage, heading northeast, and paying off southward, to go to sea. The respondent was above, coming down near midchannel, and understood the libellant's intention to turn southward. She kept her course until more than half the distance between the vessels had been traversed, and then apprehending danger, turned eastward, as far as existing circumstances permitted—which was only about two points. As she thus endeavored to cross the Penrose's bows, the vessels came into collision slightly. The injury sustained by the Penrose, for which she sues, was small.

On the hearing I was impressed with a belief that the Lipsett should have gone westward when she turned the other way, or earlier. It seemed dangerous to attempt to cross the Penrose's bow, and entirely safe to go under her stern. Further examination has satisfied me that this impression was right. It was the duty of the Lipsett to keep out of the way. She could not know how far east the Penrose would go, under the circumstances, and she should therefore have turned the other way in time to avoid danger, as she might easily have done. She was not justified in believing her course, originally or as changed, safe, because she was not justified in supposing the Penrose would turn earlier than she did. The only serious question in my mind, after such fuller examination, was whether the Penrose was not also at fault in going so far east. While her officers testify that she turned as rapidly as she conveniently could; that they fully recognized the duty of doing so and endeavored to perform it, witnesses called by the respondent testify that she could have turned earlier. The question thus presented involves consideration of the effect of the existing state of wind and tide, and of the management of helm and sails. Such a question can only be wisely dealt with by an experienced navigator; the theorizing and guessing of a landsman, no matter how intelligent, and whether lawyer or layman, is of no value. Under the circumstances I deemed it proper, therefore, to take the judgment of a master seaman who has had long experience in the navigation of sailing vessels. The answers of Capt. Call are annexed hereto. They support the testimony of the Penrose's officers; and consequently I find that this vessel turned as rapidly as she conveniently could, and was not therefore in fault.

The libel must be sustained and a decree may be prepared accordingly.

UNITED STATES v. KING.

(District Court, E. D. Wisconsin. June 25, 1897.)

OFFENSE COMMITTED BY ONE INDIAN AGAINST ANOTHER — JURISDICTION OF UNITED STATES COURT.

The offense of assault with intent to commit rape, committed by an Indian upon an Indian woman, both residing upon an Indian reservation, is not cognizable as a crime by any statute of the United States, and United States courts have no jurisdiction of such offense.

M. C. Phillips, for the United States.
Geo. E. Williams, for defendant.

SEAMAN, District Judge. The defendant stands convicted under an indictment for assault with intent to commit rape. Both the accused and the assaulted woman are Oneida Indians, under charge of an Indian agent, and residing on the Oneida reservation, where the alleged assault was committed. Motion is made in arrest of judgment, and the only question presented is whether the offense is cognizable under the United States statutes. The power of congress to legislate in regard to crimes by or against the Indians as wards of the government is clearly settled by the decisions of the supreme court. *U. S. v. Kagama*, 118 U. S. 375, 6 Sup. Ct. 1109; *U. S. v. Thomas*, 151 U. S. 577, 14 Sup. Ct. 426. Is there any such legislation covering the offense alleged in this indictment? Prior to the act of March 3, 1885 (23 Stat. 362, 385, c. 341, § 9), it appears that congress had not undertaken to legislate respecting offenses committed by one Indian against the person or property of another, aside from special provisions contained in title 28, Rev. St., exceptional in their nature. *U. S. v. Kagama*, 118 U. S. 375, 377, 6 Sup. Ct. 1109. While section 2145 of that title provides that "the general laws of the United States as to the punishment of crimes committed in any place within the sole and exclusive jurisdiction of the United States, except the District of Columbia, shall extend to the Indian country," section 2146 (as contained in the second edition of the Revised Statutes, pursuant to correction in the act of February 18, 1875) excludes from the operation of the previous section "crimes committed by one Indian against the person or property of another Indian." These provisions are clearly applicable here. *Ex parte Crow Dog*, 109 U. S. 556, 3 Sup. Ct. 396; *In re Mayfield*, 141 U. S. 107, 11 Sup. Ct. 939; *Famous Smith v. U. S.*, 151 U. S. 50, 14 Sup. Ct. 234. The act of 1885, above referred to, provided for the punishment of Indians committing murder and other specified crimes, and gave cognizance to the United States courts when committed within the limits of a reservation in a state. This legislation was considered by the supreme court, and its constitutionality upheld, in *U. S. v. Kagama*, supra, and *U. S. v. Thomas*, supra; and, so far as jurisdiction is conferred by that act, it must be regarded as exclusive, and as modifying, to that extent at least, the ruling in *State v. Doxtater*, 47 Wis. 278, 2 N. W. 439. But the offense charged against this defendant is not provided for in this

enactment, nor in any United States statute. It is true that section 5391, Rev. St. U. S., adopts the laws of the respective states for offenses committed in places under the exclusive jurisdiction of the United States where punishment is not specially provided for by any law of the United States, but this section is expressly excluded from operation in this case by section 2146, above cited. Therefore the Wisconsin statute providing for such offenses cannot be invoked. As this court is wholly dependent upon statutes of the United States for its criminal jurisdiction, and cannot take cognizance of offenses which are declared such either at common law or by state statute, unless there is express adoption and direction by act of congress, I am constrained to hold that jurisdiction does not exist in this case. The motion must be granted, and the defendant discharged.

JOHNSON ELECTRIC SERVICE CO. v. POWERS REGULATOR CO.

(Circuit Court, N. D. Illinois, N. D. March 8, 1897.)

1. PATENTS—INTERPRETATION—INFRINGEMENT.

In a patent for a heat regulator, the diagrams showed, and the specifications described, a bar designed to expand and contract with changes of temperature, and the patentee stated that the valves were actuated "by the direct utilization of the mechanical effects of the expansion or contraction of the substances of which the thermostat is composed." The claims included, as elements of the combination, "a thermostat and a double valve operated directly thereby," and "a thermostat whose free portion is moved by a change of temperature in the surrounding medium." *Held*, that the patent was not infringed by a device in which the thermostatic power was furnished by confined rhigolene, which changes from a liquid to a gaseous form, and back again, with variations of temperature.

2. SAME—TEMPERATURE REGULATORS.

The Johnson patent, No. 314,027, for an improvement in "thermo-pneumatic temperature regulators," construed, and *held* not infringed.

This was a suit in equity by the Johnson Electric Service Company against the Powers Regulator Company for alleged infringement of a patent.

Winkler, Flanders, Smith, Bottum & Vilas, for complainant.
Offield, Towle & Linthicum, for defendant.

SHOWALTER, Circuit Judge. Complainant sues for the infringement of claims 1 and 2 of letters patent of the United States numbered 314,027, for an improvement in thermo-pneumatic temperature regulators. The patentee says in his specification:

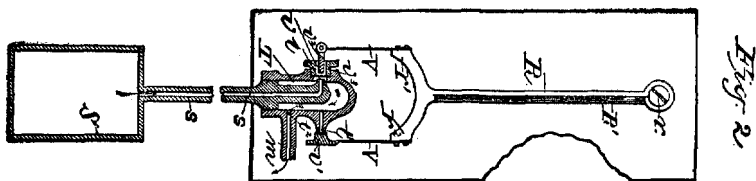
"My invention relates to a class of inventions used to control the temperature of apartments by automatically cutting off or admitting the supply of heat, and it consists in certain peculiarities of construction, as will be fully set forth hereinafter."

Again he says:

"In my present invention I utilize the expansion or contraction of substances resulting from a change of temperature to open or close air valves, which, by

admitting compressed air to expansible chambers, serve to actuate the main valves which control the supply of heat. Heretofore, so far as known to me, thermostats have been used for the purpose of controlling passages only in two ways: First, by moving the main valves directly, as in damper regulators for furnaces; and, secondly, by closing an electric circuit, which in turn serves to operate the main valve. In a previous invention of mine for an 'electric valve for regulating temperature,' etc., for which I filed an application for letters patent on March 10, 1884, I used the thermostat to control an electric current, which in turn controlled the admission to, or release from, an expansible chamber, of steam, gas, or other fluid; said expansible chamber by its movements serving to control the main valve. In my present invention, however, I discard the intermediate use of electricity for accomplishing the ultimate design, and actuate the valves for compressed air or other gas by the direct utilization of the mechanical effects of the expansion or contraction of the substances of which the thermostat is formed."

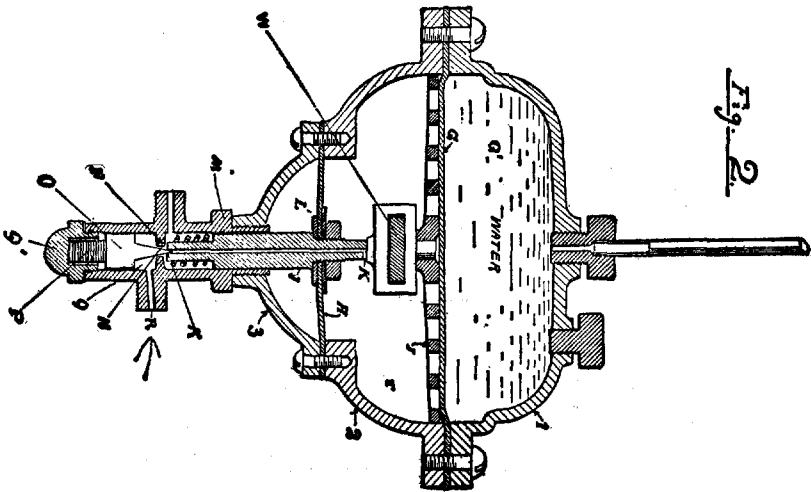
The thermostat shown and described in the diagrams and specification of the patent is a flat bar made by joining longitudinally the flat sides of two thinner bars, one of steel, and the other of a substance more sensitive to changes of temperature,—say, vulcanite. This bar is firmly fixed at one end, the other or free end extending downward, and bearing a yoke, on each extremity of which is extended, further downward, an arm or tine, so that a plane through the yoke and arms is at a right angle to the plane of junction between the steel and the vulcanite. The suit is grounded on the device shown in Fig. 2 of the patent. The arm to the left is marked V. I shall, in this opinion, call the one to the right V'. These are spring arms; that is, they



admit of slight flexion to right or left. The double-valve casing is between them, and they are so set with relation to each other that when the thermostatic bar is straight their lower ends, serving as valves, close both the discharge and the supply ports for the compressed air. When by rise of temperature the bar is warped or bowed so that its lower end inclines to the left, the valve on arm, V, parts from its seat, and the compressed air passes to an expansible chamber, and pushes down a main valve, and shuts off the heat. By the decline in temperature which now ensues, the lower end of the bar commences its movement to the right, the supply port is first closed by the arm, V, and then the discharge port is uncovered by the parting therefrom of the arm, V', thus permitting the escape of the compressed air from the expansion chamber, whereby the heat is once more let on. In brief, a change of temperature moves the lower end of the bar, like the end of a lever, to right or left, and this direct mechanical movement opens and closes—that is to say, operates—the valves.

In the device of the defendant the thermostat is an air-tight

metallic chamber, divided internally, by a corrugated, expansible partition, into two compartments. One is partly filled with a substance called "rhigolene," which is normally liquid, but which expands by volatilization under a rise in temperature. The other is connected by a downward pipe with a third chamber, the lower wall of which is an elastic diaphragm. These two latter, and the pipe connection between them, are filled with air and water. When the rhigolene volatilizes, and so expands by heat, the corrugated partition presses against the fluid piston in the inclosed space described. The central portion of the elastic diaphragm in the lower chamber is pushed downward against the upper end of an upright piece so arranged in a valve casing that by its downward motion it first closes the discharge port, and then opens the supply port. The heat being thus shut off by the



action of an expansible chamber on a main valve, the volatile substance in the chamber first mentioned contracts into the liquid form, and the corrugated partition resumes its normal position. The space within the two chambers connected by the pipe is thus again enlarged, and the pressure, whereby the diaphragm and the upright piece were so moved downward, ceases. By the elasticity of the diaphragm, and the reflex action of the two springs, P and W, which directly antagonize the downward movement of the liquid piston, the supply valve is shut, and thereafter, by the further action of the spring, W, and the contraction of the diaphragm above it, the discharge valve is opened and the heat let on.

The claims in suit are in words following:

"(1) The combination, with a main valve controlling steam or analogous passages, and an expansible chamber for operating said valve, of a thermostat and a double valve operated directly thereby, a reservoir of compressed air, and suitable pipe connections or passages, substantially as described, whereby the main valve will be operated by the compressed air, and the passage of the

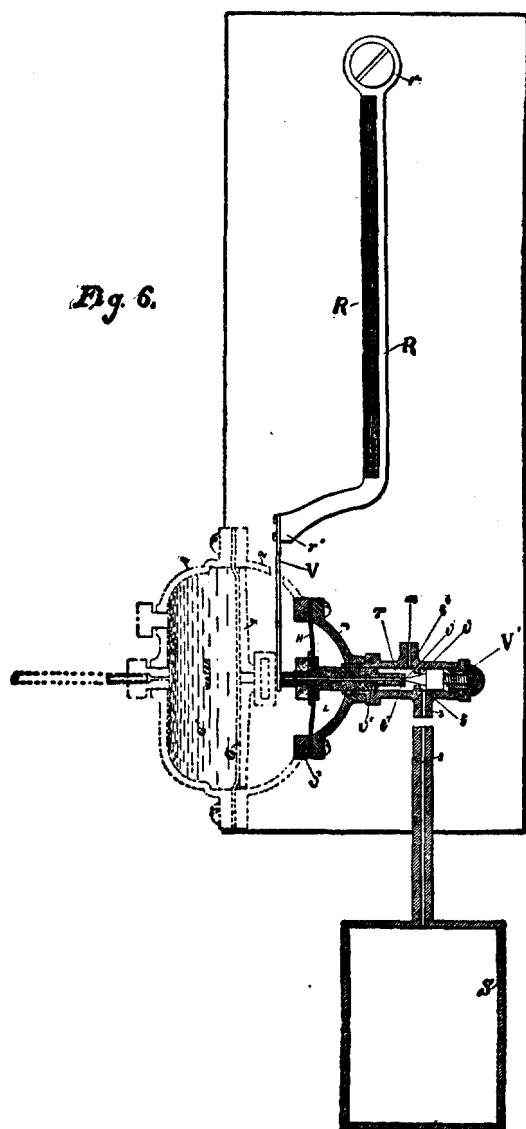
latter to and from the expansible chamber be controlled by the action of the thermostat, substantially as set forth.

"(2) In a temperature regulator, the combination of a thermostat whose free portion is moved by a change of temperature in the surrounding medium, a valve mechanism operated by the mechanical action of said thermostat, a reservoir of air or other gas under pressure, the escape of the air or gas from said reservoir being controlled by the mechanical action of said thermostat through said valve mechanism, an expansible chamber whose inlet and outlet are controlled by said valve mechanism, and a valve operated by the expansion of said chamber, said valve by its movements controlling a steam or other passage, whereby a rise of temperature in the medium surrounding the thermostat operates the outlet to said reservoir and inlet to said expansible chamber, so that the chamber is expanded, and the valve governing the steam or other passage is operated in one direction, and a fall of temperature in the surrounding medium through the mechanical action of the thermostat serves to close the inlet to said expansible chamber, and opens the outlet to said chamber, whereby the said valve which controls the steam or other passage is operated in the other direction, substantially as set forth.

In Fig. 1 of the patent the thermostat has rigid forks, which act through the instrumentality of an eccentric notched disk, link attachment to valve stem, spring, and clockwork, to operate the valve. This construction would seem, *prima facie*, to contain the "valve mechanism operated by the mechanical action of the said thermostat" of the second claim, whereas the "thermostat and the double valve operated directly thereby" of the first claim are illustrated in Fig. 2. It is insisted, however, that the structure in Fig. 2 is also covered by claim 2. But, so far as concerns that claim, the device of defendant does not show "a thermostat whose free portion is moved by a change of temperature in the surrounding medium." "The free portion" of the thermostat of the patent is that portion which is free to move by a "change of temperature in the surrounding medium," being the entire bar, except the upper end, which is held in a fixed position at *r*. The surrounding medium is the atmosphere. By a rise in temperature the lower end moves to the left; by a fall, to the right. Self-expansion and self-contraction in the "free portion" thus generate mechanical movement in either direction. In the defendant's device the thermostatic force made use of is the expansion by volatilization of the rhigolene. Movement is thereby imparted to the corrugated partition, and by the latter to the liquid piston. Thence, by the associated mechanism, the discharge valve is pushed to its seat, and thereafter the supply valve is pushed from its seat. When the rhigolene liquifies, the change of temperature generates no force to move the valve mechanism. The corrugated partition, being relieved of the pressure which forced it into strained expansion, tends by its mechanical construction to contract into its former position, aided by the disposition of the lower diaphragm to contract and force upward the liquid piston under stress of springs, *W* and *P*. The free portion of defendant's thermostat, namely, the corrugated partition, being that portion which moves, and by its motion produces mechanical effects on structures which are no part of the thermostat, is not incited to such action by self-expansion or self-contraction through change of temperature. It is not "moved by change of temperature in the sur-

rounding medium," but by the volatilization or forced disintegration of the rhigolene. The words of the claim, "a thermostat whose free portion is moved by a change of temperature in the surrounding medium," identify the bar thermostat as described in the specification and shown in the diagram of the patent. These words have no fitness, especially when read in connection with the specification and diagrams, to indicate the thermostatic structure used by defendant. In a sense, every thermostat must have a portion "which is moved by change of temperature in the surrounding medium"; and, in so far as this portion is free to so move, it is the "free portion" of the thermostat. The words, "whose free portion is moved by a change of temperature in the surrounding medium," are meaningless and superfluous, unless they describe the kind of thermostat shown in the diagrams of the patent. In my judgment, the thermostat of claim 2 is not in the defendant's device.

The combination of claim 1 contains, among others, the factor, "a thermostat and a double valve operated directly thereby, * * * substantially as described." In the device of defendant the discharge port or outlet is pushed over the apex of the conical stopper, O, and so closed by the direct action of the thermostat. By further direct thermostatic action the cone is pushed down out of contact with the circumferential edge of the supply port or aperture. But the reverse process, whereby the conical stopper is pushed upward to close the supply port, is due to the spring, P, and the lifting the discharge opening away from the stopper or apex of the cone is by spring, W. The volatilization of the rhigolene generates sufficient power not only to close the discharge port and open the supply, but to do this against the opposing pressure of the corrugated partition, the elastic diaphragm, the spring, W, and the spring, P. By a rise in temperature the rhigolene changes from a liquid to a vapor or gas. This change of form, like the change of water into steam, is the source of thermostatic power in defendant's device. Volatilization, and not mere expansion of a substance without structural change, is the principle of defendant's thermostat. Moreover, as already explained, the thermostatic force as developed by change of temperature in defendant's device is in one direction only, but this force is sufficiently intense to overcome the resistance of mechanism which, as soon as such force ceases, will exert power in the opposite direction. It is the play of the intermittent thermostatic force, in antagonism to the constant forces of the springs, P and W, the elastic diaphragm, and the corrugated partition, which operates the valves in the structure of defendant. In the device of the patent the arms, V and V', by direct thermostatic movement, open and close the valves. Mechanism which would cause the supply port to be constantly closed, and the discharge to be constantly open, is not intermittently opposed and overcome by the force of the thermostat. By thermostatic action the arm, V, in Fig. 6 of the series, whereby the evolution of defendant's construction out of the patent in suit is attempted, directly pulls the discharge port away from its conical stopper. This is done in defendant's de-



vice by the spring, W, which exerts force in direct opposition to the thermostat. When the arm, V, of said Fig. 6, moves to the right in pushing the cone from the supply port, it must oppose and overcome the resistance of spring, V, put into the figure to represent defendant's spring, P, and to serve apparently as an equivalent for the arm, V', of the patent. But in the device of the patent the arm, V', instead of opposing the arm, V, in this movement, aids it. So far as concerns the direct action of the thermostat to operate the valves (that is, to move them in either direction as may be required), the evolved construction of Fig. 6 is a departure in one direction from that of defendant, and in the opposite direction from that of the patent. "A double valve operated directly" by a thermostat, "substantially as described" in the specification of the patent, is not found in the device of defendant.

It is said that the thermostat by its direct action bends the spring, W, and compresses the spring, P, and that the force is thus lodged in these springs whereby they react, when relieved of the pressure, to first close the supply port and then open the discharge. But the resilience of these springs is not the direct action of the thermostat; nor is the capacity of the springs to rebound a force added to the springs by the thermostat. That force is due to the mechanical structure of the springs, and the nature or quality of the material out of which they are made. The patentee states in his specification that his invention consists in "certain peculiarities of structure, as will be fully set forth hereinafter." The essential peculiarity of construction is that whereby thermostatic forces in appropriate sequences and in opposite directions are utilized immediately and directly to open and close—that is, to operate—valves. The bill is dismissed for want of equity.

THE GLENDALE.

THE GLENDALE et al. v. EVICH.

(Circuit Court of Appeals, Fourth Circuit. July 10, 1897.)

No. 215.

1. ADMIRALTY JURISDICTION—STATUTORY LIENS—ACTION FOR WRONGFUL DEATH.

A state statute giving a right of suit in rem against a vessel wrongfully or negligently causing the death of any person (Code Va. § 2902) creates a lien, and may be enforced by a libel in rem in the federal courts, when the accident occurs in waters of the state navigable from the sea. 77 Fed. 906, affirmed.

2. ADMIRALTY APPEALS—WEIGHT OF EVIDENCE—EFFECT OF DECISION BELOW.

When all the testimony in the cause has been taken, not before the judge below, but before a commissioner, and is all before the appellate court in his report, that court must examine it for itself, and reach its own conclusions.

Appeal from the District Court of the United States for the Eastern District of Virginia.

This was a libel in rem by Phillip B. Evich, administrator of Joseph Evich, deceased, against the steamtug Glendale, and Horace Furman and E. J. Furman, composing the firm of Furman Bros. (owners of said tug), to recover damages for wrongfully causing the death of the said Joseph Evich. The district court rendered a decree for the libellant (77 Fed. 906), and the owners have appealed.

William Flegenheimer, for appellants.

H. R. Pollard and Conway R. Sands, for appellee.

Before GOFF and SIMONTON, Circuit Judges, and BRAWLEY, District Judge.

SIMONTON, Circuit Judge. This is an appeal from the district court of the United States for the Eastern district of Virginia, sitting in admiralty. The libel is filed by the administrator of Joseph Evich, deceased, against the steamtug Glendale in rem. The alleged cause of action is the death of libellant's intestate, arising from the collision with the said tug.

The first question is: Has the court, sitting in admiralty, in the Eastern district of Virginia, a jurisdiction in rem for a tort resulting in the death of the person injured? In *The Harrisburg*, 119 U. S. 199, 7 Sup. Ct. 140, the supreme court discusses this question. After an elaborate and full review of all the cases reported, the court decides that no such proceeding can be maintained in admiralty in the absence of a statute giving the right; and the court expressly reserves the question whether such a right having been given to the state courts, the federal courts sitting in such state can exercise it in admiralty. In *The Corsair*, 145 U. S. 335, 12 Sup. Ct. 949, the question is again fully and elaborately discussed, and the authorities, American and English, reviewed. And it is stated that, by the last and most

authoritative decision in England (*The Vera Cruz*, 10 App. Cas. 59, etc.), the law is now settled in that country that admiralty has no jurisdiction to proceed in rem in such cases. The law of this country is thus declared:

"A maritime lien is said by writers on maritime law to be the foundation of every proceeding in rem in admiralty. In much the larger class of cases the lien is given by the general admiralty law, but in other instances, such, for example, as insurance, pilotage, wharfage, and materials furnished in the home port, the lien is given, if at all, by the local law. As we are to look, then, to the local law in this instance for the right to take cognizance of this class of cases, we are bound to inquire whether the local law gives a lien on the offending thing. * * * Unless a lien be given by the local law, there is no lien to enforce by proceedings in rem in admiralty."

In this case the court had no jurisdiction, because the law of Louisiana, in which state the action was brought, did not create a lien. It is true that this case is somewhat negative in relation to the proposition. But it is clear from its reasoning that, if the lien be given by the local law, it will be enforced in admiralty. This is in accord with the general rule as to liens given by a state statute. *The J. E. Rumbell*, 148 U. S. 1, 13 Sup. Ct. 498. It is in close analogy to the remedy given by the state statutes to material men in the home port.

The jurisdiction therefore depends upon the Virginia statute. The provisions upon this subject appear in sections 2902 and 2903 of the Code of Virginia, and they settle this question in favor of the jurisdiction of the court:

"Sec. 2902. When Suit may be Maintained on Account of Death of a Person Caused by Wrongful Act of Another. Whenever the death of a person shall be caused by the wrongful act, neglect or default of any person or corporation, or of any ship or vessel, and the act, neglect, or default is such as would (if death had not ensued) have entitled the party injured to maintain an action, or to proceed in rem against the said ship or vessel, or in personam against the owners thereof or those having control of her, and to recover damages in respect thereof, then, and in every such case, the person who, or corporation or ship or vessel which, would have been liable if death had not ensued, shall be liable to an action for damages, or, if a ship or vessel, to a libel in rem, and her owners or those responsible for her acts or defaults or negligence to a libel in personam, notwithstanding the death of the person injured, and although the death shall have been caused under such circumstances as amount in law to a felony.

"Sec. 2903. How and When to be Brought; How Damages Awarded; New Trials. Every such action shall be brought by and in the name of the personal representative of such deceased person, and within twelve months after his or her death. The jury in any such action may award such damages as to it may seem fair and just, not exceeding ten thousand dollars, and may direct in what proportion they shall be distributed to the wife, husband, parent and child of the deceased. But nothing in this section shall be construed to deprive the court of the power to grant new trials, as in other cases."

The learned counsel for the appellants contends that the state statute must create and give a lien in advance and in express terms. *The Corsair*, supra, says that we are bound to inquire whether the local law gives a lien on the offending thing. The Virginia statute declares that "the person who, or the corporation or ship or vessel which, would have been liable if death had not ensued, shall be liable

to an action for damages, or, if a ship or vessel, to a libel in rem." A libel in rem proceeds upon the idea of the existence of a lien. "Whenever a lien or claim is given on a thing by the maritime law,"—and, as has been seen, the lien created by the local law is administered in admiralty on the same principles as maritime liens,—the admiralty will enforce it by its process in rem, and it is the only court competent to do this. It is much more than a right to sue. It is jus in re, a right in the thing itself, without actual possession or any right of possession, and can be executed and divested only by process in rem, and is treated as a proprietary right. Henry, Adm. Jur. & Proc. § 41.

This brings us to the facts of the case. The Glendale is a small tug, 41 feet long, 8½ feet beam, propelled by steam, and engaged in towing in and about the James river. The intestate of the libelant was with his father, the libelant, and two other men, fishing with a seine in the James river, between Richmond and Manchester, on the afternoon and evening of the 7th June, 1896. On that evening, the Glendale, proceeding down the river, came upon the small boat in which these persons had been fishing. When she came close to the boat, Evich, the libelant, caught the rail of the tug, and jumped out of his boat into the tug. One of the men, Coleman, took the boy Joe Evich by the hand, and reached out and got on the tug. Somehow his grasp on the boy was loosened, so that the boy got away from him; probably was sucked under the tug, and was drowned. He was about 12 years old. The small boat had no light. It was about 14 feet long, about 5 feet wide in the center, its greatest beam, pointed at the bow, with a square stern and a flat bottom. These facts are undisputed. By whose fault the sad accident occurred is the question in the case. The testimony is very voluminous. The number of witnesses examined out of all proportion. The evidence is contradictory to a great degree. The district court decreed in favor of the libelant. Ordinarily, this would have had great and controlling weight if the witnesses had been examined in the presence of the court. The *Thomas Melville*, 37 Fed. 271; *The Holberg*, 43 Fed. 120; *Duncan v. The Gov. Nicholls*, 44 Fed. 302.

The rule and the reason of the rule are stated in *The Alejandro*, 6 C. C. A. 57, 56 Fed. 624:

"The rule is well settled that in cases of appeal in admiralty, when the questions of fact are dependent upon conflicting evidence, the decision of the district judge, who had the opportunity of seeing the witnesses and judging their appearance, manner, and credibility, will not be reversed, unless it clearly appears that the decision is against the evidence,"—quoting *The Albany*, 48 Fed. 565, quoted and followed in this circuit; *The Lucy*, 20 C. C. A. 660, 74 Fed. 572, and 42 U. S. App. 100.

But all the testimony in the case was taken before a commissioner, and it is before us in his report. We must examine it for ourselves, and reach our own conclusion. The three men in the small boat, Evich (the libelant), Coleman, and Ebenhack, testify to about the same effect. The last says that they were fishing with the seine out on the Manchester side of the river, and saw the tug coming towards them when she was some three or four hundred yards away. They

halloosed, but the tug apparently paid no attention. They pulled towards the Manchester side of the river. The tug seemed to be coming right at them. Then Evich told Coleman, who was rowing, to pull towards Richmond. The tug came near. Coleman jumped from the boat with the boy. So did Evich. The tug struck the boat. The witness Ebenhack remained in her, and, when she tilted at the blow, he righted her. When they missed the boy, he paddled about, hunting for him; afterwards took Evich and Coleman from the tug, and they went in the boat, which was half full of water, to Richmond. He says that the tug struck the boat four or five feet from the bow, running at full force.

Coleman says that "they had taken the seine up, and made way back to Richmond, when they saw the tug between a hundred and fifty yards from us. That they commenced to get out of the way of it, and found that they could not. Every way we would turn he would turn into us. It seems to me like he had to run into us. I saw he was coming so straight into us every way we tried to shun him. Then, after, I found out that I couldn't shun him." He adds that, when he got on the tug, "then the captain of the tug, I don't know which one was it, but it was one of the men on board the tug, he said, 'You had no business to leave Richmond to-night, anyway.' Then he said to Mr. Evich that, if he had known it was him, he wouldn't have had it happened for a thousand dollars." He does not say anything of the speed of the tug or of the character of the blow.

Evich says:

"We started away from the house at 6:30 on Friday. We took a boat owned by myself, for a horse went down with the trouting lines and seines. We put out a trouting line, and then we went and hauled a seine. We started the seine out on the Manchester or Chesterfield side, and our seine reached a little better than halfway across the river. We came pretty close to the vessel, which was lying at the Chemical Works, and, just about the time we got it all out, my unfortunate boy saw the tugboat from Richmond coming down. He told me: 'Papa, you had better pull up this end. There is a tugboat coming down. I see it turning around.' It seems to me that the tug, when I saw it, was about the Clyde wharf,—was sitting across the river. I do not know if it was turning around, or he was stopping there. The end of the seine that I had just put out at the time reached about in the channel, but I thought that probably we would be out of the way of anything that goes up and down the river, as steamship or sailing vessel. But I told the colored man to back up. The boat begins to sink. And then I started to pull the seine up. I saw that I was in close range with the buoy which lays in the middle of the river, but I saw that this tugboat was coming down like a steamer without a rudder, or in a way that looked like nobody took care of it. I pulled up my seine altogether. Then I was clean over on the Chesterfield side. I saw this boat that was coming down so crooked and unruly that, when I saw it about three or four hundred yards, I began a halloosing, and I could not go any further to the Chesterfield side. I was close up to the posts, and it seems to me the boat steered backward and forward; and when we got in close quarters, about fifty yards, I saw the boat as well as I see you now, and I begged the captain, before his God, to reverse his boat, but he did not pay any attention to it. And when he got much closer, he sheered right into me, on the Chesterfield side, and I called my oarsman to pull up the other way. The boat was under my rule all the time, and, when I told him to go the other way, it seems to me that he put his wheel hard a-starboard, and he struck me six feet from the bow. The boat is 18 feet long, four feet wide at the top, and three foot six inches at the bottom. I saw several fishermen around me, and I saw a few

men that were fishing off the Chesapeake dock with their tight lines. When the boat struck me, I told the captain, 'What are you trying to do, you brute you?' When he struck me, he threw me right out of the boat entirely; and, in falling down, I threw my left hand on his rail. He drove me through the water, hanging on one hand for some time, and then some one came out of the boat, and helped me on board, after hallooing for some one to save me. I was just getting ready to let go when they gave me assistance. Then I got on the boat. When I got on the boat, I saw two men and a boy. That I could not swear the boy's age, but he was a good-sized boy. The man in the engine-room, who, I suppose, was the engineer, shook his fist in Capt. Craddock's face, and told him that he did not have any business to leave Richmond, and he said, 'I told you not to leave Richmond.'"

The libellant also introduced evidence tending to show that the master and the engineer of the tug were not sober the afternoon of the occurrence. No evidence whatever is in the record tending to show malice or bad feeling on their part towards libellant. On the other hand, the witnesses for respondent give an account of the affair essentially opposite. Brittain was on the Glendale when the accident happened. He was employed as cook and deck hand. The master of the tug came aboard of her at her dock about a quarter to 8 p. m. At that time witness had put up the four regulation lights, which were burning brightly. The master eat his supper, and then the tug went up to the locks to see the master of a sand barge, which he had agreed to tow. The tug master promised to call for him as soon as he had finished the tow of the schooner Reese, which was at the Chesapeake docks. He finished his tow of the Reese, and then went to the sand barge, and carried her down the river. The collision with Evich's boat occurred after the tug had left the sand barge, and while she was on her way to tow the Reese. This witness thus describes the accident:

He was forward, watching. "8th question: You stated that you were on the forward watch going down the river at or about the time of the collision. If that is so, please state when you discovered the rowboat that Mr. Evich and others were in; what distance the rowboat was from the tug at the time you first saw it; how many men you saw in her; whether or not you heard any one hailing your tug or hallooing. A. It was about ten or eleven yards from the tug. I heard them halloo just as I saw the boat. I saw three men in it. I told the captain that there was a boat ahead, to sheer to the Richmond shore; and he saw the boat just about the time that I did, and gave bells to go back on the boat. They kept rowing right across our bow all the time, and we struck her eighteen or twenty inches from the bow of the rowboat. Two men jumped overboard. One caught on the bow, and climbed up. He was a colored man, and a white man caught on the side of the boat opposite the pilot house, and I caught him, and pulled him aboard. The other man remained in the boat. He was sitting in the stern of the boat. 10th question: When the rowboat was struck, did she sink or turn over or fill with water? Also please state in connection therewith what happened to the man that remained in the boat, if you know it. A. No, sir; she never sunk or turned over either, nor never dipped a drop of water in it, as I could see, anywhere. The light on the flag pole shone down in the boat and I could not see any water and the man remained setting on the stern seat without getting hurt or injured in any way. 11th question: Please state, as far as you know, which way your tug was steering down the river, whereabouts in the river or the channel of the river you were when the collision took place, and state whether you were in deep water or shallow water. A. It was near the middle of the channel, as you could well tell in the night. We were about 200 yards below the chemical

works, as near as I can come at it, and were going down the river. We were in deep water."

He positively denies that the master was intoxicated or under the influence of liquor any part of the time.

Furman, the engineer, gives this account:

"It was about eight o'clock when the captain came aboard. I had up a little steam, and he was eating his supper when I first saw him after he came aboard. Then I told the steward to put up the lights. The steward's name is James Brittain. After the captain's supper, we got under way, and went up to the lock gates. I should have said the sand lighter instead of the lock gates, as it was standing right alongside the gates. It was about half-past eight when we were at the lighter. What passed between Captain Craddock and the captain of the lighter I know nothing about. I was in the engine room, and did not hear anything that passed between them. Capt. Craddock was perfectly sober when he came aboard of my boat. While on our way to the Chesapeake dock, to dock the schooner James J. Reese, I received three bells, which caused me to reverse my engine. Then I looked out of the engine-room door, and saw the tug sheering towards the Richmond shore. Then I felt the boat careen over to one side. Then one bell was rung, and I stopped my engine. I went on deck, and saw two hats floating on the starboard side of my boat. I called to James Brittain to bring me a life preserver. The captain, Captain Craddock, looked out of the pilot-house door, and says, 'There is no one overboard.' Then I went forward, and I saw him talking with a man beside of the pilot house on the starboard side, and also saw a man on the bow of the boat. Captain said to Mr. Evich (I suppose he is the man), 'Why in the world did not you have a light?' He says, 'One cent's worth of oil would have prevented all this.' Then Mr. Evich or the man says, 'It is not sundown yet.' Mr. Craddock then looked in the cabin where the light was burning beside the clock, and said, 'It is twenty minutes to nine o'clock, and you say it isn't sundown yet.' Then the man on the bow hallooes for Joe. Then I says, 'Is there any one overboard?' He said nothing in reply, but hallooeed for Joe. I couldn't find out whether it was a man overboard or a boy, or a white man or negro. Then I looked to the side of the boat, and saw a small rowboat with one man in it. He was sitting on the stern seat when I saw him. He got up in the boat, took one of the oars that was in the boat, and I says to him there is the other oar about ten feet over there. He paddled over, and got his oar. He came back; and, from the light on our flag pole, I saw that there was no water in the boat. Then he took these two men off our boat, but before he took them off, after I found there was some one drowned, I told him I wouldn't have had it happen for a thousand dollars. I says, furthermore, 'I would sooner have sunk my boat here in the river, because,' I says, 'I could get my boat up, but it will be impossible to get back the person's life.' Then the man that was in the boat took the men off. I asked them if there was anything we could do to help them, and they told me there was not. Then we passed on, and went down to the Chesapeake dock, and got the schooner James J. Reese, and fetched her up to the,—what is known as the old powder shed. That's about all about it."

He also denies that either the master of the tug or that he himself was under the influence of liquor, or had been drinking.

The master of the tug makes this statement:

"Then we turned loose from the dock by the Warwick Park Shed, and from there I went up to the sand barge in the tug, and asked the captain of the sand barge if he was ready to go down the river. He told me, 'Yes,' he was ready; and I told him I had to dock the schooner James J. Reese, and, as soon as I docked her, I would come and get him, and he said 'All right.' So, I got him to Curl's Neck by seven o'clock next morning. I then left the sand barge, which was about half-past eight o'clock, and started down to the Chesapeake dock. Going down to the Chesapeake dock, I had a boy out forward on the

lookout, because there were always in the summer time lots of boys swimming around out in the river, for which I have had to stop my boat several times. After I got about 150 yards, or maybe 200 yards, as near as I could tell, below the Richmond Chemical Works, I heard some one halloo, and the boy said to me, 'There's a boat right ahead, Captain,' which I saw about the same time that he did. They were not exactly ahead of me, but very near; and I stopped the boat, and went back on her, and had her engines reversed, starboarded my wheel, and sheered off from them all I could; but they continued to row, until they got about two feet of their bow across ours. Then, the engine being reversed, the tug had lost all of her headway, so that I could not sheer off from them any further; and, when the tugboat had gotten within four or five feet of them, two men stood up in the boat, and made a leap for the tug. One man caught on the bow or side of the bow, and the other one caught opposite the pilot house, which was about ten feet from the bow. One of the men remained in the boat. Soon after they jumped from the boat, our boat came up against the bow of their boat, about two feet from the stem, which caused her to swing alongside of the tug, and then I saw the two men alongside of the tug. One the boy pulled aboard. He was a white man, which has proved to be Mr. Evich, and the other was a colored man, who is known as Richard Coleman. The other man, the one that remained in the boat, was Mr. Ebenhack. I asked Mr. Evich why was it he did not have a light in his boat; that one cent's worth of oil would have avoided the accident. His reply was to me that it was not sunset. I then looked down the cabin at the clock, and it was twenty minutes to nine o'clock. I suppose he had then been aboard as much as five or ten minutes. Then I heard Richard Coleman halloo, 'Joey!' And I asked them if there was any one overboard, and they did not make me any reply, but continued to halloo, 'Joey!' But before they commenced halloeing 'Joey!' the engineer came out of the engine room, and asked the boy to give him a life preserver, and I told him there wasn't any one overboard. That was the time, or pretty soon after that time, that this colored fellow hallooeed 'Joey!' We stopped then as much as twelve or fifteen minutes, and helped look for the boy, but did not see anything of him. Mr. Ebenhack rowed around in his boat, and picked up two hats. Mr. Evich told him to come there, and let him get in the boat. When he came up aside of the tug, I looked in the boat, and there was no water in it. There was one tomato can and a seine and a bottle lying in the bottom of the boat. That was all I saw. Then they got in the boat,—Mr. Evich and Coleman,—off of the tug, and rowed ashore. I stayed there with the tug until after they had gotten ashore. Then I went down to the Chesapeake dock, took the schooner Reese in tow, and brought her up to Rocketts, at the old Powder Magazine Shed. Then I went up to the lock gates, got the sand barge, and went on down the river."

The witnesses on the tug put her speed at about five miles an hour. The master of the schooner, as also the master of the sand barge, corroborate the statement that the master of the tug was sober, and both say that he towed them skillfully on that night. There is conflict of evidence as to the distance at which objects could be seen that night. The accident occurred between 8 and 9 o'clock on a night in June. The electric lights on the banks of the river were lit. The master of the tug and other witnesses, notably the master and mate of the Reese, say that these lights made it difficult to see on the river, and that it was dark. The preponderance of the evidence is that the collision occurred in mid-channel.

This is a brief summary of the more important parts of the evidence. The narration of the witnesses for libellant is not credible unless the master of the tug was in a state of beastly intoxication. They say that the tug steered wildly, always towards them in whichever direction they moved, with the apparent intention of running them down;

and no motive whatever is shown for this. On the other hand, we find other witnesses, entirely disinterested, who swear that he was perfectly sober. We also find that at this very time he went about his business as tow master, gave a coherent, intelligent instruction to the sand barge, went and towed the Reese, and then finished his contract with the sand barge, to the satisfaction of both; that he had all his lights up; that he had a lookout forward, and, as soon as he had notice of the danger of collision, took prompt and successful precaution. It is absurd to say that he collided with the small boat at full speed. If he had done so, he must have cut her in two, or have run her down. There is great conflict of evidence on the point whether the boat was hurt at all. One thing is certain, she was able to carry three grown men ashore after the accident, and two of these got back in her from choice. Evidently, the men in the small boat lost their heads,—steered wildly. Instead of keeping on the Chesterfield side, where they were, they undertook to cross the river after they saw the tug coming, when she was 300 yards or 150 yards away. Having no light on her, a small boat, low in the water, it was not surprising that she was not seen until the tug was very near; and, when she was seen, the tug controlled her movement so completely that two men on the small boat could catch hold of her rail, and get on board.

This small boat had no light, although it was long after sunset. Section 4233, rule 12, Rev. St. U. S., requires such boats to have a light while navigating a river. This being so, it was incumbent on libellant to show that the absence of a light could not have contributed to the disaster. *Belden v. Chase*, 150 U. S. 674, 14 Sup. Ct. 264:

"Where fault on the part of one vessel is established by uncontradicted testimony, and such fault in itself is sufficient to account for the disaster, it is not enough for such vessel to raise a doubt with regard to the management of the other vessel."

Considering this mass of testimony, and reconciling, as far as possible, the contradiction in it, having due regard to the preponderance of evidence when it is irreconcilable, we think that the district court erred in its conclusion. The decree of the district court is reversed, and the cause is remanded, with instructions to dismiss the libel, with costs.

HOYT v. BATES et al.

(Circuit Court, D. Massachusetts. July 3, 1897.)

No. 751.

JURISDICTION OF FEDERAL COURTS—COPYRIGHT CASES—TITLE TO COPYRIGHT.

A bill filed in the state court alleged that complainant was the author of a certain song; that the song and accompanying music were his property; and that defendants, without his knowledge, procured a copyright thereon. The bill prayed that defendants be ordered to assign the copyright to complainant, "by instrument of assignment such as is provided for by the statute of the United States," and also prayed an injunction to restrain defendants from interfering with his right to the use of the song. *Held*, that this was not a suit arising under the copyright laws of the United States, so as to be within the jurisdiction of the federal courts, but was one merely involving the title to the copyright, which depended on the rules of the common law, and hence that the suit was not removable from a state to a federal court.

This was a suit in equity by Charles H. Hoyt against Edwin G. Bates and others to compel an assignment by defendants to complainant of a copyright in a song entitled "Sweet Daisy Stokes," and to enjoin defendants from interfering with the use of said song by complainant. The bill was filed in the superior court for the county of Suffolk, Mass., and was removed to this court on petition of the defendants. The cause was heard on motion to remand.

The bill, omitting the formal parts, was in full as follows:

(1) The complainant is a playwright and theatrical manager, and has written many plays and dramas, containing songs and music, which have been eminently successful before the public throughout the United States and Canada. In 1894 he wrote a play entitled "A Black Sheep," and, as a part thereof, the words of a song entitled "Sweet Daisy Stokes." The music to be used in connection with said words was written by Richard Stahl, who was then in the employ and pay of the complainant, and said song and music became and are the property of the complainant, and are valuable as a part of said play, and independently thereof. The said song is, in the production of said play, sung by Goodrich Mudd, principal character thereof, which role has from the first been taken by Otis Harlan, an actor in the employ of the complainant, and a resident of the city, county, and state of New York.

(2) The respondents are music publishers in the city of Boston, and one of both of them have been and are connected with theatrical matters, as musical director and otherwise. In December, 1894, the respondents desired to print and sell said song, and they negotiated with complainant and said Harlan for the right so to do. Complainant authorized said Harlan to give the respondents the right to print and sell copies of said song, but upon the express proviso that the arrangement to be made and the right to be given respondents should not interfere in any manner with any use which the complainant might wish to make of the words or music of said song, and the same proviso had previously been stated by complainant to respondents as a condition which must be a part of any agreement to be made with them.

(3) The respondents, as complainant knew, did print and publish said song, and offered the same for sale, and sold copies thereof; and without complainant's knowledge, until recently, the respondents deposited the title of said song in the office of the librarian of congress at Washington, in their own names, and took the other steps necessary to secure a copyright thereof, and now hold said copyright in their own names.

(4) The complainant continued to make use of said song in his play "A Black Sheep," throughout the United States, without objection from respondents, and recently arranged with the New York Herald, a newspaper published in the city of New York, to print the same in a Sunday edition thereof, to be issued some time during the month of January, 1896. His said play was then being pro-

duced at Hoyt's Theater, in the city of New York, where it had been running for ——— nights; and such publication by said paper would have been of great benefit as an advertisement of said play, and to the complainant. It would, moreover, have been an advantage to the respondents in the sale of copies of said song, for the reason that large numbers of persons would have seen it in the newspaper. It is a common practice among music publishers to induce some leading newspaper to print the words and music of their publications for the purpose of increasing the sales thereof, it being found that persons who see the music in the newspapers are unable to make continued use of it in that form of publication, and purchase the same from music dealers to secure the same in more permanent form. According to the provisions of the United States statutes concerning copyright, a penalty of one dollar a copy attaches to the unauthorized publication of copyright works; and, upon discovering that the respondents claimed to hold the copyright upon this piece, application was made to them for permission to publish as aforesaid, so that there might not be any technical violation of the statute. The respondents refused to allow the complainant to make said use of said song, and claimed that they were entitled to the exclusive control thereof, by virtue of a contract signed by the said Harlan, a copy of which the complainant has secured from respondents' counsel, and attaches hereto as "Exhibit A," and threatened to prosecute the publishers of said paper if said song was so printed by them. Said publishers thereupon refused to print the song, and complainant was deprived of the benefit which would have resulted therefrom. Complainant says that said Harlan had no authority to give to respondents exclusive rights in the publication of said song, in derogation of complainant's rights to make such use of said song as he might wish, and that respondents have no right of ownership in said copyright, or right to enforce any penalty for the violation thereof, but that said copyright and the right to use said song as he may wish belong to complainant.

Wherefore complainant prays: First. That respondents may be ordered to transfer and assign said copyright so held in their name to him by instrument of assignment, such as is provided for by the statutes of the United States. Second. That an injunction issue restraining respondents from interfering in any manner with the use by complainant of said words and music. Third. That a preliminary injunction issue from this court restraining respondents from interfering with any use which the complainant may desire to make of said words and music, and from threatening any person authorized by the complainant to make use thereof with prosecution under said copyright laws, and in particular from threatening the owners and publishers of the New York Herald, aforesaid, with suit or prosecution for violation of the copyright so standing in their names, and from prosecuting or suing said New York Herald or any other person or corporation authorized by the complainant to use said words and music.

To this bill there was attached as an exhibit the following contract:

Exhibit A.

Boston, Mass., Jan. 1, 1895.

This agreement is entered into between Charles H. Hoyt, and Otis Harlan, and Bates & Bendix, music publishers, of Boston, Mass., for the publication of the song entitled "Sweet Daisy Stokes." Said Bates & Bendix agree to pay to said Charles H. Hoyt and Otis Harlan a royalty of five cents on each copy; royalties to be paid every three months from date of publication. Said Bates & Bendix are to have full and absolute rights of words and music of said song for publication only.

[Signed]

Otis Harlan,
For Hoyt & Harlan.
Bates & Bendix.

[Signed]

Elder, Wait & Whitman, for complainant.

1. It is submitted that the case presented by the complainant's bill is founded upon the contract between the parties, and not upon the statutes of the United States relating to copyright, and therefore there is no jurisdiction in this court to entertain this bill on removal. *Silver v. Holt*, per Colt, J., May 13, 1895; *Pulte v. Derby*, 5 McLean, 328, Fed. Cas. No. 11,465; *Little v. Hall*, 18 How. 165; *Jollie v. Jaques*, 1 Blatchf. 618, Fed. Cas. No. 7,437. These cases all

arose on the question of copyright, but the cases on patent questions are equally decisive, and both rest on the same clause of the statute. *Rev. St. U. S.*, § 711, cl. 5; *Manufacturing Co. v. Hyatt*, 125 U. S. 46, 8 Sup. Ct. 756; *Felix v. Scharnweber*, 125 U. S. 54, 8 Sup. Ct. 759; *Wilson v. Sanford*, 10 How. 99; *Hartell v. Tighman*, 99 U. S. 547; *Trading Co. v. Glaenger*, 30 Fed. 387; *Ingalls v. Tice*, 14 Fed. 352; *Bloomer v. Gilpin*, 4 Fish. Pat. Cas. 50, Fed. Cas. No. 1,558. If the circuit could have no original jurisdiction of such case, it can have none by removal on the ground that a federal question is involved. *Albright v. Teas*, 106 U. S. 613, 1 Sup. Ct. 550. The cases are many where state courts have taken jurisdiction of cases involving patents and copyrights, where the controversy grew out of some contract right. *Carter v. Bailey*, 64 Me. 458; *Willis v. Tibbals*, 33 N. Y. Super. Ct. 220; *Gould v. Banks*, 8 Wend. 562; *Lockwood v. Lockwood*, 33 Iowa, 509; *Green v. Wilson*, 21 N. J. Eq. 211. The state courts have taken jurisdiction of suits to compel the assignment of patents, and have ordered such assignments to be made (*Barton v. White*, 144 Mass. 281, 10 N. E. 840; *Somerby v. Buntin*, 118 Mass. 279; *Binney v. Annan*, 107 Mass. 94; *In re Keach*, 14 R. I. 571; *Fuller & Johnson Manuf'g Co. v. Bartlett*, 68 Wis. 73, 31 N. W. 747; *Bank v. Robinson*, 57 Cal. 520); while the federal court has declined jurisdiction in a similar case (*Ryan v. Lee*, 10 Fed. 917). That the state court may be incidentally called upon to pass upon the validity of a patent or copyright does not oust its jurisdiction when the case before it is founded on a contract right. *Brown v. Hedge Co.*, 64 Tex. 396; *David v. Park*, 103 Mass. 502; *Nash v. Lull*, 102 Mass. 62; *Merserole v. Union Paper Collar Co.*, 6 Blatchf. 356, Fed. Cas. No. 9,488.

2. The jurisdiction of the federal court must appear upon the face of the plaintiff's pleading. *Tennessee v. Union & Planters' Bank*, 152 U. S. 454, 14 Sup. Ct. 654; *Chappell v. Waterworth*, 155 U. S. 102, 15 Sup. Ct. 34. Where the jurisdiction of the federal court is doubtful, the case should be remanded. *Fitzgerald v. Railway Co.*, 45 Fed. 812; *Wolff v. Archibald*, 14 Fed. 369.

3. If this case does involve a federal question under the copyright laws, then the state court had no jurisdiction whatever. *Pierpont v. Fowle*, 2 Woodb. & M. 23, Fed. Cas. No. 11,152; *Boucicault v. Hart*, 13 Blatchf. 47, Fed. Cas. No. 1,692. Where there is a total absence of jurisdiction over the subject-matter in the state court, so that it had no power to sustain the suit in which the controversy was sought to be litigated, in its then existing form or any other form, there can be no jurisdiction in the federal court to entertain it on removal, although in some other form it would have plenary jurisdiction over the case made between the parties, and the case should be remanded. *Fidelity Trust Co. v. Gill Car Co.*, 25 Fed. 737, 739; *Hummel v. Moore*, 25 Fed. 380.

4. Where the jurisdiction depends on the patent or copyright laws, the amount involved is of no consequence, and the extraordinary attempt of the defendants to make out an amount of two thousand dollars in possible penalties to be paid by possible infringing newspapers was unnecessary. *Miller-Magee Co. v. Carpenter*, 34 Fed. 433.

5. This case could not have been removed by the defendants on the ground of citizenship, even if that ground had been alleged in their petition, inasmuch as they are residents of Massachusetts, and, as such, have no right to remove the case.

Alex. P. Browne and S. C. Upton, for defendants.

The defendants insist that this case involves a question arising under the copyright laws of the United States. In *Knights of Pythias v. Kalinski*, 163 U. S. 289, 16 Sup. Ct. 1047, an action to recover upon a life insurance policy, which had been originally brought in a state court, was removed by the defendant company upon the sole ground that it was a corporation created by an act of congress. The supreme court of the United States entertained and decided the question in the case, apparently without hesitation as to their jurisdiction. In the case of *Knights of Pythias v. Hill*, 22 C. C. A. 280, 76 Fed. 468, also a suit against the same corporation to recover life insurance, it was expressly held by the court of appeals for the Fourth circuit that the case was properly removed by the defendant into the circuit court of the United States on the sole ground that it appeared from the declaration that the defendant was incorporated under the laws of the United States. Now, in the present case suit is brought against

one averred to be the proprietor of a copyright under the laws of the United States, and the question of his rights and duties as such proprietor is necessarily involved. It appears from the facts stated in the bill that the defendants have copyrighted the song in question as "proprietors," as that word is used in the copyright laws, and the bill alleges that the defendants, as "holders" of the copyright, have threatened to proceed against the New York Herald for penalties and forfeitures under the copyright laws, in case that it shall publish the said song without their permission. The decision of the questions so presented, as to the defendants' title as proprietors of the copyright song, and the extent of their right of use as such proprietors, will necessarily involve the construction of the copyright laws of the United States. It is respectfully submitted that the motion to remand should be denied.

Since the foregoing brief was printed, the attention of counsel has been called to *Duke v. Graham*, 19 Fed. 647, cited with approval in Rob. Pat. § 857. This appears to be a clear authority to the effect that a controversy like the present involves a federal question, and is within the jurisdiction of this court.

PUTNAM, Circuit Judge. This suit was removed by the respondents from the state court to this court, on the alleged ground that it is one arising under the laws of the United States. The complainant seasonably moved to remand it. In determining whether or not the suit was removable for the reason given, we are strictly limited to what appears on the face of the bill of complaint. The latest affirmation of this rule is *Walker v. Collins*, 167 U. S. 57, 17 Sup. Ct. 738. Of course, in making this determination, we must look through the complaint for the purpose of ascertaining what is the real question presented thereby, rejecting all such matters as are merely incidental thereto.

The subject-matter out of which the suit arose concerns a copyright issued under the statutes of the United States. Section 711 of the Revised Statutes provides that the jurisdiction vested in the courts of the United States shall be exclusive of the courts of the several states in "all cases arising under the patent-right or copyright laws of the United States"; and by the ninth paragraph of section 629 of the Revised Statutes this jurisdiction is left in the circuit courts. The only basis of the respondents' claim that this suit presents a federal question is in the proposition that it arises under the copyright laws of the United States; and, if this proposition were correct, it would appear that there was no valid suit ever pending in the state court which could be the basis of jurisdiction in this court after removal, and that all we could do would be to dismiss the suit, or remand it, and leave the respondents to their writ of error if the state court persisted in assuming jurisdiction. We are of the opinion, however, that, within the purview of the decisions of the supreme court, the case is not one arising under the copyright laws of the United States, and that it presents no federal question; and that, therefore, the state court had full jurisdiction over it, and it must be remanded.

It is alleged in the bill that the complainant composed a certain song, which was copyrightable, and that the song and the music accompanying it "became and are" his property. There is nothing which contains any admission that the complainant ever parted with the presumptive title which these allegations are sufficient to vest in him. The bill further alleges that the respondents, without the

complainant's knowledge, obtained a copyright for the song in their own names, and that they have no right of ownership in it. It prays that "the respondents may be ordered to transfer and assign said copyright, so held in their names, to him,"—that is, the complainant,—“by instrument of assignment such as is provided for by statute of the United States.” The bill also prays that “an injunction issue, restraining respondents from interfering in any manner with the use” by complainant of the copyrighted matter; and there is also a prayer for a preliminary injunction. It alleges incidental matters showing especial need for the issuing of injunctions, both permanent and preliminary; but all this flows out of the main controversy as shown by the bill, is wholly incidental to it, and forms no part of the essential issue which the pleadings raise.

The bill assumes that the copyright is valid, and it alleges no infringement, nor anything which can raise any question as to its scope or legality. On this statement of the pleadings, the only issue presented by the bill is one of title, depending on the rules of the common law, and in no way on any statute of the United States. It has so long been settled that a suit of that character is not within the class of removable causes that it is necessary to refer only to *Wade v. Lawder*, 165 U. S. 624, 627, 17 Sup. Ct. 425, as the latest statement of the rule, and also of the subsidiary rule that the jurisdiction is not affected by the fact that a federal question may possibly come in incidentally. The decisions relied on by the respondents in regard to corporations organized by congress have always stood on a special basis, and do not reach the case at bar. *Railway Co. v. Cody*, 166 U. S. 606, 609, 17 Sup. Ct. 703. *Wade v. Lawder* also settles that those authorities relied on by the respondents, which make a distinction arising from the fact that the controversy goes back of the issue of the patent or copyright, are not sound. It is adjudged and ordered that the suit be remanded to the court from which it was removed, and that the complainant in the state court recover his costs in this court.

WARNER v. CITY OF NEW ORLEANS.

(Circuit Court of Appeals, Fifth Circuit. June 10, 1897.)

MUNICIPAL CORPORATIONS—ESTOPPEL—VIOLATION OF CONTRACT.

A city which voluntarily made a purchase of property with which to complete drainage improvements under authority conferred by an act of the legislature, and issued in payment therefor warrants on the drainage fund, a part of which it had collected, and the remainder of which it contracted to collect, but afterwards abandoned the work, and thus rendered the drainage assessments invalid and uncollectible, and otherwise obstructed their collection, is estopped to set up, in defense to an action against it on the warrants, that it had, previous to their issuance, discharged claims against the drainage fund in excess of the amount collected.

Appeal from the Circuit Court of the United States for the Eastern District of Louisiana.

On May 14, 1895, the questions arising in this case were by this court certified to the supreme court for its instructions thereon. The certificate, which fully states the facts, was in full as follows:

"The complainant, a citizen of the state of New York, filed his bill in said circuit court against the city of New Orleans, alleging substantially as follows: By act approved March 18, 1858, the legislature of the state of Louisiana undertook to provide for draining and reclaiming portions of the parishes of Orleans and Jefferson. The work was to be accomplished through boards of drainage commissioners appointed for each of the three districts into which the territory was divided. The funds to pay for work were to be raised as follows: Whenever the several boards were prepared to drain their districts, they were required to cause a plan to be made of the proposed work, designating its subdivisions and the names of the proprietors of the land, etc. This plan was to be filed in the mortgage office, of which notice was required to be published once a week for four consecutive weeks. At the expiration of the notice the boards were to apply to a court specified in the act, which was required to decree that the district was subject to a first mortgage lien and privilege for such an amount as might be assessed upon the property. After the tax had been levied the court was authorized to render judgment against the several property owners for the amount due by them. By another act, approved March 17, 1859, the boards were authorized to issue bonds to the extent of \$300,000 for each district for the purpose of carrying on the work, redeemable out of drainage taxes. By an act approved March 1, 1861, the boards were authorized to apportion the amount which each taxpayer should be required to pay yearly to meet the annual interest and installments due on the bonds. Other and more stringent provisions for the collection of these taxes were also made in the act, such as authorizing judgments to be rendered against the taxpayer and his property, and the issuance of execution as in ordinary cases. The boards of commissioners for the First and Second districts filed plans of the work they proposed to do, and obtained judgments decreeing the lands in those districts to be subject to liens and privileges for the proposed work. They levied assessments payable in installments, and obtained judgments for the amount of the rolls, and some money was collected thereon. By Act 30 of 1871 the several boards of drainage commissioners were abolished, and the work of drainage was transferred to the Mississippi & Mexican Gulf Ship-Canal Company, but the board of administrators of the city of New Orleans for all other purposes was made their successor, and was subrogated to all moneys, assessments, and other assets then belonging to them, and was required to collect such tax and assessments, and to make and collect an additional tax of two mills per superficial foot on all lands where no tax had been levied for drainage purposes, and that all collections from these sources be placed to the credit of said Mississippi & Mexican Gulf Ship-Canal Company, and held as a fund to be applied only to the drainage of the city of New Orleans and Carrollton. By the eighth section of the act it was made the duty of the administrator of accounts to draw a warrant on the administrator of finance against this fund for the payment of amounts due for all work done by that company. The board of administrators entered on the duties imposed on them under this act, procured the mortgages and liens to be decreed, assessments to be levied, and judgments to be rendered for the taxes assessed in the Third and Fourth drainage districts. The whole amount of assessments that came under their administration was \$1,699,637.97, and of this \$1,003,342.28 was assessed against individuals and \$696,394.30 against the city of New Orleans on the area of her streets and squares. The work was continued under this act until 1876 by Warner Van Norden, who had become transferee of the said Mississippi & Mexican Gulf Ship-Canal Company. He excavated some 5,000,000 cubic yards of earth, and completed two-thirds of the plan of drainage, when Act No. 16, of February 24, 1876, was passed for the purpose of authorizing the city of New Orleans to assume exclusive control of all drainage work, and, if she desired it or deemed it advisable, to purchase from said canal company and its transferee, Van Norden, all the tools, boats, and apparatus appertaining to drainage work and the franchise of the company, upon an appraisement to be made by appraisers to be appointed by the city council. The act further provided that the price should be paid by the city

of New Orleans in drainage warrants in the same form and manner as those theretofore issued under Act 30 of 1871. Pursuant to this act the city council caused the property to be appraised. The valuation was fixed at \$300,000, and on the 7th of June, 1876, a formal act of sale and transfer was executed between Warner Van Norden and said canal company and said city of New Orleans, by which the former made a transfer of the drainage plant and franchise for said amount, payable in drainage warrants, and the city covenanted 'not to obstruct or impede, but, on the contrary, to facilitate, by all lawful means, the collection of drainage assessments, as provided by law, until said warrants have been fully paid, it being well understood and agreed by and between said parties thereto that collection of drainage tax assessments should not be diverted from the liquidation of said warrants and expenses under any pretext whatsoever until the full and final payment of the same.'

"Up to the date of this sale the city had collected on the assessments against private property \$229,922.89, leaving \$1,460,714.47 outstanding and uncollected, of which amount the city owed \$696,394.30, as assessed against the streets and squares. The drainage warrants issued prior to December 31, 1874, had been paid or taken up before said sale by the issue of bonds of the 'drainage series' to the amount of \$1,672,105.21 under authority of Act 73, approved April 26, 1872. The thirteenth section of this act, after providing for the issue of said bonds, further provided that 'all taxes collected for drainage and not required for payment of drainage warrants shall be devoted to the purchase from the lowest bidder of bonds issued for drainage.' Complainant sues on three of the drainage warrants, of \$2,000 each, given for the purchase price of the drainage plant and franchise sold to the city of New Orleans as above set forth. The bill, after setting out the foregoing state of facts in more amplified form, avers: (1) That the city of New Orleans, after she became possessed of the drainage franchise, sold some of the drainage machinery, and suffered the rest to become rotten and valueless, and abandoned all work of drainage; that by reason of the noncompletion of the drainage system the supreme court of Louisiana decided the drainage taxes could not be collected, inasmuch as no benefit had been conferred on the property. (2) That the city by various means impeded the collection of drainage taxes, and by her conduct, ordinances, and proclamations encouraged and induced people to refuse to pay the assessments, by reason whereof the drainage assessments due by private persons have become valueless. (3) That the city will plead that she has been discharged from all liability to account for the drainage taxes she has collected, or which she ought to have collected but has wasted, as well as her own indebtedness, by the issuance and delivery, between May 10, 1872, and December 31, 1874, of drainage bonds under authority of Act 73 of 1872. (4) That the city had never claimed, prior to the purchase of said property and franchise, that the issuance of said bonds operated as such discharge, and made no such plea, save in the case of James W. Peake against the city of New Orleans, filed March 19, 1888. (5) That the act of 1876 was an authority for the city to make said purchase as well as a legislative recognition that said drainage fund had not been discharged by the issue of said bonds, and was an appropriation and dedication of so much thereof as was necessary to pay the purchase warrants without offset or impairment. (6) That the contract of sale was entered into by Van Norden in consideration of the provisions of said act of 1876 and its effects on his rights and remedies; that neither at the time of entering into the contract of sale nor when the warrants were delivered in discharge of the price did the city disclose to him that she would claim the issuance of said bonds as a discharge of her liability to account for and apply the drainage taxes, including those due by herself, to the payment of said purchase warrants; that he was ignorant that the city would claim such discharge, and would not have entered into said contract if he had been advised that any such claim would be made as aforesaid; that Van Norden has expressly, and by a writing annexed to and made part of the bill, subrogated complainant to all his rights and remedies growing out of said sale. The complainant therefore avers that the city is estopped in equity and good conscience from pleading or maintaining such defense. The bill closes with a prayer for an accounting of said drainage fund, and especially that the amount due by the city as assessee of the streets and squares, be decreed to be a trust fund in the hands of the city, applicable to the payment of said drainage warrants.

"Defendant demurred to the bill, especially asserting that the decision in the case of *Peake v. City of New Orleans*, reported in 139 U. S. 342, 11 Sup. Ct. 541, is decisive of the issues in this case. The demurrer having been sustained by the circuit court, the complainant has removed the case to this court for review, assigning, among others, error in this respect. And it appearing that the suit of said *Peake* was based on drainage warrants given for work, all dated July 9, 1875, complainant insists that they were issued while the city was an involuntary and noncontractual trustee, and in this respect differ from those involved in this case, which were issued by the city as a voluntary and contractual trustee, under the permissive authority of the legislature, and that, both on principle and owing to the estoppel pleaded in the bill, his rights are not affected by said decision.

"The case having been argued in this court on the errors assigned, and this court desiring the instruction of the honorable the supreme court for the proper decision of the questions arising herein touching the matter of estoppel aforesaid, and the application of the decision of the supreme court to the issues involved in this suit, it is ordered that the following questions and propositions of law be certified to the supreme court in accordance with the provisions of section 6 of the act entitled 'An act to establish circuit courts of appeal and define and regulate in certain cases the jurisdiction of the courts of the United States, and for other purposes,' approved March 3, 1891, to wit:

"First. Is the city of New Orleans, under the warranties, express and implied, contained in the contract of sale of June 7, 1876, by which she acquired the property and franchise from Warner Van Norden, and under the averments of the bill, estopped from pleading against the complainant the issuance of bonds to retire \$1,672,105.21 of drainage warrants, issued prior to said sale, as a discharge of her obligation to account for drainage funds collected on private property, and as a discharge from her own liability to that fund as assessee of the streets and squares?

"Second. Should the decision in the case of *Peake v. City of New Orleans*, 139 U. S. 342, 11 Sup. Ct. 541, be held to apply to the facts of this case and operate to defeat the complainant's action?

"It is further ordered that a copy of the printed record and the several acts of the legislature, together with copies of the briefs on file in this court, be sent to the honorable the supreme court with the transcript certifying the aforesaid questions."

The opinion of the supreme court in respect to the questions thus certified was delivered by Mr. Justice Brewer in the following language:

"We had occasion in the recent case of *Cross v. Evans*, 17 Sup. Ct. 733, to comment on the practice of certifying questions in such manner as to practically submit the entire case to this court for consideration. In addition to what was said in the opinion then filed, it may be proper to observe that the purpose of the act of 1891, creating the courts of appeal, was to vest final jurisdiction as to certain classes of cases in the courts then created, and this in order that the docket of this court might be relieved, and it be enabled with more promptness to dispose of the cases directly coming to it. In order to guard against any injurious results which might flow from having nine appellate courts, acting independently of each other, power was given to this court to bring before it for decision by certiorari any case pending in either of those courts. In that way it was believed that uniformity of ruling might be secured, as well as the disposition of cases whose gravity and importance rendered the action of the tribunal of last resort peculiarly desirable; but the power of determining what cases should be so brought up was vested in this court, and it was not intended to give to any one of the courts of appeal the right to avoid the responsibility cast upon it by statute by transmitting any case it saw fit to this court for decision. If such practice were tolerated, it is easy to be perceived that the purpose of the act might be defeated, and the courts of appeal, by transferring cases here, not only relieve themselves of burden, but also crowd upon this court the very cases which it was the intent of congress they should finally determine. It is true, power was given to the courts of appeal to certify questions, but it is only 'questions or propositions of law' which they

are authorized to certify. And such questions must be, as held in the case just cited, 'distinct questions or propositions of law, unmixed with questions of fact or of mixed law and fact.' It is not always easy to draw the line, for, in order to present a distinct question of law, it may sometimes be necessary to present many facts upon which that question is based. But care must always be taken that, under the guise of certifying questions, the courts of appeal do not transmit the whole case to us for consideration. Here, in addition to the long preliminary statement of facts, the court ordered up the entire record, and counsel, in their briefs, assuming that the whole case is before us, have entered into a discussion of many questions, such as the effect of certain limitations in the constitution of Louisiana, which may have been in the case as it was presented to the court of appeals, but cannot be found in any distinct question of law certified to us.

"With these preliminary observations, we pass to the consideration of the questions certified, or so much thereof as are distinct questions of law. The first question is one of estoppel. In order to a full understanding of it a brief review of the facts is essential, and for these facts we look simply to the statement prepared by the court of appeals, and not to the bill and exhibits, copies of which it ordered to be sent to this court. From that statement it appears that in 1858 the state of Louisiana undertook the work of draining and reclaiming portions of the parishes of Orleans and Jefferson; that this work was to be done under the direction and control of boards of drainage commissioners appointed for the several districts into which the territory was divided. Provision was made for assessing the cost and expenses of the work upon the property benefited. The work continued under these auspices until 1871, when, by an act of the legislature, the boards of drainage commissioners were abolished, and the work of drainage transferred to a canal company. But the duty of collecting the assessments was imposed upon the board of administrators of the city of New Orleans, and the administrator of accounts was directed to draw warrants on the administrator of finance against the drainage fund for the payments of amounts due for the work. Warner Van Norden became the transferee of the canal company, and completed about two-thirds of the work prior to February 24, 1876, when an act was passed authorizing the city of New Orleans to assume exclusive control of the drainage work, and, if it desired, to purchase from the canal company and its transferee all the boats, tools, and apparatus pertaining to the work, and also the franchise of the company. This act further provided that the price should be paid by the city in drainage warrants in the same form and manner as those theretofore issued. The whole amount of assessments was \$1,699,637.37. Of this, \$1,003,342.28 was assessed against individuals, and the balance against the city of New Orleans on the area of its streets and squares. Of the assessment against private property the city had up to this time collected \$229,922.89. The drainage warrants issued prior to December 31, 1874, had been paid or taken up before this act of 1876 by the issue of city bonds, to the amount of \$1,672,105.21, under authority of an act approved April 26, 1872. The city elected to make the purchase of the property of the canal company and its transferee. It was appraised at \$300,000, and on June 7, 1876, a formal sale and transfer was executed by the company and its transferee to the city for the amount named, payable in drainage warrants, and the city covenanted 'not to obstruct or impede, but, on the contrary, to facilitate, by all lawful means, the collection of drainage assessments, as provided by law, until said warrants have been fully paid, it being well understood and agreed by and between said parties thereto that collection of drainage tax assessments should not be diverted from the liquidation of said warrants and expenses under any pretext whatsoever until the full and final payment of the same.'

"It will be seen that the bonds issued by the city more than covered in amount the assessments against its streets and public grounds and the amount it had collected from private property, and all this had taken place prior to the purchase of the property from the canal company and its transferee. Now, after the city had assumed exclusive control of the work, after it had voluntarily purchased from the canal company and its transferee their property, and had given these warrants, payable out of the drainage fund, it sold some of the drainage machinery, suffered the rest to become rotten and valueless, and

abandoned the work of drainage, so that by reason of the noncompletion of the drainage system, as held by the supreme court of the state, drainage taxes could not be collected; inasmuch as no benefit had been conferred upon the property. Not only that; it by various means impeded the collection of the taxes, and by conduct, ordinances, and proclamations encouraged and induced the people to refuse to pay the assessments, whereby those due by private persons became valueless.

"And now the question is whether the city is not estopped to plead, in defense of liability on these drainage warrants, the fact of the prior issue of bonds to a larger amount than that assessed against the areas of its streets and squares and collected from private property. We think this question must be answered in the affirmative. The city, in respect to the purchase of this property from the canal company and its transferee, and in the obligations assumed by the warrants issued, acted voluntarily. It was not, in reference to these matters, as it was to those considered in *Peake v. City of New Orleans*, 139 U. S. 342, 11 Sup. Ct. 541, a compulsory trustee, but a voluntary contractor; and the proposition which we affirm is that one who purchases property, contracting to pay for it out of a particular fund, and issues warrants therefor payable out of that fund,—a fund yet partially to be created, and created by the performance by him of a statutory duty,—cannot deliberately abandon that duty, take active steps to prevent the further creation of the fund, and then, there being nothing in the fund, plead, in defense to a liability on the warrants drawn on that fund, that it had, prior to the purchase, paid off obligations theretofore created against the fund. Whatever equity may do in setting off against all warrants drawn before this purchase from the canal company and its transferee the bonds issued by the city (and in respect to that matter we can only refer to *Peake v. City of New Orleans*, supra), it by no means follows that the city can draw new warrants on the fund in payment for property which it voluntarily purchases, and then abandon the work by which alone the fund could be made good, resort to means within its power to prevent any payments of assessments into that fund, and thus, after violating its contract promise not to obstruct or impede, but on the contrary to facilitate, by all lawful means, the collection of the assessments, plead its prior issue of bonds as a reason for evading any liability upon the warrants. One who purchases property, and pays for it in warrants drawn upon a particular fund, the creation of which depends largely on his own action, is under an implied obligation to do whatever is reasonable and fair to make that fund good. He cannot certainly so act as to prevent the fund being made good, and then say to his vendor, 'You must look to the fund, and not to me.' We are clear in the opinion, therefore, that the first question must be answered in the affirmative.

"With reference to the second, we are of the opinion that it does not come within the rule in respect to certifying distinct questions of law. It invites an inquiry into all the matters considered in the case of *Peake v. City of New Orleans* (and there were many), and asks whether the matters there decided apply to the facts of this case and operate to defeat the plaintiff's action. In other words, the question puts the facts of the one case over against the facts of the other, and asks us to search the record in each to see whether the one case operates to bar the other. Surely that is practically submitting the whole case, instead of certifying a distinct question of law. Our decision, therefore, is that the first question must be answered in the affirmative, and the second we decline to answer.

"Ordered accordingly."

Richard De Gray, John D. Rouse, and William Grant, for appellants.

A. E. O. Sullivan and Branch K. Miller, for appellee.

Before PARDEE and McCORMICK, Circuit Judges, and BRUCE, District Judge.

PER CURIAM. The city of New Orleans, under warranties express and implied contained in the contract of sale of June 7, 1876,

by which she acquired the property and franchise from Warner Van Norden, and under the averments of the bill, is estopped from pleading against the complainant below, and appellant here, the issuance of bonds to retire \$1,672,105.21 of drainage warrants issued prior to said sale as a discharge of her obligation to account for drainage funds collected on private property, and as a discharge from her own liability to that fund as assessee of the streets and squares. *Warner v. City of New Orleans*, 167 U. S. 467, 17 Sup. Ct. 892. On the case made by the bill of complaint the decision of the supreme court in the case of *Peake v. City of New Orleans*, 139 U. S. 342, 11 Sup. Ct. 541, does not necessarily apply to the facts of this case, nor operate to defeat the complainant's action. It follows that the circuit court erred in sustaining the demurrer to the complainant's bill. The decree of the circuit court is reversed, and the cause is remanded, with instructions to overrule the demurrer to the complainant's bill, and thereafter proceed as equity and good conscience may require.

DILLER v. HAWLEY et al.

(Circuit Court of Appeals, Ninth Circuit. June 28, 1897.)

No. 329.

1. PUBLIC LANDS—CANCELLATION OF ENTRY.

The land department of the government may cancel an entry of public lands when its officers are convinced, on a proper showing, and after a hearing, that the same was fraudulently made.

2. SAME—POWERS OF SECRETARY OF INTERIOR.

The secretary of the interior, acting alone, may review a judgment of the commissioner of the land office as to an entry in a local land office, and order the entry, if shown to be fraudulent, to be canceled; Rev. St. §§ 2450, 2451, requiring the adjudication in certain cases to be made by a board consisting of the secretary of the treasury, attorney general, and secretary of the interior, having no application to the review of decisions as to entries in the local land offices.

3. SAME—BONA FIDE PURCHASERS.

As purchasers of land from an entryman before the issuance of a patent obtain only an equitable title, they take subject to the power of the land department to cancel the entry upon a proper showing, and are not entitled to protection as bona fide purchasers.

4. SAME—FINDINGS OF FACT CONCLUSIVE.

The finding of the secretary of the interior as a fact that an entry was made for speculative purposes, and not in good faith for the exclusive use and benefit of the entryman, is conclusive; as it is only questions of law involved in decisions of the land department that are reviewable in the courts.

5. SAME—ENTRY MADE FOR SPECULATIVE PURPOSES.

The land department is authorized to cancel an entry where the evidence is sufficient to justify the inference that there was some prior understanding, though not directly shown, between the entryman and others, that his acts should inure to their benefit, and that he applied to purchase the land on a speculation, and not in good faith to appropriate it to his own exclusive use and benefit.

Appeal from the Circuit Court of the United States for the District of Washington, Northern Division.

This suit was brought by Ravaud K. Hawley and Russel A. Alger, the appellees, against L. Edgar Diller, the appellant herein, to compel the appellant to convey certain land to them, which had been conveyed to him by a United States patent. On the 30th day of April, 1883, the land involved in this suit, to wit, the N. W. $\frac{1}{4}$ of N. E. $\frac{1}{4}$, and N. $\frac{1}{2}$ of N. W. $\frac{1}{4}$, of section 13, and the S. E. $\frac{1}{4}$ of the S. W. $\frac{1}{4}$ of section 12, all in township 36 N., of range 3 E., Willamette meridian, in the county of Skagit, territory (now state) of Washington, was unoccupied and unappropriated surveyed public land of the United States, and was subject to entry and purchase under the timber and stone act of congress of June 3, 1878 (20 Stat. 89). On said day one Henry C. Hackley made application to purchase the land from the United States, under said act, in the local land office at Olympia, Washington territory, and paid to the receiver of the land office the sum of \$400,—that being the amount prescribed by law as the purchase price of the same,—and then and there received a certificate of the receipt from said land office, known as the "final" or "duplicate" receipt. On the same day said Hackley, for a valuable consideration, sold, assigned, and transferred said receipt and certificate, and the land therein described, to one Stephen S. Bailey, and duly made, executed, and delivered to said Bailey a good and sufficient warranty deed, conveying said property to said Bailey. On December 29, 1887, Stephen S. Bailey and his wife, for a valuable consideration, sold, assigned, and transferred all their right, title, and interest in and to said land to the appellees herein, and then and there made, executed, and delivered to said appellees a good and sufficient warranty deed therefor. On the 9th of August, 1888, the commissioner of the general land office suspended the entry of said Henry C. Hackley, and held the same for cancellation, and ordered the register and receiver of the United States land office at Seattle to notify said entryman and said transferees that they would be allowed 60 and 10 days from the date of said notice within which to apply for a hearing to show cause why said entry should not be canceled. On August 23, 1888, the register and receiver notified Hackley and his transferees of the action of the commissioner. The transferees thereafter applied for a hearing, which was granted, and the hearing had. The register and receiver, after such hearing, were divided in opinion. The testimony taken at said hearing, with the records in the case, were transmitted to the commissioner of the general land office. The commissioner decided that said lands should be passed to patent. The secretary of the interior thereupon ordered the papers in said case to be transferred to his office, and, after a consideration of the same, he ordered that said entry be canceled, and directed the commissioner of the general land office to cancel said entry on the records of the land department. On November 21, 1893, the commissioner ordered the timber entry of Hackley canceled, because said entry was made in the interest of another person, and not for the exclusive benefit of the entryman. On May 10, 1895, said land being then on the records of the land office of the United States as a part of the public domain, L. Edgar Diller, appellant herein, made application to the register and receiver to make, and did make, entry of said land, and purchased the same on July 25, 1895, and received from the government a patent therefor under the said timber and stone act of June 3, 1878. Thereafter appellees brought this suit in the circuit court of the United States, praying that said L. Edgar Diller be decreed to convey to said appellees herein the title to said land. Upon a hearing the court entered a decree in favor of complainants (Hawley v. Diller, 75 Fed. 946), from which decree this appeal is taken.

F. Starr Griffith, for appellant.

Chas. K. Jenner, for appellees.

Before GILBERT and ROSS, Circuit Judges, and HAWLEY, District Judge.

HAWLEY, District Judge (after stating the facts). 1. Did the land department have jurisdiction to cancel the entry of Henry C. Hackley? This question must be answered in the affirmative. In *Mortgage Co. v. Hopper*, 12 C. C. A. 293, 64 Fed. 553, this court had

occasion to examine many of the authorities cited by the respective counsel herein. The same questions here urged were there elaborately discussed. In the course of that opinion the court said:

"We are of opinion that the general trend and logical effect of the decisions of the supreme court of the United States virtually establish the following propositions concerning the disposition of the public lands of the United States, viz.: (1) That the land department of the government has the power and authority to cancel and annul an entry of public lands when its officers are convinced, upon a proper showing, that the same was fraudulently made; (2) that an entryman upon the public lands only secures a vested interest in the land when he has lawfully entered upon and paid for the same, and in all respects complied with the requirements of the law; (3) that the land department has control over the disposition of the public lands until a patent has been issued therefor, and accepted by the patentee; and (4) that redress can always be had in the courts where the officers of the land department have withheld from a pre-emptioner his rights, where they have misconstrued the law, or where any fraud or deception has been practiced which affected their judgment and decision." *Bell v. Hearn*, 19 How. 252; *Gainey v. Thompson*, 7 Wall. 347; *Litchfield v. Register and Receiver*, 9 Wall. 575; *Secretary v. McGarraban*, Id. 298; *Johnson v. Towsley*, 13 Wall. 72; *Myers v. Croft*, Id. 291; *Yosemite Val. Case*, 15 Wall. 77; *Shepley v. Cowan*, 91 U. S. 330; *Moore v. Robbins*, 96 U. S. 538; *Marqueze v. Frisbie*, 101 U. S. 473; *Quinby v. Conlan*, 104 U. S. 420; *Smelting Co. v. Kemp*, Id. 636; *Lee v. Johnson*, 116 U. S. 48, 6 Sup. Ct. 249; *Steel v. Refining Co.*, 106 U. S. 447, 1 Sup. Ct. 389; *Cornelius v. Kessel*, 128 U. S. 456, 9 Sup. Ct. 122; *U. S. v. Steenerson*, 1 C. C. A. 552, 50 Fed. 504; *Germania Iron Co. v. U. S.*, 7 C. C. A. 256, 58 Fed. 334; *Mill Co. v. Brown*, 7 C. C. A. 643, 59 Fed. 35; *Swigart v. Walker* (Kan. Sup.) 30 Pac. 162.

The principles thus announced are fully sustained by the decision of the supreme court in the case of *Orchard v. Alexander*, 157 U. S. 372, 15 Sup. Ct. 635, where the court held that the commissioner of the general land office may direct the proper local land officer to hear and pass upon charges of fraud, and the final proof of the pre-emption claim upon which the requisite cash entry has been paid, and has jurisdiction to review the judgment of the local land officer in respect thereof; and the secretary of the interior has jurisdiction to review such judgment of the commissioner, and to order such an entry, shown to be fraudulent, to be canceled.

The court, after referring to the statutes and to numerous authorities, and quoting from *Harkness v. Underhill*, 1 Black, 316, 325, *Hosmer v. Wallace*, 97 U. S. 575, 578, and *Knight v. Association*, 142 U. S. 161, 167, 12 Sup. Ct. 258, said:

"We have made these somewhat extensive quotations from prior decisions in order to show the rulings of this court since the act of 1836 in favor of the power of the general officers of the land department to review and correct the action of the subordinate officials in all matters relating to the sale and disposal of public lands. * * * Of course this power of reviewing and setting aside the action of the local land officers is, as was decided in *Cornelius v. Kessel*, 128 U. S. 456, 9 Sup. Ct. 122, not arbitrary and unlimited. It does not prevent judicial inquiry. *Johnson v. Towsley*, 13 Wall. 72. The party who makes proofs which are accepted by the local land officers, and pays his money for the land, has acquired an interest of which he cannot be arbitrarily dispossessed. His interest is subject to state taxation. *Carroll v. Safford*, 3 How. 441; *Witherspoon v. Duncan*, 4 Wall. 210. The government holds the legal title in trust for him, and he may not be dispossessed of his equitable rights without due process of law. Due process, in such case, implies notice and a hearing. But this does not require that the hearing must be in the courts, or forbid an inquiry and determination in the land department."

The entire opinion is instructive. Its reasoning is sound, clear, and conclusive upon the question here involved. This opinion is referred to and followed with approval in *Parsons v. Venzke*, 164 U. S. 89, 17 Sup. Ct. 27.

2. It is argued upon behalf of the appellees that the decision of the secretary of the interior ordering the cancellation of the entry is null and void. This contention is sought to be maintained upon the ground that sections 2450 and 2451 of the Revised Statutes require the adjudication to be made by a board consisting of the secretary of the treasury, attorney general, and secretary of the interior, and that the secretary of the interior, without a determination by the board, could not lawfully cancel the entry. These sections must be read and construed with reference to the other provisions of the act, and especially with reference to the provisions of section 2457, which reads as follows:

"The preceding provisions from section 2450 to section 2456, inclusive, shall be applicable to all cases of suspended entries and locations which have arisen in the general land office since the 26th day of June, 1856, as well as to all cases of a similar kind which may hereafter occur, embracing as well locations under bounty land warrants as ordinary entries or sales, including homestead entries and pre-emption locations or cases; where the law has been substantially complied with, and the error or informality arose from ignorance, accident, or mistake which is satisfactorily explained; and where the rights of no other claimant or pre-emptor are prejudiced, or where there is no adverse claim."

With the limitations thus placed upon the construction to be given to sections 2450 and 2451, we are of opinion that the views contended for by appellees cannot be sustained. No authorities are cited to support their contention, and we apprehend none can be found, except the opinion rendered by the circuit court in this case (75 Fed. 946), and by the same court in *Land Co. v. Hollister*, 75 Fed. 941, 945. The only decision of the supreme court with reference to the provisions of these sections to which our attention has been called is *Foley v. Harrison*, 15 How. 443, 447. In that case the court held that under the act of August 3, 1846 (which includes sections 2450 and 2451), the commissioner of the general land office had power to decide finally on the claims of the respective parties to certain lands, and that his decision and a patent issued thereon were conclusive. In the course of the opinion the court said:

"These patents were issued under the act of 3d of August, 1846. That act provides 'that the commissioner of the general land office be, and he is hereby, authorized and empowered to determine, upon principles of equity and justice, as recognized in courts of equity, and in accordance with general equitable rules and regulations to be settled by the secretary of the treasury, the attorney general, and commissioner conjointly, consistently with such principles, all cases of suspended entries now existing in said land offices, and to adjudge in what cases patents shall issue upon the same.' Sections 2450, 2451, Rev. St. This power is limited to two years, and the exercise of it shall only operate to divest the title of the United States, but shall not prejudice conflicting claimants."

In the numerous decisions of the supreme court sustaining the authority of the commissioner of the general land office and of the secretary of the interior to affirm, modify, or annul the entries of public land made in the local land offices, no reference is made to the pro-

visions of sections 2450, 2451. Notwithstanding this fact, we are asked to assume that that court must have overlooked these provisions of the statute. We decline to act upon any such assumption.

3. The next question for consideration is whether or not the appellees were innocent purchasers for value, and are entitled, as such, to be protected, notwithstanding the fraud, if any, committed by the entryman. The certificate or receipt which Hackley received from the land office invested him with the equitable title to the land in controversy. By this purchase he obtained the right to a patent to the land, provided his acts were in all respects such as, under the law, justified the issuance to him of a patent thereto. His purchase of the land was necessarily subject to the rules and regulations of the land department. It was subject to the control of the commissioner of the general land office. The decisions of the local land office and of the commissioner were liable to be reversed by the action of the secretary of the interior. The law is well settled that the purchaser of an equitable title takes only such an interest in the property as his grantors had at the time of the purchase. This being true, it logically follows that when Bailey took the deed from Hackley, and when the appellees took the deed from Bailey, they only acquired a title to the land which was subject to the final action of the land department, and to such steps or proceedings as might thereafter be had in the courts to affirm, modify, or annul the final decision of the officers of the land department in regard thereto. Having purchased the land before the issuance of the patent, while the government still held the legal title, they obtained only an equitable title, and are not entitled to protection as bona fide purchasers. This result necessarily follows from the views expressed and authorities cited in the first subdivision of this opinion.

4. Finally, it is argued on behalf of appellees that the decision of the secretary of the interior canceling the entry of Hackley "was solely the result of his misconstruction, misinterpretation, and misunderstanding of the law, and that it was not the result of his judgment upon the facts presented for his consideration." There were 11 other entrymen whose cases were considered at the same time as Hackley's, and the decision of the secretary of the interior applies to all the cases. In his decision the secretary said:

"The paramount and controlling question in the case, applicable alike to all these entries, is: Were they made in good faith, for the benefit of the respective entrymen, or were they fraudulently made for, and in the interest of, another or others? The fraud charged in connection with these entries is that they were made at the instance, and for the benefit, of Stephen S. Bailey and J. Theodore Lohr, to whom the lands were sold and conveyed, one tract before, and the others soon after, the entries were made. The government offered no testimony in chief to support the allegations that said entries were made in the interest of said transferees, other than what might reasonably be inferred from the records showing dates of said entries and transfers thereof. These entries were all transferred to said Stephen S. Bailey."

Lohr conducted the negotiations concerning all the lands. He "conducted the negotiations for the purchase of Hackley's entry, but made no agreement prior to April 30, 1883, the date of his entry." This witness was asked the following question: "Did it occur to

you, when you were locating these entrymen, and subsequently buying up their claims for the mutual benefit of S. S. Bailey and yourself, that you were operating in direct violation of the spirit of the timber law?" And he answered: "I did not believe that I was violating any law, any more than I would buy locations made by other parties, so long as I used due diligence in making purchases when parties had the right to sell, according to the advice given me." This witness also stated that he had been paid by Mr. Bailey his full share of the profits arising from the sale to Hawley and Alger, and had no interest in the result of the trial.

In addition to the testimony given at the hearing, the secretary referred to the fact that one Carson, a special agent of the government, had investigated the cases, and reported all the entries as fraudulent. None of the entrymen were called as witnesses for the transferees, nor was Bailey sworn or offered as a witness on his own behalf. The secretary, in reviewing the testimony, said:

"I have thus stated in detail, and at unusual length, the evidence relating to the alleged fraudulent character of these entries in the transactions between Bailey and the entrymen, for the purpose of making clear the grounds upon which my conclusion is based. At every point Mr. Bailey appears. The conveyances were made to him very shortly after the entries were made. He advanced the money to make the entries in most, if not in all, cases. He was an hotel keeper. Lohr was to select the lands, find the persons to make the entries, locate them thereon, and Bailey was to pay the expenses. Upon the purchase of the land, Bailey was to receive a deed for the tract, and Lohr and Bailey were to divide the profits between them. Lohr says this is so in his affidavit, although it is true he seeks to avoid it when he is put on the witness stand. All the circumstances satisfy my mind that this was the arrangement. Lohr picked up clerks, bartenders, grocery men, school teachers, lawyers,—in a word, anybody who was willing to make the location, or be concerned in it, for a consideration. They were mostly young men, without any permanent abiding place. It is very strange, indeed, if they entered that land for their exclusive use and benefit, that they should have conveyed it to Mr. Bailey on the same day that the entries were made, or within a day or two thereafter, when the evidence shows that he was engineering these entries from the time the parties made the first affidavit until they submitted their final proof in support of their entries. It is very plain to my mind that this was a scheme put up, in the first instance, by Lohr and Bailey, for the purpose of acquiring title to the land for speculative purposes. To my mind this raises an impassable barrier, if the law is to be observed, to the sustaining of these entries. The purpose and intent of the act was to give every citizen of the United States, or one who has declared his intention of becoming such, the opportunity to purchase 160 acres of land under said act, if it was unfit for cultivation; but in every case the entryman is required to act in good faith, but none of the entrymen at the time they made these purchases did so in good faith, in harmony with the spirit and letter of the law. This holding in no wise conflicts or interferes with the right of a purchaser in good faith of land under the act, after he acquires title, to sell the land, if he desires so to do. Sales made soon after purchase, however, if unexplained, have a tendency to arouse suspicion in the mind that when the entry was made it was not for the entryman's own exclusive benefit and use; and when we find 12 entries made in the manner in which these were made, money furnished by the assignee, engineered by the assignee, deeded to the assignee, and this arrangement made prior to the time the locations were made, I do not see any escape from the conclusion that they were made in violation of the statute, and ought not to stand."

In the administration and disposition of the public lands the decisions of the land department upon the questions of fact are deemed conclusive. It is only questions of law that are reviewable in the

courts. *Bishop of Nesqually v. Gibbon*, 158 U. S. 165, 166, 15 Sup. Ct. 779, and numerous authorities there cited. The secretary of the interior found as a fact that the entry was made by Hackley "for the purpose of acquiring the land for speculative purposes"; that the entry was not made "in good faith, in harmony with the spirit and letter of the law." Did the secretary of the interior err in his construction or interpretation of the law? We are of opinion that this question must be answered in the negative. Section 2 of the act of congress of June 3, 1878, provides that any person desiring to avail himself of the provisions of this act shall file with the register of the proper district a written statement, among other things:

"That he does not apply to purchase the same on speculation, but in good faith to appropriate it to his own exclusive use and benefit; and that he has not, directly or indirectly, made any agreement or contract, in any way or manner, with any person or persons whatsoever, by which the title which he might acquire from the government of the United States should inure, in whole or in part, to the benefit of any person except himself, which statement must be verified by the oath of the applicant before the register or the receiver of the land office within the district where the land is situated; and if any person taking such oath shall swear falsely in the premises, he shall be subject to all the pains and penalties of perjury, and shall forfeit the money which he may have paid for said lands, and all right and title to the same; and any grant or conveyance which he may have made except in the hands of bona fide purchasers shall be null and void."

U. S. v. Budd, 144 U. S. 154, 12 Sup. Ct. 575, is relied upon to support the view that the secretary of the interior acted upon an erroneous construction of this act. That case was in many essential particulars different from the case at bar. There the entry was made by Budd, who paid the purchase price and received the receiver's receipt, and thereafter a patent was issued to him by the government. Prior to the issuance of the patent, he sold and conveyed the land to one Montgomery. The suit was brought by the United States against Budd and Montgomery to set aside the patent, on the ground that it was obtained wrongfully and fraudulently, and in defiance of the restrictions of the statute. The case was disposed of upon the familiar principle that in this class of cases the respect due to a patent, the presumptions that all the preceding steps required by the law had been observed before its issue, the immense importance and necessity of the stability of titles dependent upon the official instruments, demand that the effort to set them aside, to annul them, or to correct mistakes in them, should only be successful when the allegations on which this is attempted are clearly stated and fully sustained by proof. *Maxwell Land Grant Case*, 121 U. S. 325, 381, 7 Sup. Ct. 1015; *Colorado Coal & Iron Co. v. U. S.*, 123 U. S. 307, 8 Sup. Ct. 131; *U. S. v. Des Moines Navigation & Ry. Co.*, 142 U. S. 510, 12 Sup. Ct. 308. The particular charge there made and relied upon by the government was "that Budd, before his application, had unlawfully and fraudulently made an agreement with his co-defendant Montgomery, by which the title he was to acquire from the United States should inure to the benefit of such co-defendant." The evidence in that case failed to establish this charge by the proofs demanded, under the rule as above stated. The land department and the circuit court so held, and the supreme court af-

firmed the judgment. The court, in the course of its opinion, said that all that the act "denounces is a prior agreement,—the acting for another in the purchase. If, when the title passes from the government, no one save the purchaser has any claim upon it, or any contract or agreement for it, the act is satisfied." This language should be construed with reference to the particular charge made by the pleadings in that case. We are of opinion that it was not intended by the court to apply to all of the provisions of the act contained in section 2. In that case the testimony about other entries was excluded. Here, by stipulation, twelve entries were tried as one, and the entire testimony in all the cases was admitted. In the present case, in many respects, the questions involved are entirely the reverse of those presented to the court in *United States v. Budd*. Here, if any presumptions are to be indulged in, they must be invoked in behalf of the action of the land department. It must be clearly and convincingly shown that the secretary of the interior acted without authority of law, or that he erred in his judgment as to the legal construction of the act.

We are of opinion that the evidence upon which the secretary of the interior acted was sufficient to justify the inference that there was some prior understanding, although not directly shown, between Hackley, the entryman, and Lohr, acting with and for Bailey, that his acts should inure to their benefit, and that he applied to purchase the land on a speculation, and not "in good faith, to appropriate it to his own exclusive use and benefit"; and that such acts are as much in violation of the statute as if the entryman had directly made a contract in writing with a person, by which the title which he might acquire from the government should inure to such person; and that the facts elicited upon the trial of this case in the circuit court are not of such a character as to authorize the court to enter a decree in favor of the appellees herein.

The decree and judgment of the circuit court are reversed, with directions to the court to dismiss the bill, with costs in favor of appellant.

UNITED STATES *v.* BELLINGHAM BAY BOOM CO.

(Circuit Court of Appeals, Ninth Circuit. June 28, 1897.)

No. 308.

1. **NAVIGABLE WATERS—OBSTRUCTIONS—FEDERAL AND STATE LEGISLATION.**

Acts of congress merely making appropriations for the improvement of a river lying within a state do not operate as an inhibition against state legislation authorizing the construction of booms, dams, piers, etc., so as to make unlawful such structures when erected under state authority.

2. **SAME.**

To bring obstructions and nuisances in navigable waters lying within a state within the cognizance of the federal courts, there must be some statute of the United States directly applicable to such streams.

3. **SAME—RETROACTIVE LEGISLATION.**

Act Cong. Sept. 19, 1890 (26 Stat. 426), which, in section 10, prohibits the creation of any obstruction "not affirmatively authorized by law" to the

navigable capacity of any waters over which the United States has jurisdiction, was not retroactive so as to make unlawful the continuance of a boom constructed prior to its passage, under authority of a state law. 72 Fed. 585, affirmed.

4. SAME—EFFECT OF STATE LAWS.

That a log boom constructed under authority of a state statute on a river lying wholly within the state may not conform to the regulations prescribed by the state statute does not make it an unlawful structure, so as to be cognizable in the federal courts, under Act Cong. Sept. 19, 1890 (26 Stat. 426). The question whether it does comply with the provisions of the state statute is a state, and not a federal, question.

Appeal from the Circuit Court of the United States for the District of Washington, Northern Division.

William H. Brinker, U. S. Atty.

Thomas R. Shepard and Thomas G. Newman, for appellee.

Before GILBERT and ROSS, Circuit Judges, and HAWLEY, District Judge.

HAWLEY, District Judge. This is a suit in equity, brought under the direction of the attorney general to enjoin the Bellingham Bay Boom Company, appellee, from maintaining a boom in Nooksack river, in the state of Washington, and for a decree requiring the removal of such obstruction. The Nooksack river is a navigable stream having its source in Whatcom county, Wash., running through said county, and emptying its waters into Bellingham Bay, and is navigable from its mouth for a distance of several miles towards its source by steamboats and light water craft. There are settlements, farms, and towns along the river, and prior to the construction of the boom and afterwards there was more or less traffic by steamboats plying between the towns and settlements along the river, carrying in merchandise and carrying out farm products. These settlements are increasing every year. There are also, along the river, immense forests of timber, which, when cut up into saw logs, can be brought to market by floating them down the river, and to make the river available for this purpose it is necessary to maintain a boom at the mouth of the river. The circuit court found that the value of this timber was much greater than the value of the other products transported upon the river. A number of witnesses testified on behalf of the appellants to the effect that the boom with the piles driven to support it had a tendency to collect drift timber, and cause shoaling at the mouth of the river, by detaining the silt and sand, and causing the same to form a bar, and that the navigation of the river by boats is interfered with by the bar, and by jams of drift collecting therein, and by the filling up of the channel. On the other hand, several witnesses testified on behalf of the appellee that said boom is not so constructed as to render navigation thereon impossible during any considerable portion of the year. They admit that at certain periods of the year large quantities of brush, trees, and drift are, by freshets and high water, carried down to the mouth of the river, where the same become lodged by reason of shoal water; that the appellee has expended, and does expend, large sums of money every year for the improvement of

said river by removing the brush, trees, and drift from the mouth thereof, and from the channel of the river, for several miles from its mouth; that by reason of such improvements, and of the location and maintenance of the boom, the navigation on said river of boats and water craft has been greatly facilitated. The circuit court expressed the opinion that as to the disputed facts the witnesses for the appellee had more actual knowledge, and were better able to know the facts by reason of having been connected with the works, and having made examinations and surveys, than the witnesses for the appellants, who testified only from a general knowledge. The testimony is uncontradicted that prior to the construction of the boom the trees and drift carried down the river by floods formed jams which obstructed navigation, requiring much labor and expense to keep the river open, and the court found that since the construction of the boom the appellee, at an expense of several thousand dollars, had kept the mouth of the river clear of obstructions,—other than the boom itself and saw logs collected therein,—and by such expenditures had rendered ample recompense for the impediment to navigation of the river by boats, caused by its boom. The circuit court dismissed the bill.

It is contended by appellants that for more than a year prior to the commencement of this suit (May 2, 1890) the appellee maintained, and continues to maintain, an obstruction in the navigable waters of said river, in such manner as to blockade the river during a large portion of the year, rendering navigation thereon impossible, without obtaining permission from the secretary of war to continue or to maintain said boom. This suit is brought in pursuance of the provisions of an act of congress "making appropriation for the construction, repair, and preservation of its public works on rivers and harbors, and for other purposes," approved September 19, 1890 (26 Stat. 426, 465), section 7 of which provides that it shall not be lawful to build structures which may obstruct or impede the navigable waters of the United States, unless permission of the secretary of war has been first obtained. Section 10 of the act reads as follows:

"That the creation of any obstruction, not affirmatively authorized by law, to the navigable capacity of any waters, in respect of which the United States has jurisdiction, is hereby prohibited. The continuance of any such obstruction, except bridges, piers, docks and wharves, and similar structures erected for business purposes, whether heretofore or hereafter created, shall constitute an offense and each week's continuance of any such obstruction shall be deemed a separate offense. * * * The creating or continuing of any unlawful obstruction in this act mentioned may be prevented and such obstruction may be caused to be removed by the injunction of any circuit court exercising jurisdiction in any district in which such obstruction may be threatened or may exist; and proper proceedings in equity to this end may be instituted under the direction of the attorney general of the United States."

The boom in question was constructed in the summer of 1890, and was fully completed prior to the 19th of September, 1890. The contention of the appellee is that it had the right to construct, and has the right to maintain, said boom, under the provisions of an act of the legislature of the state of Washington entitled "An act to declare and regulate the powers, rights, and duties of corporations organized to build booms and to catch logs and timber products therein," ap-

proved March 17, 1890 (Laws Wash. 1889-90, p. 471). Section 3 of this act provides that:

"Such corporations shall have the power and are hereby authorized, in any of the waters of this state, or the dividing waters thereof, to construct, maintain, and use all necessary sheer or receiving booms, dolphins, piers, piles, or other structure necessary or convenient for carrying on the business of such corporations; provided, that such boom, or booms, sheer booms or receiving booms, shall be so constructed as to allow the free passage between any of such booms and the opposite shore for all boats, vessels, or steam crafts of any kind whatsoever, or for ordinary purposes of navigation." 1 Hill's Ann. St. Wash. § 1592.

It is conceded by appellants that, in the absence of any congressional legislation upon the subject, the states possess plenary power by appropriate enactments to authorize the obstruction of navigable streams which exist within the state; but the contention is that there had been congressional legislation, prior to the passage of the act of the state of Washington, appropriating money for the survey and improvement of the river (23 Stat. 144; 24 Stat. 327; 25 Stat. 423), and that the object and purpose of congress to continue such improvement has never been abandoned (26 Stat. 452, 464; 27 Stat. 115; 28 Stat. 371; 29 Stat. 234). It is argued that the sole object of congress in making these appropriations was to regulate and promote commerce, which was clearly within its constitutional power. This contention is not sustained by the authorities. The acts of congress making appropriations for the improvement of the river imposed no inhibition upon the legislature of the state, which prevented the construction under state authority of booms, dams, piers, or bridges upon the river. The power of congress to pass laws for the regulation of the navigation on rivers, and to prevent any and all obstructions therein is not questioned. The law, however, is well settled that there must be a direct statute of the United States in order to bring within the scope of its laws, as administered by the courts of law and equity, obstructions and nuisances in navigable streams within the states. Such obstructions and nuisances are offenses against the laws of the state within which the navigable waters lie, and may be indicted or prohibited as such, but they are not offenses against the United States laws which do not exist, and none such exist except what are to be found on the statute book. *Willson v. Marsh Co.*, 2 Pet. 245, 252; *Gilman v. Philadelphia*, 3 Wall. 713, 727; *The Passaic Bridges*, Id. 782, 793; *Pound v. Turck*, 95 U. S. 459; *Escanaba & L. M. Transp. Co. v. Chicago*, 107 U. S. 678, 683, 2 Sup. Ct. 185; *Cardwell v. Bridge Co.*, 113 U. S. 205, 208, 5 Sup. Ct. 423; *Bridge Co. v. Hatch*, 125 U. S. 1, 8, 8 Sup. Ct. 811.

In *Willson v. Marsh Co.*, supra, the legislature of the state of Delaware authorized the construction of a dam across a creek for the purpose of reclaiming some marsh land, and thereby improving the health of the inhabitants. Chief Justice Marshall, in delivering the opinion of the court, said:

"The act of assembly by which the plaintiffs were authorized to construct their dam shows plainly that this is one of those many creeks passing through a deep, level marsh adjoining the Delaware, up which the tide flows for some distance. The value of the property on its banks must be enhanced by ex-

cluding the water from the marsh, and the health of the inhabitants probably improved. Measures calculated to produce these objects, provided they do not come into collision with the powers of the general government, are undoubtedly within those which are reserved to the states. But the measure authorized by this act stops a navigable creek, and must be supposed to abridge the rights of those who have been accustomed to use it. But this abridgment, unless it comes in conflict with the constitution or a law of the United States, is an affair between the government of Delaware and its citizens, of which this court can take no cognizance."

He further said that, if congress had passed any act which bore upon the case, any act in execution of the power to regulate commerce, the object of which was to control the state legislation over those small navigable streams into which the tide flows, the state law would be void; but that, as no such action had been taken by congress, the act of the state was not repugnant to the power to regulate commerce in its dormant state. In *Pound v. Turck*, supra, which was an action for damages occasioned by the construction and maintenance of a boom over the Chippewa river, a navigable stream in the state of Wisconsin, the court, after referring to *Willson v. Marsh Co.*, and other cases, said:

"The present case falls directly within the principle established by these cases, and aptly illustrates its wisdom. There are within the state of Wisconsin, and perhaps other states, many small streams, navigable for a short distance from their mouths, in one of the great rivers of the country, by steamboats, but whose greatest value in water carriage is as outlets to saw logs, sawed lumber, coal, salt, etc. In order to develop their greatest utility in that regard, it is often essential that such structures as dams, booms, piers, etc., should be used, which are substantial obstructions to general navigation, and, more or less so, to rafts and barges. But to the legislature of the state may be most appropriately confided the authority to authorize these structures where their use will do more good than harm, and to impose such regulations and limitations in their construction and use as will best reconcile and accommodate the interests of all concerned in the matter. And since the doctrine we have deduced from the cases recognizes the right of congress to interfere and control the matter whenever it may deem it necessary to do so, the exercise of this limited power may all the more safely be confided to the local legislatures."

At the time of the passage of the law by the state of Washington, and of the construction of the boom, there was no direct statute of the United States prohibiting the construction or maintenance of such booms in the inland rivers of the state. The adoption of section 10 of the act of congress was an exercise of its constitutional right to regulate commerce between the states. The object was to take control of the navigable waters of the United States so as to protect the interests of the government and prevent obstructions to the free navigation of said waters. It was intended to apply to all cases where the states had failed to pass any laws in regard thereto, and to prohibit obstructions not authorized by law. But it was not intended by congress to be retroactive in its results. This is made perfectly clear from the fact that by its terms it is made applicable only to such obstructions as were "not affirmatively authorized by law." Congress recognized that, in the exercise of the legitimate powers of the state government, acts had been passed allowing individuals and corporations to build and construct booms, wharves, piers, and other structures upon the rivers, and it was not the intention of congress to interfere with such works as had been "affirma-

tively authorized by law," either by the legislature of the state or by acts of congress. In *U. S. v. Burns*, 54 Fed. 351, 362, the court, speaking of the act of congress under consideration, said:

"What is it that the congress has prohibited by the tenth section? All obstructions to the navigable capacity of the river are not prohibited, but only those 'not affirmatively authorized by law.' This legislation, in effect, concedes that which is well known to be true, that the necessities of commerce, the interests of the country, demand that certain obstructions to the navigable capacity of our rivers must be authorized and their creation permitted. Under certain circumstances, bridges, piers, docks, dams, and booms, the object of which is to facilitate trade and commerce, become in many instances serious obstructions to the navigable capacity of our waters, and yet they are 'affirmatively authorized by law.'"

It is argued by appellants' counsel that, admitting the laws of the state of Washington to be valid, still the boom in question was not constructed as authorized by the statutes of the state of Washington, and for that reason it is claimed that, as constructed, "it was not affirmatively authorized by a valid law, or by any law whatever; but, on the contrary, it was constructed and maintained in direct violation of the law which gave defendant its being." That is a matter between the corporation and the power that created it. The question whether or not the boom was constructed in strict accordance with the terms and provisions contained in the statute of Washington cannot be considered by this court. That question is one to be determined by the state, not by the federal, court. This is settled by the decision of the supreme court in the case of *Bridge Co. v. Hatch*, supra, where the court, in considering this matter, said:

"Whether they are conformable or not conformable to the state law relied on is a state question, not a federal one. The failure of the state functionaries to prosecute for breaches of the state law does not confer power upon the United States functionaries to prosecute under a United States law, when there is no such law in existence."

See, also, *Heerman v. Manufacturing Co.*, 1 Fed. 145, 156, 157.

The views herein expressed are conclusive of this case. It is therefore unnecessary to discuss other questions argued by the respective counsel. The judgment of the circuit court is affirmed.

BURDON CENT. SUGAR-REFINING CO. et al. v. PAYNE et al.

(Circuit Court of Appeals, Fifth Circuit. June 7, 1897.)

No. 518.

1. LANDLORD AND TENANT—LESSOR'S PRIVILEGE—LOUISIANA LAW.

The lessor's privilege, given by Rev. Civ. Code La. art. 2705, as security for the rent and "other obligations of the lease," held not to operate as security for a balance due for cane made into sugar on the leased premises, but which was grown by the lessors on other lands, not covered by the lease, and delivered to the lessees under a contract of purchase and sale embraced in the same instrument with the lease, but which was in fact a separate contract from the lease. 17 Sup. Ct. 754, followed.

2. SUGAR BOUNTIES—EQUITABLE LIENS.

A sugar grower in Louisiana may, by contract with the manufacturer to whom he sells the cane, reserve an equitable lien on the sugar bounties be-

coming due under the act of October 1, 1890, which may be enforced to the exclusion of general creditors, unaffected by the state laws.

Appeal from the Circuit Court of the United States for the Eastern District of Louisiana.

This was a suit by the Burdon Central Sugar-Refining Company against the Ferris Sugar-Manufacturing Company, for the appointment of a receiver, etc. A receiver was accordingly appointed, and thereafter the firm of J. U. Payne & Co. filed an intervening petition, setting up certain alleged liens on property found on the premises, and also on the sugar bounty due under the act of October 1, 1890. The circuit court sustained the liens claimed, and entered a decree accordingly. 78 Fed. 417. From this decree an appeal was taken to this court, which certified the questions arising therein to the supreme court for instructions.

The certificate contained the following statement of facts:

(1) H. M. Payne, J. U. Payne, and J. U. Payne & Co., a commercial firm composed of J. U. Payne, J. U. Payne, Jr., and R. W. Foster, all residents of New Orleans, La., were the owners of three contiguous plantations in St. Landry parish, Louisiana, known as Barbreck, St. Peter's, and Anchorage.

(2) On June 16, 1892, they entered into the following contract with L. Murray Ferris and Wm. L. Ferris, of Poughkeepsie, New York, which was duly recorded:

"This indenture made by H. M. Payne, J. U. Payne, and the firm of J. U. Payne & Co., all residents of the city of New Orleans, state of Louisiana, as the parties of the first part, and L. Murray Ferris and William L. Ferris, both residents of the city of Poughkeepsie, state of New York, as the parties of the second part, witnesseth: That whereas the said H. M. Payne, J. U. Payne, and the firm of J. U. Payne & Co., parties of the first part, as aforesaid, are the owners and proprietors of three certain plantations, to wit, the Barbreck, St. Peter's, and Anchorage places, their respective interests in the said three plantations being of record in the said parish; and whereas, the said L. Murray Ferris and William L. Ferris, parties of the second part, as aforesaid, have proposed to contract, upon the terms and conditions hereinafter provided, for a lease of the Barbreck sugar house, and the purchase of the crops of the three aforesaid plantations: Now, therefore, the said parties of the first part, each for and as regards his respective interest in the said plantations, and the said parties of the second part, jointly and severally, hereby contract, obligate, and bind themselves as follows, to wit:

"Article First. The parties of the first part grant to the parties of the second part, upon the terms and conditions hereafter provided, a lease, for a period of ten years, of the sugar house situated on the Barbreck plantation, together with all the machinery and appurtenances thereto belonging, it being understood and agreed that this lease shall cover and include all the present inclosure around the Barbreck sugar house, and so much in addition towards the Anchorage plantation as may be necessary to provide space for handling cars, and, further, the land between the cane yard and the bayou, except the public highway, which shall be used in common by the parties hereto: provided, that the lease shall not include any cabins or dwelling houses which may be situated on the aforesaid premises, the parties of the first part reserving to themselves the right to remove any and all such cabins or dwelling houses off the said premises which the parties of the second part shall have the right, at their option, to require. And it is agreed and understood that the lease shall further cover and include the right to make such additions, alterations, or modifications to or in said sugar house as the parties of the second part may desire to make, using, at their option, all the brick and other material now in the aforesaid premises; the right being further reserved to the said parties of the second part to drain the aforesaid leased premises into the regular plantation ditches and drains. But the parties of the second part hereby covenant and bind themselves to make at least, and in any event, such additions and alterations to and in said sugar house as will enable

them conveniently, and in suitable time, to take off the crops of the Barbreck, St. Peter's, and Anchorage plantations.

"Article Second. The consideration of the aforesaid lease shall be the sum of twenty thousand dollars (\$20,000), or two thousand dollars (\$2,000) per annum, which the parties of the second part bind and obligate themselves to pay in semiannual installments of one thousand dollars (\$1,000) each; the first installment to be due and payable on the first day of January, 1893, and the others every six months thereafter. And it is understood and agreed that, while all the terms and stipulations of this contract shall be absolutely and irrevocably binding from the date of its execution, the rent, as above stipulated, shall not begin to run until the first day of October, 1892.

"Article Third. It is further understood and agreed that there shall be built immediately, or as soon as practicable after the execution hereof, a tramway and bridge from the Barbreck sugar house through the St. Peter's plantation, on the Barbreck side of the bayou, to the boundary line of the Prosser plantation, for the purpose of conveying the crops of the said plantation to the sugar house. The parties of the first part contract and agree, on their part, to grade the beds of the said tramways, and to haul all the necessary materials for their construction; the parties of the second part covenanting and agreeing, on their part, to furnish all the material, and to complete the tramways and build the bridges, after the grading and hauling aforesaid shall have been done. And, after the first crop season after the execution hereof, the parties of the second part bind and obligate themselves to build, on the same terms and conditions as are provided above, a branch tramway from the main tramway on the Barbreck plantation, hereinabove provided for, across the St. Peter's bridge and through the St. Peter's field on that side of the bayou up to the line of the Morgan Railroad. And the parties of the second part shall have the privilege of carrying the tramways entirely through all or either of the said three plantations, so as to be able to extend them beyond.

"Article Fourth. The parties of the second part shall further have the right of way for a railroad to connect the Barbreck sugar house with the Morgan Railroad, including the consent of the parties of the first part to their building a railroad bridge across the bayou at the grade level of the Barbreck cane yard, and the further right to construct and operate telegraph and telephone lines along all the aforesaid tramways and railroad. The parties of the second part shall further have, during the lease, a full and complete right of way over the road connecting the Barbreck sugar house and the railroad depot, and the further right to establish and operate during the lease, at some suitable place on one of the three aforesaid plantations, a kiln for burning brick.

"Article Fifth. But it is distinctly understood and agreed that the aforesaid tramways and railroad must be so constructed as not to interfere with the drainage facilities of the aforesaid three plantations, or either of them. And, as the courses of the aforesaid tramways and railroad are not definitely fixed herein, it is further understood and agreed that as soon as the said courses shall have been mutually agreed upon, and the tramways and railroad built, they shall ipso facto become the courses contemplated herein, and neither of the parties hereto shall have the right to change the same, or either of them, without the other's consent.

"Article Sixth. The parties of the first and second part hereto further covenant and agree mutually to sell and purchase, respectively, upon the following terms and conditions, all the cane which may be grown on the three aforesaid plantations, viz. the Barbreck, St. Peter's, and Anchorage plantations, except such as may be needed each season as seed for the following year.

"Article Seventh. The parties of the first part shall cultivate the plantations in cane, or so much thereof as would be justified by usual and improved agricultural methods.

"Article Eighth. The cane shall be delivered at the sugar house or at the tramways, at the option of the parties of the first part, to cars furnished by the parties of the second part; the said cars to be loaded to their full capacity by the parties of the first part.

"Article Ninth. The parties of the first part shall have the absolute right to deliver on and after the fifteenth day of October of each season, and the parties of the second part shall be bound and obligated to accept, unless hereinafter pro-

vided to the contrary, so much cane each working day as shall represent the average amount necessary to be delivered per day, to complete the delivery by the twenty-fifth day of December following; the said average to be based upon the number of working days between the fifteenth of October and the twenty-fifth of December, and the total estimated tonnage of the three plantations. The said estimate shall be made on the first day of each October by the parties of the first part, and shall be submitted in writing to the parties of the second part, who shall have the right to make a personal inspection of the crop; and, in case of a disagreement between the parties hereto as to the tonnage, they shall agree upon an umpire, whose decision and estimate shall be final and binding on all parties hereto.

"Article Tenth. The parties of the second part shall not be bound to accept cane frozen standing more than eight days after a freeze, but windrowed cane uninjured by freeze shall be paid for on the same basis as uninjured standing cane. And all cane must be cut as close to the ground as practicable, and not above the first red joint; and it must be delivered promptly after cutting, freed from trash, as is customary in Louisiana. Nor shall the parties of the second part be bound to accept any cane the juice of which shall test less than 9 per cent. sucrose.

"Article Eleventh. The price to be paid by the parties of the second part shall be graduated according to the percentage of the sucrose content of the juice of the cane, as expressed at the mill, and the average market price, as determined by the New Orleans quotations of prime yellow clarified sugar, during each delivery week, plus the bounty; this price to be estimated on a basis of four dollars per ton for cane when the sucrose content of the juice is 11 per cent. and the average market price of prime yellow clarified sugar, plus the bounty, is five and a half cents per pound, or 6.6 cents for every one per cent. of sucrose in the juice, thus: 11 per cent. \times 6.6 \times 5½, equals \$4.00.

"Article Twelfth. The parties of the first part shall have the right to appoint a representative, who shall have access to the mill at all times for the purpose of testing the juice, or for any other purpose legitimately and reasonably pertaining to the interests of the said parties of the first part under this contract. The juice shall be tested daily, or as often as either party may desire, and immediately, or as soon as practicable, after it is expressed. And, in case more than one determination is made during a day, the average result shall be taken as the basis of payment for that day. And, in case of disagreement between the parties hereto as to the percentage of sucrose content, Dr. W. C. Stubbs, of New Orleans, shall be the umpire; and his decision and figures shall be binding.

"Article Thirteenth. The price of cane as above determined shall be paid as follows: Two and 75/100 dollars per ton shall be paid every Monday for the cane delivered during the preceding week, until the delivery is completed. The balance, if any, per ton, shall operate as a lien and privilege, to the full extent of such balance, on the first bounty money received by the parties of the second part on sugar produced from cane ground at the Barbreck sugar house; and the said parties of the second part covenant and agree to consecrate solely to the payment of such balance all bounty payments so received by them, until the whole of the said balance shall have been paid.

"Article Fourteenth. But whereas, there is recorded against the premises hereinabove leased a mortgage to secure the payment at maturity of four promissory notes, each note being for the sum of four thousand one hundred and sixty-six dollars and sixty-six cents, and bearing interest at the rate of four per cent. per annum from the first day of January, 1890, until they respectively mature; and whereas, the said notes mature on the first of January, 1893, the first of January, 1894, the first of January, 1895, and the first of January, 1896, respectively: Now, therefore, in order to secure the parties of the second part in the quiet enjoyment of the said leased premises and the prompt payment of the said notes, principal and interest, as they respectively mature, it is understood and agreed that the parties of the second part shall have the right and privilege of reserving each season, until all the aforesaid notes shall have been paid, the rent which may be due under the terms of this contract on the first day of January of each season, and, in addition, so many of the cash weekly payments for cane, hereinabove provided for, next preceding the first day of January of the said season,

as will, together with the rent as aforesaid, aggregate the amount, principal and interest, of the note falling due on the first of January of that season. The amount so reserved shall be held by the said parties of the second part in trust for the parties of the first part, and, in case the said note is not promptly paid at maturity by the parties of the first part, then, for their own protection, the parties of the second part shall have the right to apply the amount reserved as above provided to the payment of the note, principal and interest, charging the amount so applied to the account of the parties of the first part. But, if the parties of the first part shall promptly pay at maturity the note falling due on the first of January of any season, then in that event the amount reserved, as above provided, by the parties of the second part for the payment of that note, shall immediately become due and payable to the parties of the first part. The parties of the first part further covenant and agree to remove all other liens and privileges on the leased premises, and to keep the same free from all other liens and privileges during the term of this lease.

"Article Fifteenth. In the event of a temporary closing and shutting down of the mill as the result of fire, explosion, breakage, or other purely fortuitous cause, the parties of the second part shall not be bound to receive cane during such time, and shall not be liable in damages to the parties of the first part for such nonreceipt; but during such temporary shutting down of the mill the parties of the first part shall have the right to dispose of so much cane as the parties of the second part would otherwise have been compelled, under the terms of this contract, to receive, in any way they may see fit, and they shall furthermore have the right to use for such purpose, free of charge, all the tramways, cars, and other transportation facilities of the parties of the second part. And the parties of the second part stipulate and agree to use every reasonable effort to repair, and make all such delays as short as possible.

"Article Sixteenth. In case of total loss of the sugar house, mill, and machinery, by fire or otherwise, this contract may be terminated, at the option of the parties of the second part.

"Article Seventeenth. It is agreed and understood that the value of the Barbreck sugar house, machinery, and appurtenances, as they stand at the date of this contract, shall be estimated by three appraisers to be appointed as follows: One by each of the parties hereto, and the third by these two. And the parties of the second part covenant and agree to take out thereon, in the name and for the benefit of the parties of the first part, and to keep in force during the term of this contract, a policy of insurance against fire, for the full value as above determined, provided that this valuation shall not exceed the sum of ten thousand dollars, and to pay the premium on the said policy, for the benefit of the parties of the first part, during the term of this contract.

"Article Eighteenth. The parties of the second part further covenant and agree to pay during the term of this contract any and all extra taxes which may result from increased assessment of the leased property on account of the improvements put upon it by the said parties of the second part.

"Article Nineteenth. On the termination of this contract by limitation, or as otherwise provided therein, the parties of the second part shall have the right to remove and take away all the improvements, of whatever kind or description, including tramways, which they may have put upon the leased premises, on condition, however, of paying, before such removal, to the parties of the first part, an amount which shall represent the depreciation in value of the sugar house, machinery, and appurtenances belonging to the said parties, as a means of manufacturing sugar from cane, the present value to be that determined by the appraisal hereinabove provided for, and the value at the termination of this contract to be determined by a similar appraisal; it being understood and agreed that the latter appraisal shall be made solely with reference to the relative efficiency and value of the said sugar house, machinery, and appurtenances for the manufacture of sugar from cane, without regard to the profits of the industry, or the depreciation in value of same as the result of the introduction of new and improved machinery or methods of manufacture.

"Article Twentieth. The parties of the first part agree to keep all such books and records as are required by the United States government in relation to the bounty, and to furnish to the parties of the second part all the details which may be necessary to enable them to effectuate their bounty rights.

"Article Twenty-First. Nothing in this contract shall be so construed as to authorize the establishment or conduct of a store of any sort or description upon the leased premises by the parties of the second part or others.

"Article Twenty-Second. It is further mutually understood and agreed that, in case the bounty now paid upon sugar by the United States government is removed during the term of this contract, then and in that event either of the parties hereto may, at their option, terminate the contract; but, as regards the parties of the first part, it is understood and agreed that this right of terminating the contract shall extend only so far as their obligation to cultivate and deliver cane is concerned; the right and option being reserved to the parties of the second part, in the event of an exercise by the parties of the first part of their right to termination under this section, to continue the lease as herein stipulated upon the same terms and conditions, except as hereinabove provided.

"Article Twenty-Third. And whereas, the parties hereto recognize that despite the genuine and earnest efforts of the parties of the second part to construct and put in operation the contemplated mill in time for the next grinding season after the execution hereof, such a consummation may be rendered practically impossible by events absolutely beyond the control of the said parties hereto, it is therefore understood and agreed that if, by reason of such unforeseen events, it shall become practically impossible to construct and put into operation the said contemplated mill in time for the next grinding season after the execution hereof, then and in that event the said parties of the second part shall be bound to receive, under the terms and conditions of this contract, during said next grinding season, only the cane grown on the Barbreck plantation, and the parties of the first part shall have the right to dispose of the St. Peter's and Anchorage crops during said season in any way they may see fit, with the privilege of using for such purpose, free of charge, any and all the transportation facilities of the parties of the second part. But nothing in this section shall be so construed as to relieve the parties of the second part from their obligation, under this contract, to purchase the crops of the three aforesaid plantations in case of their failure to construct and put in operation the said contemplated mill in time for the next grinding season, if such failure shall result from the financial inability of the said parties of the second part to meet their engagements, or from a want of exercise by them of all due caution, prudence, and foresight to that end.

"Article Twenty-Fourth. It is further understood and agreed that the parties of the second part shall have the right and privilege of subrogating to their rights and liabilities under this contract, at any time during the term thereof, a corporation duly organized, provided it be satisfactorily shown that the said corporation be legally organized and competent to contract; that it is the absolute owner and proprietor of the property, machinery, rights, and effects of every kind and description which shall have belonged to the parties of the second part hereto, and shall be situated upon the three aforesaid plantations, or either of them; and that the said property, machinery, rights, and effects are free from any and all liens and incumbrances except the lien of the lessors under this contract; and on this condition the parties of the first part covenant and bind themselves to accept the aforesaid corporation as the substitute of the parties of the second part hereto, and to release the said parties from any and all subsequent liability hereunder.

"Article Twenty-Fifth. It is finally understood and agreed that this is an entire contract, each stipulation and obligation herein being a part of the consideration for every other.

"In witness whereof, the aforesaid parties have hereunto affixed their hands on this 16th day of June, 1892.

"[Signed]

H. M. Payne.

"J. U. Payne.

"J. U. Payne & Co.

"[Signed] L. Murray Ferris.

"Wm. L. Ferris."

(3) Under article twenty-four (24) of said contract, the said L. Murray Ferris and Wm. L. Ferris transferred all their rights and liabilities under said contract to the Ferris Sugar-Manufacturing Company, Limited, a corporation organized under the laws of Louisiana.

(4) The McKinley tariff act, passed October 1, 1890, which provided for a bounty to sugar producers, was repealed on August 28, 1894, and on September 8, 1894, it was stipulated between the parties to said contract that the provisions of articles eleven and thirteen thereof should be extended so as to apply to any bounty that might thereafter be granted by congress to sugar produced from the crop of 1894.

(5) The Ferris Sugar-Manufacturing Company, Limited, operated the Barbreck sugar house under the terms of said contract from October, 1894, to January 4, 1895, and the said parties of the first part, J. U. Payne & Co. et al., delivered to the said Ferris Sugar-Manufacturing Company during that season, under said contract, ten thousand three hundred and seventy-seven (10,377) tons of cane grown upon premises other than those leased to said Ferris Company, for which the said Ferris Company owed a balance on the purchase price of four thousand five hundred and sixty-four and $\frac{73}{100}$ dollars (\$4,564.73) on the contract basis of \$2.75 a ton, and a further sum of six thousand five hundred and seventy-nine and $\frac{30}{100}$ dollars (\$6,579.30) in the event that the bounty should be collected.

(6) In the fall of 1894 the Ferris Sugar-Manufacturing Company, Limited, became heavily involved in financial difficulties, and prior to this a number of creditors (among them, the Reading Iron-Works Company and John H. Murphy) recorded vendors' privileges upon the machinery sold by them to the said Ferris Sugar-Manufacturing Company, Limited, and erected by it in the said Barbreck sugar house.

(7) On January 4, 1895, the Burdon Central Sugar-Refining Company, Limited, a corporation organized under the laws of New York, and an unsecured creditor of the Ferris Company to the extent of forty thousand four hundred and four and seventy-four one-hundredths dollars (\$40,404.70), its entire debt, filed a bill in equity in the circuit court of the United States for the Eastern district of Louisiana, alleging that the Ferris Sugar-Manufacturing Company, Limited, was heavily indebted and insolvent, and that its assets would be sacrificed by numerous creditors who were about to bring suit. The bill prayed for the appointment of a receiver to take charge of all the assets of said company. On the same day the defendant company filed an answer, with a resolution of its board of directors annexed authorizing such action, admitting all the facts charged in the bill, and uniting in the prayer for a receiver. A receiver was thereupon appointed.

(8) On March 25, 1895, H. M. Payne, J. U. Payne, and J. U. Payne & Co. filed a petition of intervention in this suit, stating, among other things not relevant to this certificate, the said balance of \$4,564.73 and of \$6,579.30 due them for cane delivered to the said Ferris Sugar-Manufacturing Company, Limited, and claiming that both sums were secured by a lessor's privilege on the property of the defendant company at the Barbreck sugar house, and that the latter sum, namely, \$6,579.30, was also secured by an equitable lien on any bounty that might thereafter be collected by the receiver. The receiver and the Ferris Company filed an answer to this petition, admitting the correctness of the amounts claimed, but denying that they were secured as averred. The Burdon Central Sugar-Refining Company adopted the answer of the receiver. Issue was joined by replication, and the matters in issue were referred to a master to report upon the law and the facts. The master allowed the amounts claimed by interveners, but rejected their claims both to a lessor's privilege to secure these amounts and to an equitable lien on the bounty. Upon exceptions to the master's report the court decreed that interveners were entitled to a lessor's privilege upon the movable effects of said Ferris Company and of third persons upon leased premises to secure both said sums due for the unpaid price of the sugar cane, in addition to an equitable lien on the bounty to secure the said sum of \$6,579.30, in preference to all other creditors of the said Ferris Sugar-Manufacturing Company, Limited.

(9) From this decree the Burdon Central Sugar-Refining Company, complainants, the Reading Iron Company, and John H. Murphy, interveners in this suit, as creditors of the Ferris Sugar-Manufacturing Company, Limited, for large amounts, took an appeal, and made the following assignment of errors: "First Said court erred in decreeing that said interveners, J. U. Payne et al., are entitled to a privilege and right of pledge, as lessors, upon the movable effects of

the defendant on the leased premises, to secure the sums due said interveners for cane sold and delivered by them to said defendant, amounting to \$4,564.73 and \$6,579.30. Second. Said court erred in decreeing that said interveners are entitled to an equitable lien on the bounties which may be collected on sugars made from cane belonging to said interveners, and taken off by the defendant or its receiver."

The questions certified by the circuit court of appeals are given in the opinion.

The opinion of the supreme court, answering those questions, was delivered by Mr. Chief Justice Fuller, as follows:

By article 3183 of the Revised Civil Code of Louisiana, it is provided: "The property of the debtor is the common pledge of his creditors, and the proceeds of its sale must be distributed among them ratably, unless there exist among the creditors some lawful causes of preference." By article 3184: "Lawful causes of preference are privilege and mortgages." By article 3185: "Privilege can be claimed only for those debts to which it is expressly granted in this Code." By article 3186: "Privilege is a right, which the nature of a debt gives to a creditor." Article 2705 provides: "The lessor has, for the payment of his rent, and other obligations of the lease, a right of pledge on the movable effects of the lessees, which are found on the property leased. * * *" And by article 3268 this privilege is made superior to the privilege of a vendor.

Judge Parlange, holding the circuit court, was of opinion that under the terms of the contract the purchase price of the cane delivered by the sellers, the lessors, to the purchasers, the lessees, was secured by the lessors' privilege, because under the contract the obligation to pay the price of the cane was one of the essential obligations of the lease, and therefore covered by the words "other obligations of the lease." 78 Fed. 417. Counsel's contention is that by reason of these words the privilege extends to every obligation created by a contract of lease; and *Warfield v. Oliver*, 23 La. Ann. 612, *Fox v. McKee*, 31 La. Ann. 67, and *Henderson v. Meyers*, 45 La. Ann. 791, 13 South. 191, are cited as maintaining that view. In the first of these cases it was held that the obligation resulting from a clause in a lease providing that the lessee should repair and keep in repair the leased premises was secured by the lessor's privilege. In the two other cases it was decided that, when a contract of lease provided for an attorney's fee in the event of suit to recover the rent, the amount of the stipulated fee was also so secured. But it may be observed that repairs to be made to leased property are in their very nature incidental to a lease of the property, and that such a stipulation as to an attorney's fee is a mere accessory to the rent itself.

It is further contended that the Code Napoleon and the Louisiana Code on the subject of the lessor's privilege are substantially alike, and that the French commentators and the decisions of the French courts support the proposition that the lessor's privilege secures, not only the rent, but also advances made during the course of the lease for the execution of the lease; that the meaning of the Louisiana law should be regarded as settled by this construction; and that, as the price of the cane delivered under this contract would be secured by the privilege of the lessor under the law of France, the same conclusion follows here. Article 2102 of the Code Napoleon provides that the lessor shall have a privilege for "the repairs which the tenant is bound to make (*réparations locatives*), and for everything that concerns the execution of the lease." Many French commentators are referred to as establishing that under this provision the privilege of the lessor extends to and secures advances made by him to a lessee, and they undoubtedly maintain that under the French law the amount due for raw material delivered by a lessor to the lessee of a manufacturing establishment for the purpose of being worked at the factory, under the terms of the lease, would be secured by the lessor's privilege. 29 *Laurent, Droit Civil Français* (4th Ed.; 1887) §§ 407, 408, states the principle thus: "By execution of the lease, we understand all the obligations which the law or the contract imposes on the lessee. Those which the law establishes are considered as agreed between the parties. All, therefore, concern the execution of the contract. * * * Are advances which the lessor makes under the contract of lease to the lessees se-

cured by his privilege? The affirmative is adopted by jurisprudence. It is incontestable when the advances concern the lease; that is to say, the rights and obligations which result from it. In this case both the letter and spirit of the law are applicable. But if a loan of money were made to the lessee, in the contract of lease, without there being any relation between the loan and the lease, this would not be an advance; it would be an ordinary loan; and the law gives no privilege for such a loan. Jurisprudence adopts this view; for, if it grants a privilege to the lessor for the advance which he makes, it is because these advances concern the lease. The owner of an iron furnace stipulates to furnish to the lessee of his furnace the wood necessary to operate it; it has been adjudged that such an advance is privileged. Such is also the case when the lessor furnishes beets to the lessee of a sugar factory. The lessor furnishes 10,000 francs to the lessee of a mill, as a fund to be used in operating it. The advance being intended to operate the mill, therefore its object was the execution of the lease, and the claim is privileged."

The only decision of the French courts cited in argument is referred to by Laurent, and is the case of *Vanderaghen c. Decocq*, decided April 18, 1850, by the court of appeals of Douai (not by the court of Cassation, as inadvertently stated by counsel), and reported in 1 *Journal du Palais* (1851) p. 395. The following statement made by the court of original jurisdiction was adopted by the court of appeals in affirming the judgment: "Considering that, as regards the claim of 6,800 francs for rentals, the privilege of Decocq is not contested by the defendant, and is, besides, expressly established by article 2102 of the Civil Code; that, according to paragraph 1 of that article, the same privilege takes effect for repairs chargeable to the tenant, and for everything that concerns the execution of the lease; that it is by virtue of a clause of the lease, and for the execution of that clause, and in order to insure the operation of the factory leased, that the Decocqs have delivered and furnished to Blanquart beets to value of 8,086 francs; that article 9 and following of said lease required them to plant beets on 53 hectares and 19 acres, and to furnish and deliver to the factory the entire product of the crop at the price of 16 francs per 1,000 kilos of beets, and under a penalty of 150 francs damages for each 35 acres of beets not delivered; that all the authors and jurisprudence grant the privilege of article 2102 to the lessor, who has made advances and furnished commodities, as in this case, by virtue of a clause of the lease, and for the execution of the lease,—it is held that under the terms of article 2102 the claim of Decocq is privileged as well for the beets furnished as for rentals." Whether the language of the Louisiana Code, "every obligation of the lease," may not justly be held to be narrower than the words "everything that concerns the execution of the lease," as found in the Code Napoleon, and therefore whether the latter would secure by the lessor's privilege an advance made by the lessor, which would not be so secured under the Louisiana law, we need not discuss; for, even conceding that the two Codes are alike, and that the provisions of both support the theory relied on, yet we think that under the provisions of this contract the price of the cane was not secured by the lessor's privilege. The test applied by the French writers to ascertain whether the particular obligation is secured by the lessor's privilege is whether the obligation created by a particular clause in a contract of lease is really a part of the contract of lease proper, or an obligation necessary for its execution. Thus Laurent, as we have just seen, says: "But, if a loan of money were made to the lessee in the contract of lease, without there being any relation between the loan and the lease, this would not be an advance; it would be an ordinary loan, and the law gives no privilege for such a loan." And the conclusion of the court of appeals of Douai in the case cited rested on the fact that the particular contract there considered made the price of the beets a part of the contract of lease, and intended for the execution of the lease.

It is clear, then, that, though we concede the view of the Louisiana law contended for by appellee, the question still remains: "Did the obligation to pay for the cane as stipulated in this contract make such obligation a part of the lease itself, or did the duty to pay under the contract result, not from the lease, but from another and distinct contract, namely, one of sale, not contemplated by the parties to be considered as a part of the lease as such, and therefore not secured by the lessor's privilege?" The learned district judge proceeded on the ground that there was an identity between the French and the Louisiana law, that the

interpretation of the one was persuasive in respect of the other, and that under both laws the privilege claimed should be allowed; but to reach this result he also held that the contract was brought within this view of the law because the sale of the cane, as between the parties to the contract, was "an essential consideration of the lease, both on the part of the lessors and lessees." We should remember that the contract must be so construed as to give meaning to all its provisions; and that that interpretation would be incorrect which would obliterate one portion of the contract in order to enforce another part thereof (Rev. Civ. Code La. art. 1951); and that as privileges, under the law of Louisiana, are in derogation of common right, they cannot rest on implication, and can only result from express terms, or from clear and irresistible intentment (Shaw v. Grant, 13 La. Ann. 52; Bank v. Maureau, 37 La. Ann. 857). In Case v. Taylor, 23 La. Ann. 497, the supreme court of Louisiana said: "It matters not what name the parties have given to the instrument; its character is determined by its constituent elements." Article 2063 of the Revised Civil Code of Louisiana (an article not found in the French Code) provides: "A conjunctive obligation is one in which the several objects in it are connected by a copulative, or in any other manner which shows that all of them are severally comprised in the contract. This contract creates as many different obligations as there are different objects; and the debtor, when he wishes to discharge himself, may force the creditor to receive them separately." And article 1883, that "every contract has for its object something which one or both of the parties oblige themselves to give, or to do, or not to do."

The writing before us embodies, in fact, two contracts,—a contract of lease and a contract of sale. If we were compelled to treat it as a single, indivisible contract, what would be its proper denomination? The sale of the cane was manifestly more important to Payne & Co. than the lease of the sugar house. By the contract they severed their lands into two parcels; leasing, for a time and price fixed, one part thereof, with the sugar house, and retaining the remainder, which they were to cultivate, and the crop upon which the Ferrises agreed to purchase. Apparently the lease was the inducement to the sale, rather than the sale the inducement to the lease. So that, if there was a loss of identity, which form of contract absorbed the other? We do not think; however, the effect of the document was to fuse the two into one, but that a contract of sale and a contract of lease were both provided for. The preamble recites: "Whereas, the said L. Murray Ferris and William L. Ferris, parties of the second part, as aforesaid, have proposed to contract, upon the terms and conditions hereinafter provided, for a lease of the Barbreck sugar house, and the purchase of the crops of the three aforesaid plantations." And articles 1 to 5 regulate, in substance, the relations between the parties as landlord and tenant, while articles 6 to 13 govern the sale of the crops. Article 6 says: "The parties of the first and second part hereto further covenant and agree mutually to sell and purchase, respectively, upon the following terms and conditions, all the cane which may be grown on the three aforesaid plantations, viz. the Barbreck, St. Peter's, and Anchorage plantations, except such as may be needed each season as seed for the following year." Article 11: "The price to be paid by the parties of the second part shall be graduated according to the percentage of the sucrose content of the juice of the cane," etc. Article 13: "The price of cane as above determined shall be paid as follows: Two and $\frac{75}{100}$ dollars per ton shall be paid every Monday for the cane delivered during the preceding week, until the delivery is completed. The balance, if any, per ton, shall operate as a lien and privilege to the full extent of such balance on the first bounty money received by the parties of the second part on sugar produced from cane ground at the Barbreck sugar house," etc.

We do not see how it can be successfully denied that there was a contract of sale as well as a contract of lease, and, this being the fact, it is impossible to so read the writing as to destroy the one in order to give effect to the other. And, in interpreting the contracts, if all the obligations which they created, excepting those essentially necessary to the existence of the contract of sale, should be attributed to and treated as obligations of the lease, this would not make the duty to pay for the cane an obligation of the lease, because price is of the essence of the contract of sale, under the law of Louisiana, and without price there can be no sale. Rev. Civ. Code, art. 2439. This conclusion is

strengthened when we consider that the contracting parties themselves sedulously separated the obligation to pay the price of the cane from the other obligations by stipulating that the price should be secured by a privilege and lien entirely independent of the lease. Thereby the duty to pay for the cane was treated as resulting from a sale, and secured by a privilege specially provided for upon the bounty money, which is inconsistent with the view that the contracting parties contemplated that the duty to pay for the cane resulted, not from a sale, but purely from a lease. It is true that the mere taking of security for the obligations of the lease would not import that the lessor's privilege created by law in favor of these obligations was abrogated, yet when the necessary effect of the contract under consideration is to separate the duty to pay for the cane from the obligations of the lease as such, and to secure it separately, the stipulation as to security is entitled to great weight, as tending to show that the parties regarded the obligations of the lease as one thing, and the obligation to pay the price separately secured as another. Privilege, says the Code, is the right "which the nature of the debt gives to the creditor." Now, the stipulation was that the price of the cane should be secured by a privilege on the bounty money; and this clearly justifies the assumption that the parties proceeded on the theory that the price of the cane arose from a different consideration and created a different obligation from the obligations created by the lease. Again, the twenty-second article of the contract expressly provided for the continuance of the lease at the option of the lessee, the manufacturing company, even after the lessors had been discharged from all obligation to cultivate or deliver cane to the company. That article is: "It is further mutually understood and agreed that, in case the bounty now paid upon sugar by the United States government is removed during the term of this contract, then and in that event either of the parties hereto may, at their option, terminate the contract; but, as regards the parties of the first part, it is understood and agreed that this right of terminating the contract shall extend only so far as their obligation to cultivate and deliver cane is concerned; the right and option being reserved to the parties of the second part, in the event of an exercise by the parties of the first part of their right of termination under this section, to continue the lease as herein stipulated under the same terms and conditions, except as hereinabove provided." How can it be concluded that the cultivation, delivery, and sale of the cane, on the one hand, and the payment of the price therefor, on the other, was an essential and necessary part of the continuance of the contract of lease, when the contracting parties themselves declared that, although all obligation to cultivate and deliver cane and to pay for the same should be dispensed with, the lease itself might continue to exist for its full term? And it may be observed, in this connection, that the contingency as to the bounty had happened before any delivery whatever had been made under the contract. If, in the year following, the vendor had exercised his option to cease delivering cane, and the vendee had continued to lease, could it have been said that there was no lease, because the obligation to deliver cane had disappeared, when the contract itself provided that this should not be the case? As the contract of lease provided for the erection by the lessor of new machinery in the sugar house, and therefore must be considered to have contemplated a debt as arising from its execution, it appears to us that it was the plain duty of the lessors, if their intention was that the purchase price of the cane should be an obligation of the lease secured by a lessor's privilege, to have so stipulated in unambiguous terms. And as this was not done, but, on the contrary, as the obligation to pay for the cane was stated in the contract as arising from the sale, and was separated from the obligations of the lease by the reservation of a privilege and lien on the bounty money, the rule of strict interpretation precludes us from so reading the contract as to enlarge its terms to import a privilege not necessarily resulting therefrom. Nor do we think that the twenty-fifth article, providing that "this is an entire contract, each stipulation and obligation herein being a part of the consideration for every other," tends to impair the conclusions we have indicated. The parties treated the written agreement as embodying both a sale and a lease, as independent contracts. Rev. Civ. Code La. art. 1769. The contract of lease is essentially commutative. Id. art. 2669. And article 1768 of the Code defines such contracts thus: "Commutative contracts are those in which what is done, given or promised by one party, is considered as equivalent to, or a consideration

for what is done, given, or promised by the other." It was because the parties considered the agreement as embodying independent stipulations that the provision before quoted was inserted, for it would otherwise have been superfluous; while, considering them as independent contracts, the stipulation making them interdependent created the right to rescind the one in case of the violation of the other. We hold, then, that the price of the cane delivered under the contract was not secured by the lessors' privilege, and that the first question must be answered in the negative.

2: The thirteenth article of the contract reads as follows: "The price of cane as above determined shall be paid as follows: Two and $\frac{75}{100}$ dollars per ton shall be paid every Monday for the cane delivered during the preceding week, until the delivery is completed. The balance, if any, per ton, shall operate as a lien and privilege to the full extent of such balance on the first bounty money received by the parties of the second part on sugar produced from cane ground at the Barbreck sugar house; and the said parties of the second part covenant and agree to consecrate solely to the payment of such balance all bounty payments so received by them, until the whole of the said balance shall have been paid." If it was within the power of the contracting parties to create an equitable lien upon the bounty collected, the terms of the contract effectuated that purpose. *Walker v. Brown*, 165 U. S. 654, 17 Sup. Ct. 453, and cases cited. The right of the parties, however, by the contract to create an equitable lien, and the power of a court of equity to enforce such lien, are denied upon the ground that as, by the provisions of the law of Louisiana, equality of distribution is the rule among creditors, and preferences can only result from privileges and mortgages, and as the subject-matter from which the lien here arose was not one of the cases to which the law of Louisiana gives a privilege, therefore an equitable lien could not be created by contract or enforced in violation of the terms of the statutes of Louisiana. But, without passing on the correctness of this proposition, we think it has no relation to the matter under consideration. The bounty on sugar was derived wholly from the act of congress of October 1, 1890, providing therefor (26 Stat. 567, c. 1244), and the act of March 2, 1895, making a partial allowance for the repealed bounty (28 Stat. 910, c. 189). *U. S. v. Realty Co.*, 163 U. S. 427, 16 Sup. Ct. 1120. The bounty was given, by the terms of the act of 1890, not to the manufacturer of sugar manufactured within the United States, but to the producer of such sugar from "beets, sorghum and sugar cane grown within the United States." In this way the law, in conferring a bounty, created a link between the manufacturer of the sugar and the grower of the beets, sorghum, or cane from which it was manufactured. And this connection between the manufacturer and the grower being created by the act of congress in conferring the bounty only for sugar manufactured from cane grown within the United States, the relation between the grower and the manufacturer was one arising from the laws of the United States, and not from the local law of the state of Louisiana. As a transfer of the claim against the United States derived from the bounty could not have been given by the manufacturer who received the cane of the grower without a violation of section 3477 of the Revised Statutes, the contention of appellants denies to the grower of cane, on its delivery to a manufacturer, any security whatever; but this would be incompatible with the purposes and objects of the acts of congress, and would cause the statutes of Louisiana to operate upon, and, in a measure, render nugatory, laws of the United States. The parties to the contract had in view in making it the necessary relation between them accorded by the act of congress, for the contract stipulated that the parties of the first part should "keep all such books and records as are required by the United States government in relation to the bounty, and to furnish to the parties of the second part all the details which may be necessary to enable them to effectuate their bounty rights." The right to collect the bounty having arisen from a law of the United States, and the provisions of that law creating a necessary relation between the grower and the manufacturer, making them, in effect, joint producers of the sugar, the right to the equitable lien stipulated by the contract was not controlled by the provisions of the local law of Louisiana, even although, as a general rule,—and in regard to this we express no opinion,—the effect of that law would be to deprive contracting parties, except when expressly allowed, of the right to contract for an equitable lien, and to deny to courts of equity the power to enforce the same.

These considerations lead to an affirmative answer to the second and third questions. The first question is answered in the negative, and the second and third questions in the affirmative, and it will be so certified.

John D. Rouse, Wm. Grant, Walter H. Saunders, and Frank McGloin, for appellants.

Chas. E. Fenner, for appellees.

Before PARDEE and McCORMICK, Circuit Judges, and MAXEY, District Judge.

PER OURIAM. Certain questions arising in this cause, which are hereinafter more fully set out, were certified to the supreme court, to obtain the instruction of that court in the matter embraced in the question. A complete statement of the case will be found in 167 U. S. 127, 17 Sup. Ct. 754, and it is unnecessary to repeat it here. The questions certified were the following:

"(1) It being shown that the cane sold by appellees, J. U. Payne & Co. et al., to the Ferris Sugar-Manufacturing Company, Limited, pursuant to the contract between the parties, was grown on lands not embraced within the limits of the premises leased to the Ferris Sugar-Manufacturing Company, Limited, are appellees, under the laws of Louisiana, considered in connection with the provisions of the contract, entitled to the lessor's privilege to secure the payment of the purchase price of such cane? (2) Under the terms of the thirteenth article of the contract between the Paynes and the Ferrises, and to secure the payment of the price of the sugar cane sold and delivered under said contract, have the appellees, H. M. Payne, J. U. Payne, and the members of the firm of J. U. Payne & Co., an equitable lien upon the bounty money collected from the United States by the receiver in this suit? (3) If the second question shall be answered in the affirmative, can such equitable lien, under the laws of Louisiana, be so enforced in the present suit as to appropriate the bounty money to the payment of the claim of the Paynes, to the exclusion of the general creditors of the Ferris Sugar-Manufacturing Company?"

The first of the certified questions was answered by the supreme court in the negative, and the second and third questions in the affirmative. The decree of the circuit court appealed from in this cause adjudged that the appellees were entitled to both the lessor's privilege and an equitable lien to secure the payment of the price of the cane sold by the appellees to the Ferris Sugar-Manufacturing Company, Limited. The decree of the circuit court is erroneous in extending to the appellees the benefit of the lessor's privilege to secure the payment of the price of the cane. Appellees have an equitable lien on the bounty money, to the extent only of \$6,579.30, which should be appropriated first to the payment of their claim, and the remainder thereof should be distributed to the creditors of the Ferris Sugar-Manufacturing Company, Limited, as justice and equity require. For the error indicated, the decree of the circuit court should be reversed, and the cause remanded, with directions to enter a decree in conformity with the views above expressed; and it is so ordered.

ROSS v. WESTERN UNION TEL. CO.

(Circuit Court of Appeals, Fifth Circuit. June 7, 1897.)

No. 577.

1. TELEGRAPHS—DELAY IN DELIVERING MESSAGE—PROXIMATE CAUSE.

The delay of a telegraph company in delivering a message warning the person to whom it is addressed that armed men are pursuing him is not the proximate cause of his death at the hands of his pursuers.

2. SAME.

Where there is only a bare possibility that the prompt delivery of a message warning the person to whom it was addressed that he was pursued by armed men would have enabled him to escape, it seems that the company is not, by reason of its delay in delivering the message, responsible for his death at the hands of his pursuers.

3. SAME.

Where a message addressed to one who was not a resident of the town, and which was directed to no particular street or locality in the town, warned him that he was pursued by armed men, and in a few minutes after he reached the town, and while he was proceeding to the telegraph office, he was overtaken and killed by his pursuers, the company was not negligent in not delivering the message, as it was not charged with the duty of sending out messengers to watch for his arrival.

Error to the Circuit Court of the United States for the Northern Division of the Northern District of Alabama.

R. W. Walker, for plaintiff in error.

Milton Humes, for defendant in error.

Before PARDEE and McCORMICK, Circuit Judges, and NEWMAN, District Judge.

NEWMAN, District Judge. Suit was brought by the plaintiff in error in a state court in Alabama against the Western Union Telegraph Company to recover damages for the death of her husband, Robert C. Ross, which she alleged was caused by the negligence of the agent of the defendant corporation in failing to deliver a telegram to Robert C. Ross. It seems that Ross had incurred the enmity of four brothers named Skelton, and that to avoid them he left Scottsboro, Ala., early in the morning of February 4, 1894, to go to Stevenson, Ala. Before leaving he requested a relative, E. H. Ross, to inform him by telegraph at Stevenson of anything important for him to know. Between 10:17 and 10:20 o'clock that morning E. H. Ross went to the telegraph office at Scottsboro, and sent the following message, paying 25 cents for the transmission of the same:

"To R. C. Ross, Stevenson, Ala.: Four men on horseback with guns following. Look out.

"[Signed]

E. H. Ross."

While E. H. Ross was writing this telegram, or just after he had written it, Judge John B. Tally came into the office, and wrote a telegram. The message sent by Tally was as follows:

"To Wm. Huddleston, Stevenson, Ala.: Don't let party warned get away. Say nothing.

"[Signed]

John B. Tally."

When Tally handed his message to Whitner, the operator at Scottsboro, he remarked to him, "Here is one that bears on that one." The two messages seem to have been sent at the same time, or as near the same time as they could be transmitted,—Ross' message at 10:25 and Tally's message at 10:28. When Huddleston, the operator at Stevenson, received the message, he wired back to Whitner to know what the message to him (Huddleston) meant, and Whitner replied that he did not know. It appears from the testimony in the case that Huddleston was mayor of the town of Stevenson, Ala., as well as telegraph operator, and he seems to have been uncertain as to what the trouble was that caused the sending of the two telegrams. He appears to have been under the impression that he was expected to have Ross arrested, and he took steps to that end by sending for the town marshal. When he returned to the telegraph office, having gone out, as he says, for the purpose of communicating with the officer, Ross drove up to the depot, where the telegraph office was, in a hack, and stepped out. There is some doubt in the evidence as to the exact time that Ross stepped out of the hack, but almost immediately thereafter the four Skeltons, who had been pursuing Ross on horseback, and had dismounted, and left their horses about a half mile behind, opened fire on Ross from different directions, with guns and pistols, and killed him. A number of shots were fired. The claim of Mrs. Ross, as administratrix, is that, if the agents of the telegraph company had used greater diligence in delivering the telegram from E. H. Ross to Robert C. Ross, he would have had time to escape, and his death would have been averted. The case was tried twice in the circuit court. On the first trial the court submitted the matter to the jury, which returned a verdict in favor of the plaintiff, and this the court subsequently set aside. On the second trial the court gave the jury peremptory instructions to return a verdict for the defendant. This last action of the court is the error assigned here.

By the statutes of Alabama (Code Ala. 1886, § 2589) "a personal representative may maintain an action, and recover such damages as the jury may assess, for the wrongful act, omission, or negligence of any person or persons, or corporation, his or their servants or agents, whereby the death of his testator or intestate was caused, if the testator or intestate could have maintained an action for such wrongful act, omission, or negligence, if it had not caused death." Suit is brought under this statute. Is there any legal liability, under the circumstances named, on the part of the telegraph company, for Ross' death? Assuming that there was negligence on the part of the company in the matter of the nondelivery of the message, was that the cause of the death of Ross in such way as to give his legal representative a cause of action? If another and independent force intervened to bring about the death of Ross, it will be the responsible cause, even conceding the failure of the telegraph company to deliver him the message from E. H. Ross in time for it to serve as a warning. The new and independent force would be, in law, the proximate cause; and, if the company's neglect could be said to be a cause at all, it would be remote and ineffective. This is not the case of one cause setting another cause in motion, and thereby the original cause, by an unbrok-

en sequence, producing a result; but it is the situation recognized in all the authorities, where an entirely new and independent cause intervenes to bring about a result. Continuing to assume the strongest case against the company, what it did would not itself have killed Ross, nor would anything it set in motion. The company did not start the Skeltons in pursuit of Ross. The Skeltons, for reasons of their own, were acting on entirely independent lines, without any kind of connection with the telegraph company. Much authority might be cited on this line, but so unusual are the facts of this case that it must be controlled by recognized principles, rather than by any direct authority on anything like similar facts. The closest case to the one now under consideration to which we have been cited is the case of *Reid v. Railroad Co.* (Ind. App.) 35 N. E. 703. The following extract from that case will show its similarity to this on the facts, and the view taken of the question by the court:

"A passenger train may be late, according to its schedule time, in starting from a given station. The delay may be attributable to the negligence of the company's servants. By reason of the delay in starting, a passenger on the train is injured by the accidental discharge of a gun in the hands of a bystander. This injury would not have occurred but for the lateness of the train in starting. The delay in starting the train was negligence, but can it be said that the railroad company must, under the circumstances, answer in damages for the injury? If the company is not liable in the case supposed, it must be for the reason that the negligent delay in starting the train was not the proximate cause of the injury. It is not enough that such injury be one of the numerous links in the chain of consequences that may flow from the wrongful act. The result must be a natural one, and one that might have been reasonably anticipated. In the supposed case there is not only an intervening agency, proximate in point of time, but it is such an agency as was sufficient to break the causal connection between the original act of misfeasance and the injury."

But the facts do not show a case against the telegraph company, even if the law were different. In the first place, considering the message from Judge Tally to Huddleston in connection with the Ross message, we think that Huddleston was justified in assuming that the men following Ross were pursuing him for the purpose of arrest, and that he (Huddleston) was expected to aid in holding him (Ross) in Stevenson until the arresting party should overtake him. He was the mayor of Stevenson, and Tally was a judge at Scottsboro,—both peace officers. Therefore a slight delay on the part of Huddleston would seem to be justified as a reasonable precaution under all the circumstances. Besides this, it was only the briefest time between the very earliest moment at which the Ross telegram could have been delivered to Ross, and the shooting. There is evidence to show that the telegrams were being placed in the envelopes and directed at the time the firing commenced. But, even if the company is held to so stringent a rule as that contended for by the plaintiff in error, and Huddleston should have rushed out to meet Ross without waiting to have the telegrams placed in envelopes and directed in the usual manner, the delay then was hardly sufficient to amount to actionable negligence. But, if Ross had received the telegram, would it have prevented his death? It appears from all the facts in the case that the Skelton brothers were close on his track, and, even if Huddleston had

exercised the most extraordinary diligence, and had gone to meet him with the telegram, it is barely possible, but hardly probable, that Ross would have escaped his pursuers. We have discussed these questions in deference to counsel, who earnestly pressed them orally and by brief, but it is not necessary to rest our decision thereon, for under the undisputed facts in the case the telegraph company was not guilty of negligence in not delivering the message of warning in question. Robert C. Ross, the person to whom the message was addressed, was not a resident of the town of Stevenson, nor was he in fact in the town of Stevenson at the time the message was received at the Stevenson office. As the message was directed to no particular street or locality within the delivery limits of the town, it was the duty of the telegraph company to deliver a written copy to Ross promptly on his calling at the telegraph office, and, failing Ross' early call at the office, to deliver such written copy to him by messenger within a reasonable time after the agents of the company should be informed that Ross was to be found at some locality in the town of Stevenson. Ross arrived in the town of Stevenson soon after the message reached the Stevenson office, and was evidently proceeding directly to that office when he was waylaid, shot, and killed without there intervening sufficient time in which the telegraph company could have delivered a copy of the message to him, even if the company was charged with notice of his arrival in town as soon as he came in sight of the telegraph office. Conceding that the message sufficiently notified the company of the importance of speedy delivery, still the company was not charged with the duty of sending out messengers with copies of the message to watch for the arrival of Ross; and, unless charged with such duty, it is clear it was guilty of no negligence. On this ground alone the trial judge was warranted in directing a verdict for the telegraph company, and on this ground the judgment of the circuit court must be affirmed.

LOUISVILLE & N. R. CO. v. JOHNSON.

(Circuit Court of Appeals, Seventh Circuit. July 1, 1897.)

No. 366.

1. MASTER AND SERVANT—UNSAFE PREMISES—INSTRUCTIONS.

In an action by a railway brakeman for injuries suffered in uncoupling cars through an alleged defect in the track, an instruction that defendant "undertook to furnish plaintiff a reasonably safe place to work" is erroneous; defendant's true obligation being to exercise ordinary and reasonable care, having regard to the hazards of the service, to furnish a reasonably safe place to work and to keep it in reasonably safe repair.

2. TRIAL—CORRECTING ERRONEOUS INSTRUCTIONS.

When it is proposed by a further instruction to correct an erroneous charge, the purpose should be stated, and the explanation made so clear as to leave no room for reasonable mistake.

3. NEGLIGENCE—PROXIMATE CAUSE—QUESTION FOR JURY.

When negligence, if established as alleged or asserted, clearly contributed to the injury, it should not be left to the jury to say whether that negligence was the proximate cause of the injury.

In Error to the Circuit Court of the United States for the Southern District of Illinois.

J. M. Hamill, for plaintiff in error.

Ross Graham and G. V. Menzies, for defendant in error.

Before WOODS, JENKINS, and SHOWALTER, Circuit Judges.

WOODS, Circuit Judge. The appellee, Frank Johnson, recovered judgment against the appellant, the Louisville & Nashville Railroad Company, for an injury to his left foot, suffered while uncoupling cars in a moving freight train at the crossing of the railroad track and Third street, in Carmi, Ill. The crossing was made of boards laid lengthwise between the rails of the track, and appellee's foot was caught in the space or crevice between one of the rails and the adjacent board, and was held there until run upon by the wheels of the forward truck of the car behind him, which was moving slowly, and came to a stop, it was testified, "within eight feet." The negligence charged against the appellant consisted in the undue width of the crevice in which the foot was caught. On the other hand, it was contended that the railroad company was free from fault, and that the appellee was guilty of negligence contributory to the injury, because, in violation of a known rule of the company, he placed his foot between the rails when the cars to be uncoupled were in motion. The evidence shows, and it seems to be agreed, that a space of 2½ inches between the rails of a track and adjacent boards of a street crossing is necessary to give room for the flanges of passing car wheels, and the evidence tends to show that by reason of wear or other cause, perhaps defective construction, the width of the place where the appellee's foot was caught was 3 or 3½ inches. Error is assigned upon the admission of evidence, and upon the giving and refusing of instructions.

In respect to the duty of the railroad company the court erroneously instructed that the company "undertook to furnish the plaintiff a reasonably safe place to work," and to maintain the same. The instruction in full appears in the margin.¹ The rule is well settled, and as early as 1894, in *Railroad Co. v. Meyers*, 24 U. S. App. 295, 11 C. C. A. 439, and 63 Fed. 793, had been declared by this court, that "the master's duty requires him to exercise ordinary and reasonable care, having regard to the hazards of the service, to furnish his servants with reasonably safe appliances, machinery, tools, and working places, and also to exercise ordinary and reasonable care at all times to keep them in a reasonably safe condition of repair." See, also, same case

¹ "By this contract or arrangement, however, the railroad company, on the other side, undertook to furnish the plaintiff a reasonably safe place to work where he could carry on the business for which he was employed, braking, with reasonable safety. The company did not become an insurer that the plaintiff would not be injured at any of the places where he was called upon to work, but it did say to him in effect, and that was its undertaking, that a reasonably safe place would be furnished to do his work. But if, while exercising reasonable care, his injury was brought about by the failure of the company to provide a reasonably safe place for him to do his work, the company is liable. That is the very crucial question for you to decide in this case."

on second appeal, 46 U. S. App. 226, 22 C. C. A. 268, and 76 Fed. 443. In this case the question whether the railroad company was chargeable with negligence was, to say the least, close, depending upon the inquiry whether the space between the rail and board had become, or perhaps was by construction, of such unnecessary width, as not to be reasonably safe, and whether the fact was so manifest and so long continued that in the exercise of due care the company ought to have discovered the defect in time to remove it. The error is emphasized by the terms in which the instruction concludes: "If, while exercising reasonable care, his injury was brought about by the failure of the company to provide a reasonably safe place for him to do his work, the company is liable. That is the very crucial question for you to decide in this case." It was, therefore, the more important that an accurate definition and explanation of the company's duty should have been given to the jury. The error was not corrected by other portions of the charge, which, though implying the true rule, were not sufficient to prevent misunderstanding on the part of the jury. For instance, the jury were told that if they found that the defendant failed or neglected to keep its track at the place of the injury in a reasonably safe condition, and such condition was known to the defendant, or by the exercise of reasonable diligence could have been known to the defendant, etc., they should find the defendant guilty. In so far as this indicates that the defendant was bound only to ordinary diligence to discover defects caused by use it is perhaps sufficiently accurate; but the repeated and erroneous statement of the primary duty—to provide a safe working place—was left unmodified and unexplained. When it is proposed by a further instruction to correct an erroneous charge, the purpose should be stated, and the explanation made so clear as to leave no room for reasonable mistake.

Another trial being necessary, we assume that other questions, in so far as they are doubtful, will, to the extent practicable, be eliminated, and therefore do not deem it necessary to consider them now, further than to observe that the question of proximate cause does not seem to arise in the case, and should not have been left to the jury. The two questions in the case are simple. They are of negligence on the part of the railroad company and of contributory negligence on the part of the appellee. If the railroad company was negligent, it was because of its responsibility for the hole or crevice in which appellee's foot was caught. The hole caused the injury, and, if it was dangerously large because of the company's negligence, the company's liability is clear, unless avoided by the contributory negligence of the appellee. The appellee's negligence, if he was negligent at all, consisted in stepping across the rail. If he had kept his foot outside the rail, as warned to do by the rule of the company, it would not have been caught. If, therefore, he was guilty of negligence in stepping between the rails, that negligence, it is beyond dispute, contributed directly to the injury, and he is entitled to no relief against the company. Whether either party was guilty of negligence in the particular stated was a question for the jury upon all the pertinent evidence, and so the case should have been explained and submitted. When negligence, if established as alleged or asserted, clearly contributed

directly to the injury, it should not be left to the jury to say whether that negligence was a proximate cause of the injury.

The judgment below is reversed, and the cause remanded, with instruction to grant a new trial.

RANDLE v. BARNARD et al.

(Circuit Court of Appeals, Seventh Circuit. July 1, 1897.)

No. 317.

1. PARTNERSHIP—PARTICIPATION IN PROFITS OF LEASED PREMISES—LIABILITY FOR RENT.

An agreement by a party who loans money to, and becomes surety for, a lessee, stipulating for a share of the profits of the leased property, does not make him liable for unpaid rent, as a partner, though the contract provides that no subletting or assignment shall be made without his consent.

2. REVIEW ON ERROR—TRIAL TO COURT.

Where there is a special finding of facts, the appellate court will only consider whether, upon such facts, the judgment was correctly rendered.

In Error to the Circuit Court of the United States for the Southern District of Illinois.

Alex. W. Hope, for plaintiff in error.

Geo. W. Taussig, for defendant in error.

Before WOODS, JENKINS, and SHOWALTER, Circuit Judges.

WOODS, Circuit Judge. The question presented in this case is whether the appellee George D. Barnard is liable in assumpsit to the appellant, Charles H. Randle, for rent stipulated in a lease made by the appellant to A. C. Ricksecker, it being alleged that Barnard and Ricksecker were partners in the transaction. Trial by jury was waived, and upon a special finding of facts judgment was given for the defendant. The substance of the finding is as follows: In 1892, Randle was erecting a hotel on Fortieth street, a short distance west of Cottage Grove avenue, in Chicago, and for \$100 gave an option for a lease to Ricksecker, who at the time stated that Barnard, a resident of St. Louis, Mo., was interested in the transaction. Later, on the 29th day of October, 1892, at Barnard's office in St. Louis, Randle and Ricksecker entered into a written agreement for a lease, to the effect that Randle should complete the hotel by May 1, 1893, and thereupon lease the same to Ricksecker for a term of 183 days from that date, for a stipulated rent, which Ricksecker agreed to pay in monthly installments in advance. At the same time Ricksecker and Barnard executed to Randle a penal bond in the sum of \$5,000, conditioned that Ricksecker should well and truly perform every provision of the agreement and in all things perform and carry out each and all of his undertakings contained therein, a copy of which agreement was attached to the bond, and likewise Randle executed a bond with security to Ricksecker, conditioned that he would faithfully perform the covenants and conditions of the agreement on his part. At the same

time and place Ricksecker and Barnard executed a contract of the tenor following:

"I, A. C. Ricksecker, for and in consideration of Geo. D. Barnard signing a five thousand dollar bond in favor of C. H. Randle, and the advancing of five hundred dollars in money as called for by me, do hereby agree to pay to Geo. D. Barnard, of St. Louis, Missouri, the \$500 advanced by him to me, and twenty-five per cent. of all the net profits arising from the leasing of a certain property to be erected on Fortieth street, about three hundred feet west of Cottage Grove avenue, in the city of Chicago, Cook county, and state of Illinois, to be erected by Mr. C. H. Randle, and under contract of lease to the said A. C. Ricksecker, which contract of lease is hereby referred to and made part of this contract. The said A. C. Ricksecker further agrees to pay to the said Geo. D. Barnard fifteen per cent. of the net profits on all other deals to be made by the said A. C. Ricksecker, in the city of Chicago, and which he is enabled to make because of the signing of the aforesaid \$5,000 bond and advancement of the \$500 in money. The said A. C. Ricksecker hereby agrees to submit all trades or deals made by him to the said Geo. D. Barnard for his approval."

The sum stipulated in that writing to be advanced by Barnard to Ricksecker was advanced. On April 25, 1893, Ricksecker went into possession of the building mentioned in the agreement for a lease, and remained in possession until November 1, 1893. On May 11, 1893, a lease was executed by Randle to Ricksecker, in pursuance of the agreement. A copy of the lease is set out in the finding, but its provisions do not affect the present question. Liability upon the bond executed by Barnard and Ricksecker is not asserted.

We agree with the circuit court that, upon the facts set forth in the finding, Barnard did not become the partner of Ricksecker in the lease of the hotel, and was not on that theory liable for the unpaid rent. The authorities on the subject are numerous, but it is enough to refer to *Meehan v. Valentine*, 145 U. S. 611, 12 Sup. Ct. 972, for a statement of the principles upon which, ordinarily, the question whether a partnership existed should be determined. An agreement that the lessor of a hotel shall receive a certain portion of the profits thereof by way of rent, it has been held, does not make him a partner with the lessee (*Perrine v. Hankinson*, 11 N. J. Law, 181; *Holmes v. Railroad Corp.*, 5 Gray, 58; *Beecher v. Bush*, 45 Mich. 188, 7 N. W. 785); and the result, it is clear, would not be different in such a case if the lessee were forbidden to sublet or assign without the consent of the lessor. On the same principle, one who loans money and becomes surety for a lessee, and stipulates for a return of the money loaned, and for a share of the profits to be made out of the leased property, does not thereby become a partner, unless he allows himself to be so represented or held out to the world. Such is the case before us.

It is not found that Barnard and Ricksecker intended a partnership in the lease of the hotel, nor that Barnard permitted himself to be represented, or was in fact represented, to be a partner. He acquired no right to control the management, or to interfere, by advice or otherwise, in the conduct of the hotel; and if, under the last clause of the contract between him and Ricksecker, it was intended that there should not be a subletting, or an assignment of the lease, without his consent, that was not such control as made him a partner. Much of the brief for the appellant is given to an effort to demonstrate

by the evidence that a partnership was in fact intended, but it is well settled that in a case at law tried by the court, and in which there is a special finding of the facts, this court can consider only whether, upon the facts found, the judgment rendered is right. *Jenks' Adm'r v. Stapp*, 9 U. S. App. 34, 3 C. C. A. 244, and 52 Fed. 641; *Skinner v. Franklin Co.*, 9 U. S. 676, 6 C. C. A. 118, and 56 Fed. 783; *Marston v. U. S.*, 34 U. S. App. 461, 18 C. C. A. 216, and 71 Fed. 496; *Phipps v. Harding*, 34 U. S. App. 148, 17 C. C. A. 203, and 70 Fed. 468; *Daube v. Iron Co.*, 46 U. S. App. 591, 23 C. C. A. 420, and 77 Fed. 713. The judgment of the circuit court is affirmed.

SHOWALTER, Circuit Judge (concurring). Randle sued Barnard and Ricksecker in assumpsit to recover a balance of rent reserved on a certain lease. Ricksecker was not served with process, and did not appear. The lease put in evidence was in the ordinary form, and was under seal. Randle was therein named as lessor, and Ricksecker as lessee. Barnard was not a party to the instrument. In law, the leasehold estate in its entirety was vested in Ricksecker. The court did not find that this leasehold estate, or any part of it, had ever been assigned to Barnard; nor is there any finding from which such assignment can be inferred. The matters put forward as indicating a partnership relation between Ricksecker and Barnard do not go to the extent of showing any alienation of the leasehold estate by the one to the other. Moreover, the lease itself provided in express terms against assignment. There was neither privity of estate nor privity of contract between Randle and Barnard,—nothing whatever on which to predicate, as between these two, the relation of landlord and tenant. I think, therefore, the judgment should be affirmed.

MEADS et al. v. UNITED STATES.

(Circuit Court of Appeals, Sixth Circuit. July 6, 1897.)

No. 475.

1. OFFICIAL BONDS—RECEIPT OF MONEY BEFORE IT IS DUE.

The receiver of a land district is liable on his bond for money received by him from entrymen before it was payable under a rule of the interior department, even giving to such a rule the force of an act of congress, since it is directory only, as it merely regulates the time and mode of payment of money which becomes due by virtue of other and independent law.

2. SAME—EFFECT OF DEPARTMENT REGULATIONS.

While department regulations duly promulgated have the force of law, in a limited sense, they cannot enlarge or restrict the liability of an officer on his bond.

Error to the Circuit Court of the United States for the Western District of Michigan.

Clark & Pearl, for plaintiffs in error.

John Power, U. S. Atty.

Before TAFT and LURTON, Circuit Judges, and CLARK, District Judge.

CLARK, District Judge. This suit was brought in the United States circuit court for the Northern division of the Western district of Michigan against the plaintiff in error Thomas D. Meads and the sureties on his official bond as receiver of public moneys at Marquette, Mich., for the land district of Marquette. Meads was appointed receiver for this land district June 5, 1890, and continued in office until March, 1894; and this suit is for the balance of money received by Meads during that term of office, and not paid out or otherwise legally accounted for. The money in question was received from persons proposing to make pre-emption and homestead entries, and the sum consisted in part of the purchase price of the public land, and in part of the fees of receiver and register, and entry fees. It is not necessary for the purpose of the questions here presented to distinguish between the sums paid as purchase price and those paid as fees. Among the various rules and regulations promulgated by the secretary of the interior and the commissioner of the general land office is rule 53, which reads as follows:

"The local officers will thereafter take no further action affecting the disposal of the land in contest until instructed by the commissioner. In all cases, however, where a contest has been brought against an entry or filing on the public lands, and trial has taken place, the entryman may, if he so desires, in accordance with the provisions of the law under which he claims, and the rules of the department, submit final proof, and complete the same, with the exception of the payment of the purchase money or commissions as the case may be. Said final proof will be retained in the local land office, and should the entry finally be adjudged valid, said final proof, if satisfactory, will be accepted upon the payment of the purchase money or commissions, and final certificate will issue, without any further action upon the part of the entryman, except the furnishing of a nonalienation affidavit by the entryman, or, in case of his death, by his legal representatives. In such case, the party making the proof, at the time of submitting the same, will be required to pay the fees for reducing the testimony to writing. All provisions of the rules of practice, inconsistent with the above changes and modifications are hereby rescinded."

It will be observed that this rule is applicable to the case where contest arose in regard to the superior right in relation to the land of a particular entry, and was intended apparently to direct the procedure by the local officers pending such contest, and until its final settlement in the usual and proper way. The argument is that this particular regulation requires just what the previous regulations and their interpretation by the commissioner and the secretary required, and no more, and nothing different. It further appears that, with three or four unimportant exceptions, a contest arose in regard to the proposed entries on which the purchase price and fees were paid to the receiver, which constitute the items of the account now sued on. It is agreed that the sums were paid to the receiver, and the only defense made to the suit is that these payments, under rule 53, were made to the receiver in advance of the time when by that rule they could properly be made, and that the sums were not therefore paid to the receiver in the line of his duty and officially, but were paid to him in violation of rule 53, and that he received them as an individual, and as an agent of the party proposing to make pre-emption or homestead entries, and not as the agent or officer of the government, and that

the money is not therefore, in his hands, public money, for which the sureties on his bond are liable to account, according to the terms of the bond. Omitting the names of the sureties, the entire body of the bond is as follows:

"The condition of the foregoing obligation is such that whereas, the president of the United States has appointed the said Thomas D. Meads to be receiver of public moneys at Marquette, Michigan, by commission dated June 5, 1890, and said Thomas D. Meads has accepted said appointment: now, therefore, if the said Thomas D. Meads shall at all times during his holding and remaining in said office carefully discharge the duties thereof, and faithfully disburse all public moneys, and honestly account, without fraud or delay, for the same, and for all public funds and property which shall or may come into his hands, then the above obligation to be void and of no effect; otherwise to remain in full force and virtue."

The amount sued for was \$2,863.56, and the court below directed a verdict in favor of the government, upon which judgment was pronounced, and the case is brought here on writ of error.

Just what is the true intention and effect of the various rules promulgated by the land department upon this subject, as construed by the decisions of that department, has been the subject of much discussion at the bar; but, in the view we take of the case, we are relieved from the task of examining the regulations and decisions in detail with a view to reconcile the apparent conflict in such rules and decisions. As suggested, the contention of the plaintiff in error is that rule 53 determines the right and duty of the receiver, and thereby affects the obligation of the sureties on the official bond, and that the money was not due and payable to the receiver at the time when received, and the sureties are therefore released. This contention presents the question of the true nature and effect of a regulation such as rule 53 on the obligation of the bond, but we merely mention the question now, and will return to it in the further progress of the opinion.

It will be observed that the plaintiff in error assumes that this regulation has all the force and effect of a positive enactment of congress, and it is obvious that the importance thus claimed for the regulation is necessary, in order that the plaintiff in error may make any headway with his contention. Treating rule 53, then, as having all of the effect which the contention thus assumes, we are unable to agree that it follows as a result that the sureties are released from liability on the bond for these sums of money. The bond is executed pursuant to section 2236 of the Revised Statutes. The general provisions as to the time when payments may be made by homestead and pre-emption claimants will be found in sections 2267 and 2301 of the Revised Statutes. It is not suggested in the pleadings or in argument by the plaintiffs in error that the payments were prematurely made to the receiver, except by reason of the limitation contained in rule 53. The general enactments of congress upon the subject expressly provide that such payments shall be made by persons proposing to acquire rights in the public lands, and the manner of disbursing and otherwise accounting for public money so received is provided by general law. The entryman or homesteader, as the case may be, does not make payment of the purchase price or fees required under the au-

thority of rule 53, but under the statutes enacted by congress by which such sums are made due; nor does the receiver pay out or account for such money by authority of any rule or regulation of the department, but by authority of the laws enacted by congress. The assumption that this money becomes due and payable to the receiver by authority of rule 53 is the basis of the defendant's contention, and constitutes a manifest vice in the reasoning and conclusion by which it is sought to make good the defense in this case. Independently of the general law enacted by congress upon the subject, rule 53 would confer no rights and impose no obligations whatever on the receiver or the sureties on his bond. Rule 53 is obviously a regulation which affects only the time and mode of payment, and does not touch the right to make such payment, the obligation to receive it, and to disburse it. These rights and obligations are all fixed by general law. It is to be remembered that the obligors on an official bond of this character should be held to a strict accountability, as was said by the supreme court of the United States in the early case of *U. S. v. Prescott*, 3 How. 588, and by the supreme court of Tennessee in the well-considered case of *McLean v. Tennessee*, 8 Heisk. 24. It has often been decided that the laws enacted by congress and in force at the time of the execution of a bond of this character enter into and determine the obligation of the bond, as much as if incorporated by express reference to such law. Treated as equivalent to an act of congress on which the sureties might rely, still rule 53, as before stated, properly construed, could have no such effect as that claimed for it, but merely regulates the time and mode of payment of money which becomes due by virtue of other and independent law, and is in its nature directory only, and would not release the sureties. It is in this respect not different in character from a statutory requirement that officials intrusted with the collection of public revenue shall make quarterly or other fixed settlements, and promptly pay any balance found due upon such settlement. Such requirement being by positive statute, it might be made and has been a contention by the surety that he might rely on a proper enforcement of such statutory regulation, and that failure to require a settlement pursuant to such statute would have the effect to discharge the surety from liability for defaults occurring previously to the time fixed for such stated settlements. In *Crawn v. Com.*, 84 Va. 282, 4 S. E. 721, the supreme court of Virginia said:

"In the case of *Com. v. Holmes*, 25 Grat. 771, this court held, upon abundant authority, that the regulations prescribed by law for the settlement of such accounts at stated periods, being intended for the benefit of the government, to secure punctuality and promptness in its officers, were directory merely, and did not enter into and form part of the sureties' contract, so as to prevent the legislature from altering or extending the times of settlement at pleasure without the sureties' assent; and therefore, and from the nature of the officers' obligation and duties, and of the condition of the bond, such an extension did not operate as a discharge of the surety. We reaffirm that principle, and are of opinion that the sureties in this case are not discharged from liability for the official acts of their principal by reason of the extension of time for settlement granted to him."

And so in *U. S. v. Kirkpatrick*, 9 Wheat. 735, Mr. Justice Story, delivering the judgment of the court, said:

"It is said that the laws require that settlements should be made at short and stated periods, and that the sureties have a right to look to this as their security. But these provisions of the law are created by the government for its own security and protection, and to regulate the conduct of its officers. They are merely directory to such officers, and constitute no part of the contract with the surety. The surety may place confidence in the agents of the government, and rely on their fidelity in office; but he has of this the same means of judgment as the government itself, and the latter does not undertake to guaranty such fidelity. No case has been cited at the bar in support of the doctrine, except that of *People v. Jansen*, 7 Johns. 332. In respect to that case, it may be observed that it is distinguishable from the present in some of its leading circumstances. But, if it were not, we are not prepared to yield to its authority. It is encountered by other authorities which have been cited at the bar; and the total silence in the English books, in a case of so frequent occurrence, affords strong reason to believe that it never has been supposed that laches would be fatal in the case of the government where it would not affect private persons. Without going more at large into this question, we are of opinion that the mere laches of the public officers constitutes no ground of discharge in the present case."

See, also, *U. S. v. Van Zandt*, 11 Wheat. 184; *U. S. v. Nicholl*, 12 Wheat. 505; *U. S. v. Boyd*, 15 Pet. 187.

These cases proceed upon the distinction between statutes which merely regulate in detail the mode and time of payment and those which determine the right to receive and the duty to pay. The one class of statutory provisions create the duty to pay, with the right to receive, and the duty to disburse; and such provisions are mandatory and essential, and determine the right and obligation, while provisions of the other class are directory, and affect merely the mode of exercising the right and discharging the duty. It was decided in *Dollar Sav. Bank v. U. S.*, 19 Wall. 227, that the provision of law as to the proper mode of assessment and collection of taxes did not affect the right to demand and the duty to pay the taxes imposed by general law, and that an ordinary action of debt would lie to collect such taxes without any assessment whatever. So in *King v. U. S.*, 99 U. S. 229, the collector had received from the treasurer of the Toledo, Wabash & Western Railway Company the sum of \$24,923.87, as a tax on interest paid on mortgage bonds of the company. No return had been made to the assessor, sworn to as required by law, and the defense was that this sum was paid to the collector, not upon any return made to the assessor, or any assessment made by him or the commissioner of internal revenue for such taxes, and that it was a voluntary deposit of the money in the hands of the collector at Toledo by the company, and not received by the collector in his official character; that it was not his duty to receive it for the government, under these circumstances; and that his act in receiving the same was unofficial. The point was that Chase, the collector, had no legal authority, as collector of internal revenue, to receive the money. In regard to this defense the court said:

"There can be no question that Chase understood himself as receiving the money for the government, and in payment of the taxes due. Nor is there any question that the treasurer of the railroad company intended it as pay-

ment to Chase in his official character as collector, and supposed he had paid the taxes by so doing; for Chase gave him three separate receipts, in which the taxes for each of the years we have mentioned are set out, and also the months of the year in which they accrued, which he signed officially as collector, and declared in each receipt that it was in full of the account." "The answer," said the court, "made to this by counsel, is that the debt was not due, or at least not payable, until the assessor had received and acted on the return made by the corporation. There is nothing in the statute which says this, in terms. If it be sound, it must be an implication, and we do not see how such an implication can arise. That such an assessment was not made long before was owing to the neglect of the company to make proper returns. Did that neglect make the taxes which should have been paid a year before any less a debt from that time? And can it be said they were not due at the time the statute says they should be paid, because the company failed to make the report which it was its duty to make?" If there could be any doubt upon this point, it was set at rest by the decision of this court in *Dollar Sav. Bank v. U. S.*, 19 Wall. 227, where the same objection was taken to a suit to recover this tax. The court held explicitly that the obligation to pay the tax did not depend on an assessment made by any officer whatever, but that, the facts being established on which the tax rested, the law made the assessment, and an action of debt could be maintained to recover it, though no officer had made an assessment. So that, both on principle and authority, we are of opinion that the judgment for the sum received by the collector and not paid over, with interest, is right, and must be affirmed. See, also, *U. S. v. Ferrary*, 93 U. S. 625."

So in *Miller v. Moore*, 3 Humph. 189, it was held, on motion against the sheriff, as tax collector, for unpaid taxes, not necessary for the plaintiff to show that the justices had returned proper tax lists as required by law, and that the taxes had been properly assessed as required. The court ruled that it was enough that authority was placed in the sheriff's hands to collect, and that he did in fact collect, the taxes. So in *McLean v. Tennessee*, 8 Heisk. 22, it was decided upon full consideration that certain sections of the Code of Tennessee which prohibited any officer from receiving or filing a bond not approved in the particular mode pointed out by the statute did not affect the obligation of the sureties on a bond accepted in violation of the statute, and under which the official in fact acted. It was said that these and similar provisions were for the further security of the public, and did not release the sureties, and in the same case it was held that a void levy of taxes which the taxpayers might have resisted was no defense against judgment on the bond for the taxes in fact paid by the people. The opinion proceeded upon the ground that taxes were justly due, and the obligation to pay at a proper time and in proper mode existed, and the fact that these taxes were received by the official without valid levy constituted no defense. So it was held that the failure of the county clerk to keep a revenue docket as required by law did not affect the right of the county to proceed by motion for judgment on the bond. And in *Fuller v. Calkins*, 22 Iowa, 301, in a suit against the deputy tax collector of internal revenue, the defense was that the money received was for taxes on incomes not levied, and not due until after the payment of the same to the deputy. This defense was overruled, and it was adjudged that although paid by the taxpayers before due, or before formally levied, yet, being received by the deputy collector as taxes, it came into his hands by virtue of his office, and he

was bound to pay over the same as collector. The court, in disposing of this case, said:

"The substance of the whole matter, however, is that, though the collector may not have been legally bound to receive this money at the time, yet he did receive it, and, as we are bound to presume, executed the usual and proper receipts, and entered the proper memorandum on the tax list at the time, or so soon as the same was placed in his hands. By so doing he was in no just sense the mere custodian or trustee of the taxpayers, holding the funds for their use, and alone liable to them, or individually to the government, for the faithful application of the funds. This was public money, funds in his hands by virtue of his office, revenue which he was bound to account for and pay over, and by the very terms of the bond the sureties were liable therefor. As was said in *Warren Co. v. Ward*, 21 Iowa, 84, the officer was perhaps not bound to take the money, but he did, accepting it as collector, and he is therefore bound for it as money received by virtue of his office."

A tax collector and his sureties are liable for penalties collected, and no question as to the legality of collecting the penalties can be made either by the collector or his sureties. *Wilson v. State*, 1 Lea, 317. It has been repeatedly held that a collector and his sureties on his official bond are liable for taxes collected on a void assessment, and so it is no defense to the collector and his sureties that the law imposing the particular tax collected is unconstitutional. So held in regard to the dog tax, the statute imposing which was afterwards declared unconstitutional. *Chandler v. State*, Id. 296.

Upon the question how far the acts of an officer are to be regarded as official, and to which the liability of the surety on his official bond extends, the ruling in the foregoing cases is strongly supported by analogy in decisions in respect of the liability of officers in the execution of court process. In *Lammon v. Feusier*, 111 U. S. 17, 4 Sup. Ct. 286, the marshal, having in his hand a writ of attachment on mesne process against property of Feusier, levied upon the goods of plaintiff in the action, who was a stranger to, and not named in, the process of attachment. The defense was that, as the writ commanded seizure of the property of the person named, the sheriff, in taking the property of a stranger, was not acting in the line of duty, and the sureties were not liable. The court, however, said that taking property of a person not named in the writ, or property exempt from attachment, was a breach of official duty, equally with the neglect to take attachable property of the person actually named. There has, it is true, been much difference of opinion in the courts of the several states upon this question, but, as pointed out in *Lammon v. Feusier*, the great preponderance of authority is in favor of the proposition that such act is official, and renders the sureties liable. In that case the supreme court of the United States expressly approved *State v. Jennings*, 4 Ohio St. 423, and *City of Lowell v. Parker*, 10 Metc. (Mass.) 309. In *State v. Jennings* the court said:

"The reason for this is that the trespass is not the act of a mere individual, but is perpetrated colore officii. If an officer, under color of a *fi. fa.*, seizes property of the debtor that is exempt from execution, no one, I imagine, would deny that he had thereby broken the condition of his bond."

And the court further said:

"True, it may sometimes be more difficult to ascertain the ownership of the goods than to know whether a particular piece of property is exempt from

execution; but this is not always the case, and, if it were, it would not justify us in restricting to litigants the indemnity afforded by the official bond, thus leaving the rest of the community with no other indemnity against official misconduct than the responsibility of the officer might furnish."

In *City of Lowell v. Parker*, a constable, being authorized by statute to serve only writs of attachment in which the damages were laid at no more than \$70, took property upon a writ in which the damages were laid at a much greater sum. The argument was that the constable had no more authority to make the seizure than if he had acted without any writ whatever, but the court overruled this objection, and said:

"He was an officer, had authority to attach goods on mesne process on a suitable writ, professed to have such process, and thereupon took the plaintiff's goods; that is, the goods of Bean, for whose use and benefit this action is brought, and who therefore may be called the plaintiff. He therefore took the goods *colore officii*, and, though he had no sufficient warrant for taking them, yet he is responsible to third persons, because such taking was a breach of his official duty."

Rule 53, then, regarded as having the effect of a duly-enacted law, would be merely directory as to the time when the official should or should not receive payments of a sum which was being paid, and which he was receiving by virtue of law independently of rule 53; and the rule would not, under any just interpretation, affect the surety's liability on the bond.

Judge Severens, who presided at the trial, stated his view of the question as follows:

"Payment of the price by the entry man is part of the transaction whereby he is to acquire title to the land. Rules prescribed by the department to the local land offices are for convenience in the transaction of business. Such is a rule requiring payment before action on proofs by those officers,—a rule designed to prevent vain proceedings there resulting from a subsequent failure to pay the purchase price. The money may properly be paid at any time while the proceedings for the purpose are in fieri, unless some statute or rule prohibits it, and none such has been shown to me. I have no doubt that if the money were not paid at the time of the application, but, upon notification from the land office that the proofs were held sufficient, it should then be paid, the proceeding would be perfectly valid, and the purchaser would have the right to a title. It is a matter of order only. The receiver is the agent of the government to make the sale. If an intending purchaser of land should, with his proposition to buy, pay the price asked by the owner to the agent of the latter appointed to make the sale, the agent would be accountable to his principal for the money, as between them. If the transaction should fail,—as, for instance, on account of defect in the owner's title,—the principal would be bound to make restitution. The agent would not be liable to the purchaser. It was known that he was acting as agent. He was not selling his own land, nor dealing with a matter of personal concern to himself. There are very cogent reasons for applying this rule of agency to such circumstances as these. My conclusion, therefore, is that, at whatever stage of the proceedings the money is paid by the applicant to the receiver upon his intended purchase, the receiver is bound to render an account thereof to the department. It is not his money. He does not receive it as the agent of the applicant. He has no such dual status. If the money was properly payable at the time of the application, it would make no difference whether the government exacted payment then, or was willing to waive payment until the proceeding should ripen."

With this we fully agree. As was pointed out by the learned circuit judge, the rule of the department does not in terms prohibit pay-

ment at any time, and it is only by implication that such a result is insisted upon.

We may now return to consider for a moment the real character and effect of rule 53 promulgated by an executive department of the general government, and we are very clear that rule 53 was an administrative regulation or order intended to prescribe suitable business methods of doing the work required of officers in the department. In its effect it raises a question of discipline and procedure between the head of the department and the subordinate officers or agents, and, while disobedience of the regulation might furnish sufficient and just ground for discharging an employé, it was not competent by such regulation as this to enlarge or restrict the rights or obligations growing out of the execution of the bond in question as determined by law. The department itself is a mere creature and administrative instrument under laws duly enacted by congress, and would be without power by such regulation to change the liability of the sureties or the rights of the government on a bond like this, executed for the purpose of securing the faithful discharge of trusts imposed by law, and not by this or similar regulations. Official bonds like that here involved are required for the purpose of protecting the public having business relations with the government through officers and agents, and also for the purpose of securing the government against fraud and insolvency on the part of its agents intrusted with collecting and accounting for public revenue; and if it be once conceded that the obligation of such bonds may be changed, and sureties thereby released, by mere department regulations, it is obvious enough that there would be a complete practical failure in the purpose for which such bonds are required and executed, as these department regulations would, in the nature of the case, vary to meet the differing views of heads of departments coming in and going out with changes of administration. In *Quinn v. Chapman*, 111 U. S. 445, 4 Sup. Ct. 508, it appeared that there was a rule in the land office forbidding the filing of a declaratory statement based upon a pre-emption right subsequent to the commencement of a contest between other parties for the same land, but the court held that the existence of such rule was no valid ground for rejecting a claim which was otherwise legally or equitably good under the general laws of congress. So in *Westervelt v. Mohrenstecher*, 22 C. C. A. 93, 76 Fed. 119, the action was upon the bond of the cashier of a national bank. The national bank act expressly provided that the cashier of a national bank should hold his office subject to the pleasure of the board of directors. The bank, by a by-law, provided, however, that the cashier should hold his office for one year, and should be elected annually; and the defense made by the sureties on the bond was that the default did not occur during the year for which they were sureties on the bond of the cashier, and that they were liable on the bond for the term of one year only. This contention was overruled, and it was adjudged that the by-laws were nugatory, being in conflict with the laws of congress on that subject, and that it was not competent by a by-law to modify or change the law of congress; that under the law of congress a cashier was appointed and held office subject to removal by the board of directors, and that the term of his

office continued from the time of his appointment until removal and another appointment in accordance with the acts of congress, and the sureties were liable for the entire term. In 20 Op. Atty. Gen. 24, the liability of disbursing agents for public moneys deposited in bank was considered by Judge Taft, then solicitor general. One Hay had been appointed by the secretary of the interior disbursing agent. He was a member and secretary of the board of town-site trustees of Oklahoma territory. The act of congress had expressly provided that the secretary of the interior should provide regulations for the proper execution of the trust; and among the regulations made by the secretary was one which undertook to define the duties of the disbursing agent, and, among other things, provided that he should "deposit all the sums received by him at least once a week, and, when practicable, daily, in some bank designated by the board," and should "pay the same out only on his checks countersigned by the chairman of the board of which he is secretary, which checks, after they are honored, shall be filed with his account as vouchers." The town-site board designated the Commercial Bank of Norman and the Commercial Bank of Guthrie as banks of deposit for the disbursing agent. Sums of money were on deposit in each at the time of their failure, and the question was whether Hay and his sureties on his official bond were liable for any loss arising from the failure of these banks. Discussing this question, the solicitor general said:

"A preliminary objection is made to his liability for the loss of a part of the sums on the ground that it was collected from assessments made and never in the treasury. It was, however, money properly paid into his hands as a special disbursing agent, and was public money while there, because the United States was responsible for its proper disposition, whatever that might ultimately be. His bond expressly bound him to account for all public moneys coming into his hands. The main question is whether the designation of the banks by the board of trustees as places of deposit relieved Hay from the loss. This must be answered in the negative. Hay was a disbursing officer of the United States, and was forbidden by sections 3639, 3620, Rev. St., to deposit the public money in his possession in any other place than with assistant treasurers of the United States, or in some place designated as a depository by the secretary of the treasury. The regulation of the secretary of the interior provided for the designation by the town-site board of a bank for the deposit of moneys in the hands of their secretary and disbursing agent must be construed in the light of the foregoing sections. The power of designation by the board is limited, therefore, to banks which are lawful depositories of public moneys within the statute. It is not claimed that either the Norman bank or the Guthrie bank was such a depository. The result is that Hay is not exonerated from liability on his bond arising from the failure of these banks."

And the view thus expressed was approved by the attorney general.

In *U. S. v. Symonds*, 120 U. S. 49, 7 Sup. Ct. 412, Mr. Justice Harlan, speaking for the court, said:

"The authority of the secretary to issue orders, regulations, and instructions, with the approval of the president, in reference to matters connected with the naval establishment, is subject to the condition, necessarily implied, that they must be consistent with the statutes which have been enacted by congress in reference to the navy. He may, with the approval of the president, establish regulations in execution of, or supplementary to, but not in conflict with, the statutes defining his powers or conferring rights upon others. The contrary has never been held by this court. What we now say is entirely consistent

with *Gratlot v. U. S.*, 4 How. 80; and *Ex parte Reed*, 100 U. S. 13, upon which the government relies. Referring in the first case to certain army regulations, and in the other to certain navy regulations, which had been approved by congress, the court observed that they had the force of law. See, also, *Smith v. Whitney*, 116 U. S. 181, 6 Sup. Ct. 570. In neither case, however, was it held that such regulations, when in conflict with the acts of congress, could be upheld."

See, also, *U. S. v. Eaton*, 144 U. S. 677, 12 Sup. Ct. 764.

It is very true that these regulations duly promulgated by the department have the force of law, in a limited and just sense, especially when authorized or approved by congress. It is to be borne in mind, however, in considering the effect of such orders, that the power, authority, and purpose of the particular departments are well defined by the legislation of congress, and the department is organized for the purpose of giving practical effect in detail to such legislation, and for that purpose the department is vested with power to make all needful rules and regulations within the limits of the authority and purpose thus manifested by congress. In what was thus said it is implied that the general laws of congress with respect to the rights of the public in dealing with these official agencies, as well as the obligations arising out of the execution of these bonds, and the rights of the government thereunder, cannot be changed by mere department regulation. The recognition of such power and of such effect in a department order would, for reasons just indicated, as well as others, be dangerous to the government. There is no claim or suggestion, and, indeed, could not be, upon the record, that the sureties at any time had any knowledge of rule 53, or that anything was done or omitted to be done by them upon the faith of said rule. There is therefore no equitable feature in the position of the sureties by reason of which they should be favored by any nice or doubtful interpretation. Upon what has thus been said, and without further elaboration, it is sufficient to announce that the judgment of the circuit court was, in our opinion, clearly correct, and the same is affirmed.

SHELP et al. v. UNITED STATES.

(Circuit Court of Appeals, Ninth Circuit. June 7, 1897.)

No. 346.

1. INDICTMENT—NEGATING EXCEPTIONS.

In an indictment for a statutory offense, it is only necessary to negative an exception in the statute when that exception is such as to render the negative of it an essential part of the definition of the offense.

2. SAME—SELLING INTOXICATING LIQUORS IN ALASKA.

In an indictment for selling liquor to Alaska Indians, contrary to the act forbidding the "importation, manufacture, and sale of intoxicating liquors" in Alaska, "except for medicinal, mechanical, and scientific purposes" (23 Stat. 28, § 14), it is not necessary to negative the exception mentioned in the statute.

3. CRIMINAL LAW—ACCUSED'S RIGHT TO LIST OF WITNESSES.

On an indictment for selling intoxicating liquors in Alaska, the accused has the right to have indorsed on the indictment only the names of the witnesses examined before the grand jury; this being the provision of the

Oregon statute made applicable by the act of congress. Rev. St. U. S. § 1033, requiring a list of all the witnesses to be furnished before the trial, applies only to trials for capital crimes.

4. SAME—MISCONDUCT OF COUNSEL—REVIEW ON ERROR.

Improper remarks of the prosecuting attorney in his address to the jury cannot be considered on error, where no objection was made thereto at the trial, and no exception taken.

5. SAME—CREDIBILITY OF WITNESSES—INSTRUCTIONS.

No witness is to be discredited merely because of his race or color; and, where counsel have asserted that comparatively little credit is to be attached to the evidence of ignorant and semibarbarous Indian witnesses, there is no error in the court's saying that both white men and Indians lie, and that the evidence of both is entitled to the same credit, and such credibility is to be determined by the same rules of law, when this is coupled with a correct statement of the jury's right to consider the intelligence, appearance, apparent candor, opportunities of knowledge, etc., of each witness.

6. SAME—MISLEADING INSTRUCTIONS—EXCEPTIONS.

If counsel are of opinion that any part of the charge requires the jury to consider outside matters not proved at the trial, it is their duty to call the attention of the trial court to the specific language complained of, so that a correction or explanation may be made. A general exception to the charge is insufficient to raise the point before an appellate court.

7. SAME—ARRAIGNMENT AND PLEA—FAILURE OF RECORD TO SHOW PLEA.

Until defendant has pleaded to the indictment, there is no issue to be submitted to the jury, and an omission to plead is fatal to the judgment in cases of misdemeanor, as well as infamous crimes.

8. SAME—REVIEW ON ERROR—INFERENCE AS TO ENTERING PLEA.

Where the record fails to show that any plea to the indictment was entered, the mere statement in the bill of exceptions that "the issue joined in the above stated case * * * came on to be tried," and the "jury was impaneled and sworn to try the issues between the said parties," does not authorize the appellate court to infer that a plea was in fact entered, but that the clerk failed to note it in the record.

In Error to the District Court of the United States for the District of Alaska.

This was an indictment against Archie Shelp and George Cleveland for unlawfully selling liquor to Indians in Alaska. The defendants, having been convicted in the trial court, sued out this writ of error.

Lorenzo S. B. Sawyer, for plaintiffs in error.

Burton E. Bennett, U. S. Atty., and Samuel Knight, Asst. U. S. Atty.

Before GILBERT and ROSS, Circuit Judges, and HAWLEY, District Judge.

HAWLEY, District Judge. This appeal is taken from a judgment of the district court of Alaska upon the conviction of the plaintiffs in error (hereafter designated as "defendants") of the crime of unlawfully selling intoxicating liquor. There are several assignments of error urged by counsel as being sufficient to justify a reversal of the judgment.

1. It is claimed by the defendants that the indictment is fatally defective because it does not negative the exceptions contained in the statute. The language of the indictment, in so far as it relates to this objection, is that the defendants "did unlawfully and willfully sell to Alaska Indians * * * an intoxicating liquor called

'whisky,' * * * without having first complied with the law concerning the sale of intoxicating liquors in the district of Alaska."

Section 14 of "An act providing a civil government for Alaska," under the provisions of which the defendants were indicted and convicted, reads as follows:

"That the provisions of chapter three, title twenty-three, of the Revised Statutes of the United States, relating to the unorganized territory of Alaska, shall remain in full force, except as herein specially otherwise provided; and the importation, manufacture, and sale of intoxicating liquors in said district except for medicinal, mechanical and scientific purposes is hereby prohibited, under the penalties which are provided in section nineteen hundred and fifty-five of the Revised Statutes for the wrongful importation of distilled spirits. And the president of the United States shall make such regulations as are necessary to carry out the provisions of this section." 23 Stat. 28; Rev. St. § 1955.

In *U. S. v. Nelson*, 29 Fed. 202, 209, and in the same case on writ of error to the circuit court of Oregon, 30 Fed. 112, 115, a similar indictment, which did not negative the exceptions in the statute, was held to be sufficient.

The exception stated in the statute does not either define or qualify the offense created by the statute. The offense designated in the statute is the sale of intoxicating liquors in Alaska. This can be properly stated without any reference to the exception. There is nothing in the exception that enters into the offense condemned by the statute. The exception is purely a matter of defense, which, if relied upon, could readily have been proven by the defendants. A careful examination of the authorities will show that it is only necessary in an indictment for a statutory offense to negative an exception to the statute when that exception is such as to render the negative of it an essential part of the definition or description of the offense charged. It is the nature of the exception, and not its locality, that determines the question whether it should be stated in the indictment or not. *State v. Ah Chew*, 16 Nev. 50, 54, and authorities there cited; *U. S. v. Cook*, 36 Fed. 896; *U. S. v. Cook*, 17 Wall. 168, 173; *State v. Van Vliet* (Iowa) 61 N. W. 241; *Bell v. State* (Ala.) 15 South. 557. The court did not err in refusing the motion in arrest of judgment.

2. It is contended that the court erred in allowing certain witnesses to testify on behalf of the government whose names were not indorsed upon the indictment, for the reason that no list containing the names of such witnesses was furnished to the defendants or their counsel. The statute of Oregon, the provisions of which are applicable to cases tried in the district court of Alaska, only requires that "the names of the witnesses examined before the grand jury must be inserted at the foot of the indictment or endorsed thereon." Gen. Laws Or. 1843-1872, p. 348, § 61. This statute was fully complied with. The statute of the United States provides that, when a party is indicted for treason, a copy of the indictment and a list of the jury and of the witnesses to be procured at the trial, stating the place of abode of each juror and witness, shall be furnished to such person three days before the trial. In other capital cases the list must be furnished two days before the trial. Rev. St. § 1033. This

statute has no application to this case. There is no statute which requires a list of the witnesses to be furnished to a person indicted for a misdemeanor. If the indictment is not for a capital offense, the defendant is not entitled, as a matter of right, to a list of witnesses or jurors. *U. S. v. Wood*, 3 Wash. C. C. 440, Fed. Cas. No. 16,756; *U. S. v. Williams*, 1 Cranch, C. C. 178, Fed. Cas. No. 16,709; *U. S. v. Van Duzee*, 140 U. S. 169, 173, 11 Sup. Ct. 758, and authorities there cited.

3. It is claimed that there was such misconduct on the part of the United States attorney as to entitle defendants to have the judgment reversed. In his argument to the jury he said:

"That 'the result of the acts with which the defendants were charged was that a murder had been committed, and that the Indian who had committed the murder was in the penitentiary at San Quentin for such crime,' although no evidence whatever had been introduced of any murder having been committed; and further stated to the jury that 'the defendants went to the Indian village of Hoona, and sold whisky there,' although the defendants were not charged in said indictment with selling liquor at Hoona, and although there was no evidence that defendants had stopped at Hoona or sold liquor there."

And, further, he said:

"If these defendants were the good and innocent men that they try to make themselves out, why did they not bring witnesses to testify to their good character? although their character had not been put in issue."

It is a sufficient answer to this claim to state that no objection was made to the remarks of counsel at the trial, and no exception taken thereto. If the statement of counsel was improper, exception thereto ought to have been promptly taken. The question whether the remarks of counsel were improper cannot be considered by this court in a case where the point was not raised or exception taken until after the trial. It is undoubtedly within the power of the trial court, with or without objection, to promptly interfere when counsel attempt to influence the jury by a reference to facts not in evidence, or makes any appeal to prejudice the jury de hors the record, or comments upon the character of the defendant when his character has not been put in issue. But the rule is well settled that improper remarks of counsel not made the subject of an exception will not be considered on appeal. *State v. Regan*, 8 Wash. 506, 511, 36 Pac. 472; *State v. Foster*, 115 Mo. 451, 22 S. W. 468; *State v. Howard*, 118 Mo. 127, 146, 24 S. W. 41; *Hill v. State*, 42 Neb. 505, 528, 60 N. W. 916; *State v. Sorter*, 52 Kan. 531, 34 Pac. 1036; *Com. v. Weber*, 167 Pa. St. 153, 162, 31 Atl. 481; *State v. Hilsabeck* (Mo. Sup.) 34 S. W. 39; *Harvey v. State* (Tex. Cr. App.) 34 S. W. 623, 625; *Campbell v. People*, 109 Ill. 566, 577.

4. It is assigned as error that the evidence was insufficient to justify the verdict of the jury. This point was not urged by any argument, and is utterly devoid of merit. There was positive testimony as to the commission of the crime by defendants, which, if believed by the jury to be true, certainly justified the verdict, as will more fully appear hereafter.

5. The next error assigned is that the court erred in its charge to the jury. In order to fully understand the parts of the charge object-

ed to, it is essential to state briefly the general character of the testimony at the trial.

One Indian witness, on behalf of the government, testified as follows:

"My name is Dennis. I live at Chilkoot. * * * I know these defendants, * * * Their boat was anchored off the shore. The younger man (meaning the defendant Cleveland) waved his hat to me; picked up a keg; then drank out of a tin cup. When I came to their boat, they gave me whisky to drink, and told me to tell the other people at the village that they had plenty of whisky. I went and told at the village, and 12 of us came down in a canoe, and got whisky from the white men. I got two bottles and paid four (\$4) for it."

Several other Indians testified substantially to the same effect.

The defendants testified that they resided at Douglas; that on the 12th of August, 1894, they started on a prospecting expedition in a sloop; that they went to Bear Creek, on Douglas Island; that they left there, and arrived at Funter Bay, on Admiralty Island, August 16th, and left on the 17th, and arrived at Bartlett Bay on the 18th; left there on the 19th, and arrived at Hoona Sound on the 20th; and stayed there, prospecting around the sound, for 8 or 10 days.

The defendant Shelp, in the course of his testimony, said:

"I was never at Chilkoot in my life. I never saw, to my knowledge, any of the Indians who testified in this case. We had no whisky on board of our sloop; neither sold nor gave away any whisky to Indians."

It is also necessary to consider what was said by defendants' counsel in the argument to the jury, for it is evident that some of the sentences objected to in the charge were given by the court in reply thereto. In discussing the weight to be given to the evidence by the jury, one of the defendants' attorneys said:

"That the evidence of ignorant, half-civilized barbarians, whose moral and religious sense was not developed, and who did not understand and appreciate the binding force of an oath as understood by Christian people, and who had little or no appreciation of our religious ideas, from which the oath gets its binding force and efficacy, and who had no appreciation of the enormity of perjury,—that the evidence of such witnesses was not entitled to as much credit as the evidence of a witness whose moral ideas were more fully developed, and who understood the binding nature of an oath, and the pains and penalties of perjury."

The court, after referring to the remarks of counsel, charged the jury as follows:

(1) "It is a fact that Indians lie, and it is also a fact that white men lie, and some of the most civilized and cultured men are among the greatest liars. The evidence of Indian witnesses is entitled to as much credit and weight as the evidence of white men, and such credibility and weight are determined by the same rules of law. (2) In weighing the evidence of witnesses, you have the right to consider their intelligence, their appearance upon the witness stand, their apparent candor and fairness in giving their testimony, or the want of such candor or fairness, their interest, if any, in the result of this trial, their opportunities of seeing and knowing the matters concerning which they testify, the probable or improbable nature of the story they tell; and from these things, together with all the facts and circumstances surrounding the case, as disclosed by the testimony, determine where the truth of this matter lies. (3) You have the right to use your own knowledge of this country, the habits and disposition of the Indians, and your knowledge and observation of the fact that whisky peddlers cruise about this coast, going from one Indian village to another, selling vile whisky to the natives. (4) There is no evidence that these defendants located

a claim or drove a stake, and it is for you to determine from the evidence whether they were out prospecting with pick and pan and shovel, as honest miners, with a view of locating claims, or whether they were out with a keg of whisky and a tin cup, prospecting for the aboriginal native."

—To which charge of the court "the defendant then and there excepted, on the ground that the same is not the law, is misleading, tending to confuse the jury, and distract their attention from the evidence."

The portion marked "(1)" cannot be said to have misled the jurors. It was evident from the testimony that either the defendants or the Indians had lied, and it was not error for the court to call the attention of the jury to that fact, and point out what the jurors were entitled to consider in determining the truth. The statement that "the evidence of Indian witnesses is entitled to as much credit and weight as white men's" must be construed with reference to the other portions of the charge. No witness is to be discredited simply on account of his race or color. Every witness, whether white, dark, black, or yellow, unless otherwise disqualified by statute, is competent to testify. It may be that an Indian whose religious ideas have not been as fully developed as some white men's may have as keen a perception of the facts which transpired in his presence, and be as able to satisfy a jury of the truth of his statement, as any white man could be; and this may be true notwithstanding the fact that the white man might be able to express his ideas or knowledge of the principles of the Christian religion, or the nature of an oath, better than the Indian. Suppose an objection should be made to the competency of a witness who is a religious enthusiast that he thinks too much of God and too little of human nature, or to an Indian that he thinks too much of human nature and too little of God, to be considered worthy of belief; should either be considered as well founded? Certainly not. The truth is that, in law, both classes stand upon the same plane. The weight and credibility of every witness is to be determined in the manner set forth in the clause marked "(2)," which contains a clear and correct statement as to the duty of jurors in weighing the testimony of the witnesses, whether they be white men or Indians. In the light of the testimony in this case, it cannot be said that there was any error in the portion of the instruction marked "(4)." There is no evidence in the record to the effect that either of the defendants ever "located a claim or drove a stake." A judge has the right, and it sometimes becomes his duty, to state the facts. Is the judgment in any case to be reversed because, in that connection, he states the truth? The only debatable question as to the correctness of the entire charge is with reference to the language used in the part marked "(3)." The court had previously, in part "(2)," correctly charged the jury to consider certain things, "together with all the facts and circumstances, as disclosed by the testimony." The issue as to the guilt or innocence of the defendants was to be determined from the evidence given at the trial, without any reference to outside matters. Whatever the defendants did in their trip along the coast the jury had the right to consider. It mattered not what others may have done in cruising around the coast; the question, and the sole question, in-

volved in this case, was whether the defendants had sold liquor to an Indian. The fact that other people were in the habit of selling liquor to the Indians would be immaterial and wholly irrelevant. But, if defendants' counsel were of the opinion that the language used in clause "(3)" was susceptible of such a construction as to make it the duty of the jury to consider such outside matters (irrespective of the evidence given at the trial), it was their duty to have specifically called the attention of the court to that fact, so that the meaning of the language used could have been amended or explained so as to deprive it of such meaning, or a proper instruction might have been prepared by counsel, with the request that it be given to the jury. It is the duty of counsel to call the attention of the court specifically to the precise point, phrase, or sentence which is claimed to be erroneous, so as to give the court an opportunity, before the jury retires, to correct it. A general exception to a whole charge is insufficient.

The rule is well settled that an exception to an entire charge of a court, or to a series of propositions contained therein, cannot be sustained if any portion thus excepted to is sound. This rule is established in nearly every state of the Union, and in all of the national courts, and applies to both civil and criminal cases. *Harvey v. Tyler*, 2 Wall. 338; *Lincoln v. Claflin*, 7 Wall. 132, 139; *Beaver v. Taylor*, 93 U. S. 46, 54; *Cooper v. Schlesinger*, 111 U. S. 148, 151, 4 Sup. Ct. 360; *Railway Co. v. Jurey*, 111 U. S. 585, 596, 4 Sup. Ct. 566; *Insurance Co. v. Union Trust Co.*, 112 U. S. 250, 261, 5 Sup. Ct. 119; *Burton v. Ferry Co.*, 114 U. S. 474, 5 Sup. Ct. 960; *Block v. Darling*, 140 U. S. 235, 238, 11 Sup. Ct. 832; *Bogk v. Gassert*, 149 U. S. 17, 26, 13 Sup. Ct. 738; *Allis v. U. S.*, 155 U. S. 117, 122, 15 Sup. Ct. 36; *Jones v. Railroad Co.*, 157 U. S. 682, 15 Sup. Ct. 719; *Newport News & M. V. Co. v. Pace*, 158 U. S. 36, 15 Sup. Ct. 743; *Thiede v. Utah Ter.*, 159 U. S. 511, 521, 16 Sup. Ct. 62; *Bonner v. State (Ala.)* 18 South. 227; *People v. Hart (Utah)* 37 Pac. 330; *Woods v. Berry*, 7 Mont. 196, 204, 14 Pac. 758; *State v. Mason (Mont.)* 45 Pac. 557; *Curry v. Porter*, 125 Mass. 94; *Yates v. Bachley*, 33 Wis. 185; *Hopkins Manuf'g Co. v. Aurora F. & M. Ins. Co.*, 48 Mich. 148, 11 N. W. 846; *Walsh v. Kelly*, 40 N. Y. 556. In *Harvey v. Tyler* the court said that justice itself and fairness to the trial court "require that the attention of that court shall be specifically called to the precise point to which exception is taken, that it may have an opportunity to reconsider the matter, and remove the ground of exception." In *Beaver v. Taylor* the court said: "If the entire charge of the court is excepted to, or a series of propositions contained in it is excepted to in gross, and any portion thus excepted to is sound, the exception cannot be sustained."

6. The record shows that George Cleveland, one of the defendants, waived arraignment, and entered his plea of "not guilty" to the indictment. It does not affirmatively show that Archie Shelp, the other defendant, was ever formally arraigned, or that any plea was ever entered by him to the indictment. The record is silent upon that question. No objection was ever made in the court below, either during the trial, or upon the motion in arrest of judgment, or upon the motion for a new trial, or in the bill of exceptions, nor is it assigned

as error upon the appeal to this court that defendant Shelp was put upon his trial without any plea being entered to the indictment. It is therefore claimed by the United States that the question ought to be considered as having been waived by the defendant. It is, however, admitted that this court can, in a proper case, "notice a plain error not assigned"; that a writ of error addresses itself to the record; and that, if the record itself discloses the ground upon which a reversal is sought, there is no necessity for a bill of exceptions. If the failure to plead is a mere matter of form, and not of substance, the judgment should not be reversed. Rev. St. U. S. § 1025. The authorities, however, are to the effect that, while the arraignment may be waived, the plea is absolutely essential. In capital or other infamous crimes, an arraignment and plea has always been regarded as matter of substance, and must be affirmatively shown by the record. *Crain v. U. S.*, 162 U. S. 625, 16 Sup. Ct. 952. Until the defendant has pleaded to the indictment, there is no issue to be submitted to the jury, and the omission to plead is fatal to the judgment, even after verdict. This rule applies as well to cases of misdemeanor as to cases of felony. *Douglass v. State*, 3 Wis. 820; *Aylesworth v. People*, 65 Ill. 301; *State v. Williams*, 117 Mo. 379, 22 S. W. 1104; *State v. Hubbell*, 55 Mo. App. 262; *McFarland v. State*, 18 Tex. App. 313; *Roe v. State*, 19 Tex. App. 90; *Bowen v. State*, 108 Ind. 411, 9 N. E. 378; *State v. Cunningham*, 94 N. C. 824; 1 Bish. New Cr. Proc. §§ 733, 1354, and authorities there cited.

The bill of exceptions shows "that the issue joined in the above-stated case between the said parties came on to be tried before the said judge and the jury which was duly impaneled and sworn to try the issues between the said parties." From this statement in the bill of exceptions it is argued by the government that this court should infer that a plea of not guilty was in fact entered, and that the clerk failed to note that fact in the record. We cannot, in the light of the authorities, draw any such inference. In *Crain v. U. S.*, the court, upon this question, said:

"Until the accused pleads to the indictment, and thereby indicates the issue submitted by him for trial, there is nothing for the jury to try, and the fact that the defendant did so plead should not be left to be inferred from a general recital in some order that the jury was sworn 'to try the issues joined.'"

In *Bowen v. State*, the court said:

"Under the decisions of this court, it can no longer be regarded as a subject of controversy that, where the record in a criminal cause fails to disclose affirmatively that a plea to the indictment was entered, either by or for the defendant, such record on its face shows a mistrial, and that the proceeding was consequently erroneous."

If the defendant stands mute, and refuses to plead, the court is authorized to enter his plea of not guilty. Rev. St. U. S. § 1032. But a trial without the entry of any plea by or on behalf of the defendant is invalid.

It follows from the views above expressed that the judgment of the district court as to the defendant Cleveland must be, and is hereby, affirmed, and that the judgment against the defendant Shelp must be, and is hereby, reversed, and the cause remanded for a new trial.

In re TSU TSE MEE.

(District Court, N. D. California. July 9, 1897.)

No. 11,338.

DEPORTATION OF CHINESE—COMMISSIONER'S DECISION—HABEAS CORPUS.

A judgment of conviction and deportation of a Chinese person by a United States commissioner, who has obtained jurisdiction, is conclusive on the question of the right of such person to remain in the United States, subject to appeal to the district judge of the district, as provided by section 13 of the act of September 13, 1888. That question cannot be reviewed on habeas corpus, either on the same or additional evidence.

This was a hearing upon return to a writ of habeas corpus issued in behalf of Tsu Tse Mee, a Chinese person, under sentence of deportation from this country.

Wm. Hoff Cook, for petitioner.

Bert Schlesinger, for the United States.

DE HAVEN, District Judge. The return to the writ of habeas corpus issued herein shows that the said Tsu Tse Mee was at the date of the issuance and service of said writ restrained of his liberty, for the purpose of deportation from the United States, by virtue of a judgment of conviction and deportation made by the commissioner of the circuit court of the United States for the Western district of Texas on the 9th day of March, 1897, in a proceeding in which the said Tsu Tse Mee was charged with having on the 16th day of February, 1897, unlawfully entered, and since remained, in the United States, in violation of the acts of congress commonly known as the "Chinese Exclusion Acts."

The judgment of deportation, as shown by its recitals, is based on the following facts, found by the commissioner:

"First. That the defendant, Ching Tsu Sing, alias Tsu Tse Mee, is guilty of having unlawfully entered the United States on the 16th day of February, 1897, as charged in bill of complaint. Second. That he is now, and was on the said date, a subject of the empire of China. Third. That, being unlawfully in the United States, he is not entitled to enter the United States, or to remain therein, having so entered."

To this return the petitioner filed an answer, and traverse, specifically denying all the facts so found by the commissioner; and upon the hearing had before the special referee and examiner authorized to inquire into the facts, and report to this court his conclusion from the evidence presented to him, the petitioner offered to prove:

"That Tsu Tse Mee never testified on any hearing before any commissioner at El Paso as to how he was in the United States, and that, as a matter of fact, he came to the United States, San Francisco, about twelve years ago, and has been a resident of San Francisco until about the middle of January, 1897, and had been a merchant of San Francisco during that time, and that the firm of which he was a partner dissolved partnership about the time he left San Francisco, to wit, about the middle of January, 1897, when he went from San Francisco to El Paso, without going beyond the boundaries of the United States, for the purpose of making collections at El Paso and other places in the United States along his route connected with the business of the firm,

which had dissolved partnership; and that he is not a laborer, and, under the laws of the United States, he is not required to have any certificate for being allowed to remain here."

This offered evidence was rejected by the special referee and examiner, and the petitioner now claims that such ruling was erroneous, and that he was thereby deprived of his right to disprove the facts set forth in the return to the writ, and thus to show the illegality of his imprisonment. In passing upon the question thus presented, it is necessary to consider the force and effect of the judgment of deportation set out in the return, and whether such judgment or determination is subject to attack in this collateral proceeding.

The authority of a commissioner of the circuit court of the United States to hear and determine a complaint charging a Chinese person with being unlawfully in the United States was given by section 13 of the act of September 13, 1888 (25 Stat. 476), and is as follows:

"That any Chinese person, or person of Chinese descent, found unlawfully in the United States or its territories, may be arrested upon a warrant issued upon a complaint, under oath, filed by any party on behalf of the United States, by any justice, judge, or commissioner of any United States court, returnable before any justice, judge, or commissioner of a United States court or before any United States court, and when convicted, upon a hearing, and found and adjudged to be one not lawfully entitled to be or remain in the United States, such person shall be removed from the United States to the country whence he came. But any such Chinese person convicted before a commissioner of a United States court may, within ten days from such conviction, appeal to the judge of the district court for the district. A certified copy of the judgment shall be the process upon which said removal shall be made, and may be executed by the marshal of the district or any officer having authority of a marshal, under the provisions of this section."

This provision in the law of September 13, 1888, is still in force. *U. S. v. Wong Dep Ken*, 57 Fed. 203.

It seems to me too clear to admit of any doubt that in a proceeding commenced against a Chinese person before a commissioner of a United States court, in the manner authorized by that section, after jurisdiction of the person charged has been obtained, and hearing had, a judgment by such commissioner of conviction and deportation is final and conclusive upon the question of the right of such person to remain in the United States, subject only to review on appeal by the district court of the district, as provided by that section. Such judgment is not, in a collateral proceeding, subject to review by any other court upon the same or upon other and additional evidence. The law must leave the final decision of every controversy somewhere, and, when a judgment or decision has been made in any case by the tribunal or officer duly appointed by law to hear and determine such case, no other court is authorized to re-examine or controvert the sufficiency of the evidence upon which such court or officer acted, or to retry such case upon its merits, unless specially authorized by law so to do. Yet this is precisely what the petitioner asks the court to do in this proceeding,—to hear evidence in relation to the right of Tsu Tse Mee to remain in the United States, and, in view of such evidence, to determine the question as to his right to remain as an original question, and as if it had not been already fully determined by the commissioner of the circuit court of the United States for the Western dis-

trict of Texas by the judgment of deportation set out in the return to the writ of habeas corpus issued herein. I feel satisfied that the court is not authorized in this proceeding to retry the same questions of fact determined by that judgment, and it follows therefrom that the special referee and examiner was justified in refusing to receive the evidence embraced in the petitioner's offer.

This conclusion is fully sustained by the cases of *In re Leo Hem Bow*, 47 Fed. 302, and *U. S. v. Don On*, 49 Fed. 569, and is also supported by the general principle governing courts in proceedings under the writ of habeas corpus, that such writ cannot be used as a substitute for a writ of error for the purpose of reviewing alleged errors either of fact or of law, and which might, upon an appeal, be found to have entered into the judgment imposing the imprisonment or restraint complained of. In all cases in which the return shows that the petitioner is restrained of his liberty by virtue of the judgment of a court, and such judgment is not assailed by the allegation of some extrinsic fraud, which, if it exist, would render it a nullity, the inquiry under the writ of habeas corpus is limited to the question whether the court rendering such judgment acted within or without its jurisdiction. Section 760, Rev. St. U. S., which gives to a petitioner in a proceeding like this the right to "deny any of the facts set forth in the return," and also to allege other matters which may be material in the case, and which section is relied upon by the learned counsel for the petitioner here, does not change the well-settled rule of law in relation to the conclusive effect of a judgment of a court of competent jurisdiction as to all matters properly before the court, and embraced in its judgment, as against a collateral attack. That the section just referred to does not have the effect claimed for it by the counsel for the petitioner here, and was not intended to enlarge the jurisdiction of a court or judge, issuing the writ of habeas corpus so as to permit in the proceeding under such writ a retrial and discharge of a person imprisoned by virtue of a valid judgment, is clearly shown by the learned and exhaustive opinion of the late Judge Blatchford in the case of *In re Stupp*, 12 Blatchf. 501, Fed. Cas. No. 13,563.

The writ issued herein will be discharged, and the said Tsu Tse Mee remanded to the custody from whence he was taken, to be deported to China, in accordance with the judgment of deportation set out in the return to the writ; and it is so ordered.

SAXLEHNER v. GRAEF et al.

(Circuit Court, S. D. New York. June 17, 1897.)

TRADE-MARK—UNFAIR COMPETITION.

A company which was the exclusive consignee in this country of the Hungarian Hunyadi Janos water, in order to distinguish it from imitations sold here, placed on its bottles a trade-mark of its own, not used by its consignors. Afterwards it ceased to import this water, and began selling another Hungarian water, using the same trade-mark, but with labels so distinctive as to challenge the attention of purchasers. *Held*, that this was no infringement of the rights of the owners of the Hunyadi Janos water.

This was a suit in equity by Emilie Saxlehner against Harry C. Graef and another, agents of the Apollinaris Company, to enjoin the use by the latter of certain alleged infringing labels and trade-marks in the sale of mineral waters. The cause was heard on motion for a preliminary injunction.

Briesen & Knauth, for the motion.

Edmund Wetmore and Henry Melville, opposed.

LACOMBE, Circuit Judge. Most of the questions which have been presented and argued on this motion may be best reserved for final hearing. It will not be necessary to express any opinion as to whether laches or inaction has in any way impaired complainant's right to enjoin imitations of the unattractive, but peculiarly distinctive, label of dark blue and red, with the vignette of John Huniades, which has been the well-recognized livery in this country of the original Hunyadi Janos water for many years. For the purpose of this motion, it will be assumed that complainant's right to prevent the sale of other bitter waters in a dress calculated to deceive the public as to their identity with the Hunyadi Janos is entirely unimpaired. It appears that many years ago the markets of this country were flooded with dark blue and red labels lettered with variations of the name Hunyadi, and calculated to deceive the public. At that time the Apollinaris Company was the sole consignee of complainant's predecessor, Andreas Saxlehner, in the United States. Said company urged Saxlehner to unite with it in suit to stop such infringements, but he peremptorily refused. Thereupon the Apollinaris Company adopted a distinctive badge of its own, to wit, a red diamond on a yellow ground, with the inscription: "The diamond is the trade-mark of the Apollinaris Company, Limited, and is meant only to indicate that mineral waters so marked are sold by the Apollinaris Company, Limited." And, so long as it continued to sell Saxlehner's Hunyadi Janos water, it pasted its individual mark upon each bottle. It no longer sells Saxlehner's Hunyadi Janos water, and it now affixes its individual red diamond label on another natural Hungarian aperient water, which it now sells. Complainant has no right to this red diamond label, and her application for an injunction could be sustained only on the theory of unfair competition. Of course, having handled the original Hunyadi Janos water so long, and become well known as the exclusive importers of it into this country, the Apollinaris Company, when it took up another variety of water, was bound in good faith to the public to offer the new water in a dress so different as to the challenge the attention of the purchaser to the fact that it is some other mineral water to which the red diamond label is now affixed. This has been done. The label of the "Apenta" water now sold by the Apollinaris Company is totally unlike the old Hunyadi Janos label. It fully sustains the proposition repeatedly laid down in this court that, when there is an honest effort to accentuate differences in labels and wrappers, there need be no confusion as to the identity of competing goods. Comparison is made with the later form of defendant's label, which no longer contains the words "Bottled

at the Uj Hunyadi Springs." Whether the continued use of the word "Hunyadi," after the sale of complainant's water was discontinued, was or was not proper, may appropriately be left for final hearing. Promptly upon the decision in the Hungarian tribunal that word disappeared from defendant's labels, and, when it is a question whether preliminary injunction shall issue, it is always appropriate to consider what it is which defendant threatens to do if unrestrained. Should defendant hereafter, and before final hearing, resume the use of the word "Hunyadi," the question can then be presented by a renewal of the motion. Meanwhile the motion for preliminary injunction is denied.

ST. LOUIS CAR-COUPLER CO. v. NATIONAL MALLEABLE CASTINGS CO.

(Circuit Court, N. D. Ohio, E. D. May 27, 1897.)

PATENTS—COMBINATIONS—CONSTRUCTION OF CLAIMS—INFRINGEMENT—AUTOMATIC CAR COUPLERS.

The Lorraine and Aubin reissue, No. 10,941 (original No. 369,195), for an automatic car coupler, shows a mere reproduction of similar parts used in other couplers of the same kind (being the Janney, or M. C. B., type) for the same purpose and with the same functions. If there is any patentable novelty in the combination, it is in the exact form shown in the specifications and drawings, and any variation therefrom in any of the parts will prevent infringement. The claims are, therefore, not infringed by a coupler made in accordance with the Tower patent, No. 541,446.

This is a bill in equity, brought by the St. Louis Car-Coupler Company, as complainant, to enjoin the National Malleable Castings Company, defendant, from further alleged infringement of a patent for an automatic car coupler averred to be the property of the complainant and for the damages arising from past infringements.

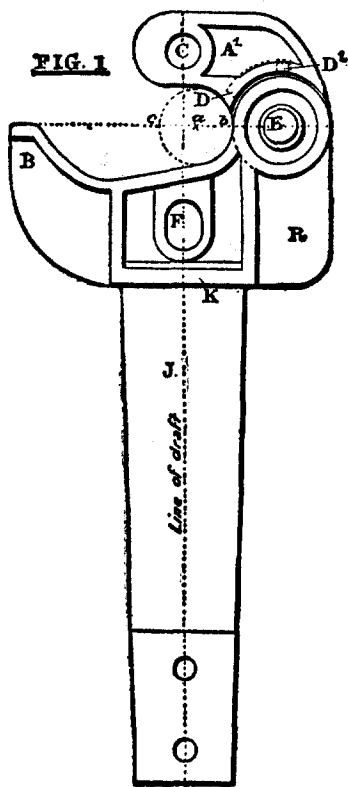
The patent upon which the suit is based is a reissued patent, issued upon the 26th of June, 1888, to Madison J. Lorraine and Charles T. Aubin, and numbered 10,941. The original patent was issued to the same patentees upon August 30, 1887, and numbered 369,195. The answer admits the issuing of the patents, but does not admit the ownership by the complainant. It avers that the reissued patent is void because the claims thereunder state unlawful extensions of the matters and things claimed in the original letters patent, that the patent is void for want of novelty and patentable invention, and that the patent is anticipated by a number of patents set out. The answer further denies infringement.

The specifications of the reissued patent in suit state the character of the invention to be as follows:

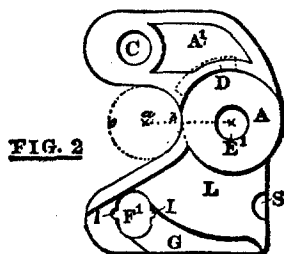
"Our invention relates to that class of car couplings known as 'vertical plane,' and having a pivoted, outwardly opening, coupling-head, or clutch, and an extended arm, or buffer. The object of our invention is to provide a vertical plane coupling free from complicated parts, locking by means of a simple automatic gravity pin, requiring no adjusting and made in one piece; to provide a vertical plane coupling, in which, when the coupling-head is unlocked and released, said coupling-head, by reason of its own weight, will turn outwardly and open, and thus automatically set itself in position to effect a coupling with a similar opposing coupling-head, which may be either open or closed; to provide an improved and simplified means of setting not to couple; to so construct and arrange the coupling-head that it will be unusually strong; and to make a coupling that will perform the work under all circumstances, as well

on the sharpest curves as on a tangent, and with the greatest variations in height of the opposing parts,—in fact, to provide a car coupling that will be simple in construction, automatic in action, and free from springs and superfluous and loose parts, that will combine strength and durability with simplicity and perfection of action."

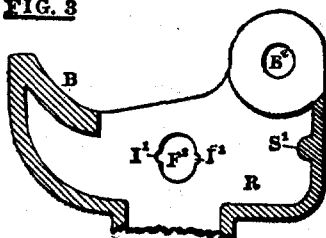
"Fig. 1 is a plan of draw-head with coupling-head attached and closed.



"Fig. 2 is a plan of coupling-head detached from draw-head.



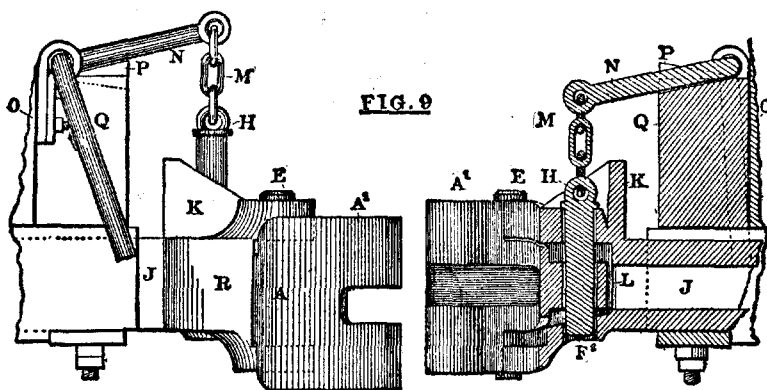
"Fig. 3 is a horizontal section, showing lower half of draw-heads separate from coupling-head.

FIG. 3

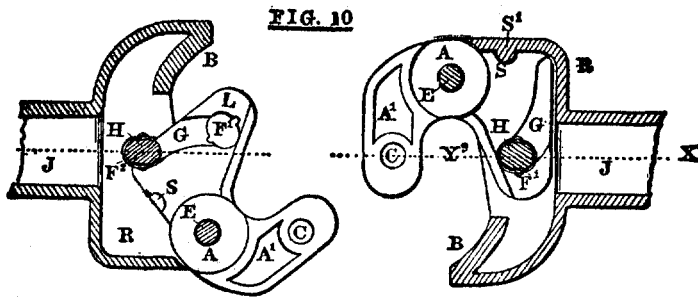
"Fig. 5 is a side view of locking pin.

**FIG. 5**

"Fig. 9 is a side view of two draw-heads, with coupling-heads attached, about to make a coupling with the left-hand coupling-head open and down, and the right-hand coupling-head closed, up, and locked, and showing vertical longitudinal section of draw-head through line, X-X, Y-Y, Fig. 10.

**FIG. 9**

"Fig. 10 is a horizontal longitudinal section of two opposing draw-heads, with coupling-heads attached about to make a coupling, with left-hand coupling-head unlocked and open, and the right-hand coupling-head closed and locked.



"A is the coupling-head, which is pivoted at its center to the draw-head, and which, viewed in position shown in Fig. 2, has a general U shape. A is the outer arm of this U, and L is the inner arm. F is a hole in top of draw-head for reception of locking pin. F¹ is a hole which perforates inner arm of coupling-head for purpose of receiving locking pin, and F² is a hole in bottom of draw-head for same purpose. G is a groove in inner arm of coupling-head for guiding the locking pin as hole F¹ moves from or toward it. H is locking pin (said locking pin can be either oblong, round, or square), and I² is a knob projecting from side of locking pin to keep it from being drawn out of hole, F. J is the drawbar. M is chain for raising and supporting locking pin. N is a lever arm attached to chain for operating coupling pin. O is the car body. S is recess in arm, L, made to receive rib, S¹, which is cast to side of draw-head. The outer arm, A¹, of the coupling-head, or knuckles, is partially divided by a horizontal slot, and has a hole, O, extending through both parts. This arrangement is to receive and secure the link and pin when coupling with a common draw-head. D, in Fig. 1 and Fig. 2, is an inclined groove in the coupling-head, made for the projecting knob or pin, D¹, to travel in, and automatically open the coupling-head. When two similarly constructed draw-heads approach each other, as shown in figures 9 and 10, the arm, A¹, of the closed coupling-head, encounters the end of the arm, L, of the opposing and open coupling-head, moving the open coupling-head inward, and, with the aid of the concaved surface of the buffer arm, B, forces the coupling-head completely around to the inner head by this movement. As the arm, L, of the coupling-head is being pushed inward, the pin, H, which rests on the top of that arm, is guided by the groove, G, towards the hole, F¹, falls through it, and into the hole, F², and thus secures and locks the coupling-head."

The recess, S, fits against the rib, S¹, when the arm, L, is pushed completely inward, giving the coupling-head a solid bearing against the draw-head when it is locked by the pin, H. In uncoupling by the use of the lever, N, and the chain, the brakeman at the side of the car lifts the pin, H. The coupling-head then has nothing to retain and support it, and, as the opposing head draws away from it, the action of gravity draws the coupling-head down into the vacant space beneath, and, as it falls by reason of the top of the groove, D, traveling down and across the knob and pin, D¹, the coupling-head turns and opens, and is set into position for another coupling. This occurs whether the coupling-head be coupled with its fellow, or simply closed and not coupled. While the coupling-head is open, the pin, H, rests on top of L, in the groove, G. Should it be necessary to set it so that the coupler will not couple, the lever arm is raised and pushed or pulled on top of the block, P, and, as this keeps the pin, H, in the raised position, the coupling-head cannot be locked, and the coupling cannot be effected.

The object of pivoting the coupling-head at its center is threefold: First, if the coupling-head was otherwise pivoted, by reason of its shape, when uncoupled, the arm, L, of the unlocked head, would bind the arm, A¹, of its neighbor, and prevent uncoupling with facility, and this it would do especially on curves; second, if the coupling-head were pivoted back of its center, or in the arm, L, it would then be necessary to open both heads to either couple or uncouple, which would be unnecessary and faulty; third, if the coupling-head

were pivoted in its forward arm, A¹, when the coupling-head was entirely open, the arm, L, would then come entirely without the draw-head, and there would be nothing to support the locking pin in a raised position, and it would accordingly fall, and, when coupling, it would be necessary to construct some mechanism to automatically raise said locking pin, which would be complicated and is unnecessary. The specification further states that when the coupling-head is removed from draw-head, which can be done by withdrawing the pin, E, the remaining portion of the construction constitutes a sufficient means of itself for coupling with any center-draft coupling; that is, the link may be inserted in the coupling-head, and secured by the coupling pin reaching down through F, F¹, and F².

The claims of the patent which are said to be infringed are the 1st, 3d, 6th, 7th, 8th, 10th, 11th, 12th, 18th, 19th, and 20th, as follows:

"(1) The combination of the U-shaped coupling-head pivoted at its center, the draw-head, and the automatic locking pin, for the purposes set forth."

"(3) The combination of the U-shaped coupling-head, the groove, G, the draw-head, the locking pin resting on top of the arm, L, when the coupling-head is open, and falling through the holes, F¹ and F², when the coupling-head is closed, and the lever arm and chain, substantially as described."

"(6) The combination of the U-shaped coupling-head, having the recess, S, the locking pin engaged with the rearward arm of said coupling-head, and the draw-head having the rib, S¹, which fits in the recess, S, only when the coupling-head is closed, for making the coupling-head firm and secure when locked."

"(7) The combination of a coupling-head turning laterally on its pivot, and having an external arm extended to engage with and grip a like fellow, and a rearward arm intended to engage with some locking mechanism, with a draw-head carrying a common gravity, vertically moving, locking pin, said automatically locking pin riding directly upon such rearward arm when opened, and locking such inner arm by dropping through a hole perforated in the inner arm of the coupling-head, substantially as described."

"(8) The combination of two similarly constructed draw-heads having U-shaped, pivoted, automatically opening coupling-heads and the automatic locking pins, substantially as described, for the purpose of making an automatic coupling."

"(10) The combination of a coupling-head, the draw-head, the groove, G, the locking pin resting on top of the arm, L, when the coupling-head is open, and falling through the holes, F¹ and F², when the coupling-head is closed, and the lever arm and chain, substantially as described."

"(11) The combination of the draw-head, the pivoted coupling-head, and the locking pin, said locking pin resting upon the inner arm of the coupling-head when the coupling-head is opened, and riding upon said inner arm when the coupling-head is turned to be closed, and said inner arm being grooved to receive and guide the locking pin."

"(12) The combination of the draw-head, the pivoted coupling-head, and the locking pin, said locking pin working vertically in a perforation in the draw-head, and resting directly upon the inner arm of the coupling-head when the coupling-head is opened, riding directly upon said inner arm when the coupling-head is turned to be closed, and dropping through said inner arm to secure said coupling-head when closed."

"(18) The combination of the draw-head, the pivoted coupling-head and the vertically moving locking pin; the inner arm of said coupling-head, when the coupling-head is closed, being held by said pin, and also interlocked with the draw-head at a point between the location of said locking pin and the coupling-head pivot, for the purpose described."

"(19) The combination of a coupling-head turning laterally upon its pivot, and having an external arm intended to engage with and grip a like fellow, and an inner arm intended to engage with some locking mechanism, with a draw-head carrying a common gravity, vertically moving, locking pin riding directly and solely upon such inner arm when the coupling-head is open, and dropping to lock it when closed, substantially as described."

"(20) The combination of two similarly constructed draw-heads having pivoted, automatically opening, coupling-heads, and the automatic gravity-locking pins, substantially as described."

In the original patent, of which this is a reissue, the coupling-head was described as follows: "A is the coupling-head, which is pivoted at its center to the draw-head (said center being in direct line with prolongation of radius, a, b, of circle, a, b, c, and said radius being at right angles to the line of the draft), and which, viewed in position shown in Fig. 2, has a general U shape." The clause in parentheses is omitted in the reissue. The first 8 claims of the reissued patent are substantially the same as those of the original patent. The remaining 12 were not contained in the original patent, and the claims alleged to be infringed, therefore, the 1st, 3d, 6th, 7th, and 8th, were contained in the original patent.

The defendant's device is made in accordance with a patent issued to C. A. Tower for a car coupler, June 18, 1895, and numbered 541,446. The Tower patent was avowedly an improvement on the patent issued to the same patentee June 5, 1894, and that was an improvement on the patent issued to the same patentee October 24, 1893, No. 507,511.

Fig. 1 of the patent shows a horizontal section of two couplers,—one closed, and the other open, about to couple.

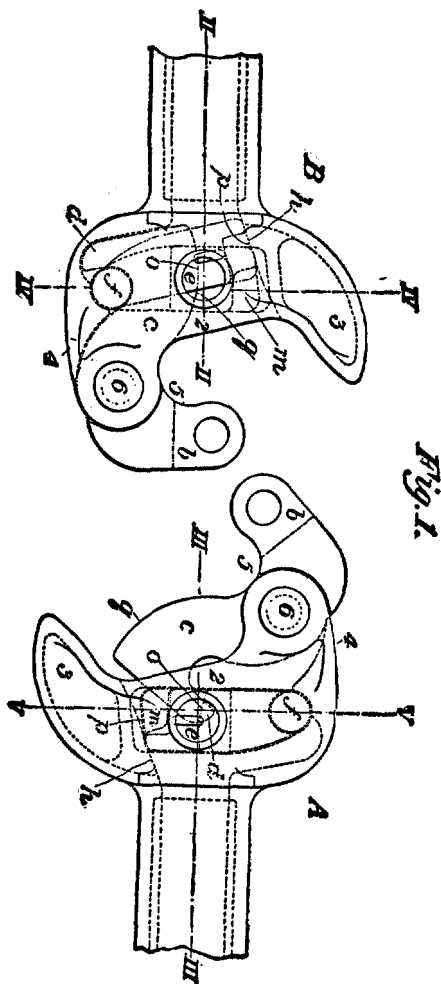
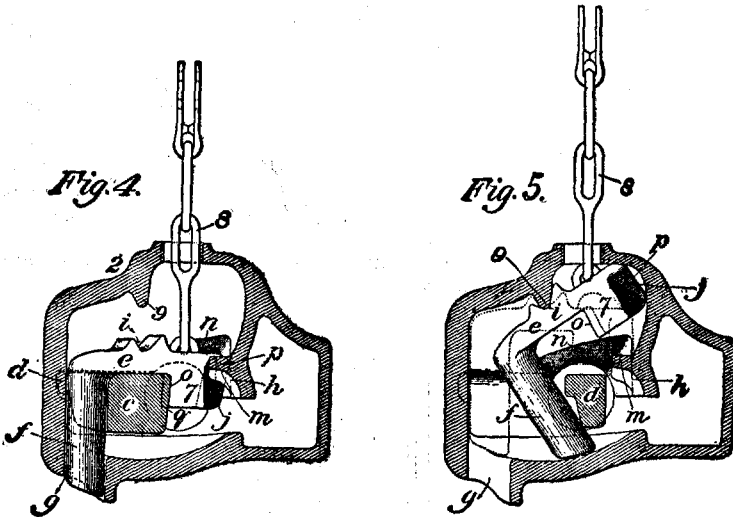


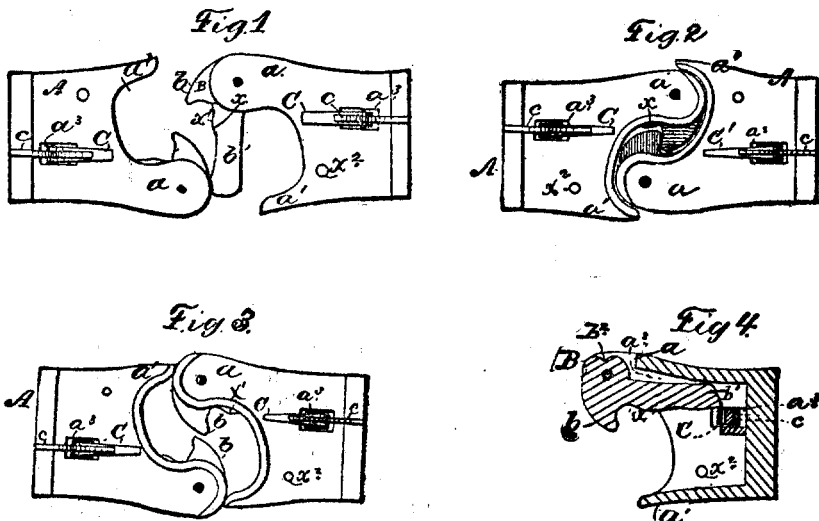
Fig. 4 and Fig. 5 show the locking device,—Fig. 4 when the coupling-head is locked, and Fig. 5 when the coupling-head is open.



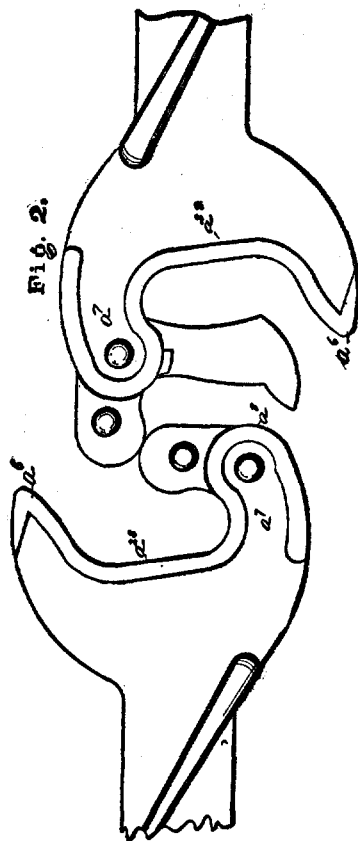
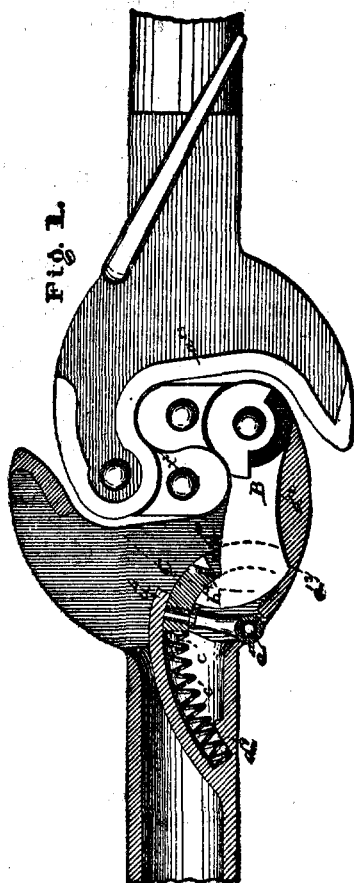
The draw-head is of the same shape as that of the complainant's coupler, and all of that class of couplers known as the "Janney Type." In one of the prongs swings the coupling-head, and the other prong is used as a buffer bar. The knuckle or coupling-head is formed with an outer arm, b, and an inner (and preferably longer) arm, or tail, c, which project substantially at right angles to each other, and the rear side of the tail is formed into a hook, d. In order to hold the knuckle in locked position (the position shown in Fig. 4, and at B in Fig. 1), an angled locking and opening piece is set within the coupler head, and shown most clearly in Fig. 4 and Fig. 5. The upper and transversely extending member, or arm, e, of this angled piece reaches over the tail of the knuckle. Its dependent block or head, 7, is adapted to fit in front of and to lock the knuckle when in closed position, and its dependent arm, f, which extends downwardly at the rear of the knuckle, and is substantially upright when the knuckle is in locked position, passes through a guide hole, g, in the floor of the coupler. When the knuckle is locked, the head, 7, of the angled piece fits between the front side of the knuckle tail and the shoulder, h, on the coupler-head; but when the brakeman raises the angled piece by a link, or lifting rod, 8, it is raised above the knuckle, and out of its path of motion. The notch, i, on the upward side of its member, e, engages a projecting rib or shoulder, 9, on the coupler-head, which shoulder acts as a fulcrum upon which the arm, f, acquires a radial motion against the rear side of the tail of the knuckle, moving it outwardly into the open space. The end of the arm, f, will then drop upon and be supported by the bottom or floor of the draw-head until the knuckle tail is swung back and the operation of locking again succeeds. In this operation the rear side of the knuckle tail engages the arm, f, and moves the angled piece so as to carry the arm back into a vertical position until its lower end comes into register with the hole, g, and then the angled piece will drop by gravity, its arm, f, entering the hole, and its head, 7, adjusting itself in front of the knuckle tail, and locking the knuckle. As a security against the jumping of the locking piece, the opposite sides of the head, 7, are not in parallel, vertical planes, but with downward, divergent surfaces.

Munday, Evarts & Adcock and Henry W. Post, for complainant.
M. B. Philipp, T. W. Bakewell, and E. A. Angell, for defendant.

TAFT, Circuit Judge (after stating the facts as above). In order to determine how broad and liberal a construction is to be put upon the reissued patent of the complainant, it is necessary to examine the state of the art at the time of its issue. The patent in question is a mere improvement on a well-known form of car coupler. As early as the 29th of April, 1873, a patent was issued to E. H. Janney, No. 138,405, for a car coupler which established a type. It had a forked draw-head, one arm of which operated as a buffer, and to the other arm was pivoted a knuckle or coupling-head consisting of two arms, one adapted to hook with a similar arm upon a similar coupling-head on a fellow coupler, and the other when the coupling-head was open, swinging out in a position where it would be struck by the arm of the opposing coupler and driven back into a hollow draw-head, there to be latched by a spring latch firmly against the side of the draw-head, and thus holding the outer arm or hook of the coupling-head in engagement with the corresponding hook of the coupling-head of the opposing coupler. The form may be gathered from the following figures taken from the drawings of the patent:

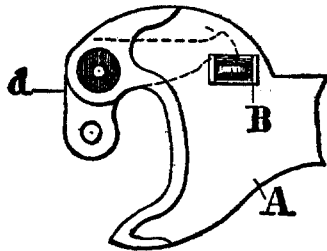
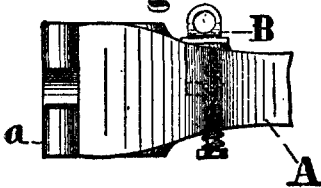
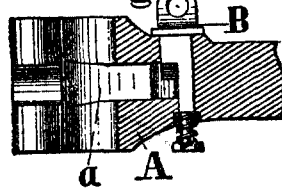


Various improvements were made by Janney on his coupler in the matter of the locking device and the form of the draw-head and coupler, one in 1874, another in 1878, another in 1879, and another in 1882. On the following page are Figs. 1 and 2 of the drawings of the Janney patent of 1879. The locking device is a spring latch embracing the tail or inner arm of the knuckle head.



In the Janney patent of 1882 the form of the coupler is substantially the same, but the locking device is a locking pin extending downward through a hole in the top of the draw-head, and fitting in a corresponding hole in the same. The pin has an inclined face upon one side, so that the end of the lever arm, when it is swung in a backward direction, strikes the inclined face, lifts the locking pin until high enough to permit the arm to pass beneath into the recess behind it, when the pin returns to its normal position, either by gravity or by use of a spring, and locks the lever arm. The form which the Janney coupler has now assumed may be seen from the Figs. 1 and 3 of the patent given on the following page.

It will be seen from the foregoing that the device of the patent in suit is, if any invention at all, a mere improvement upon a well-known type of car couplers. The number of patents upon car couplers is about 1 per cent. of all the patents issued by the patent office, and there are to-day 6,500 patents for such devices. In 1885

Fig. 1.**Fig. 2.****Fig. 3.**

the Master Car Builders' Association, an association made up of all the car builders of the United States, held a convention for the purpose of bringing about a uniformity in the car couplers to be used, and established a model or contour, to which all manufacturers and inventors were invited to shape their couplers. That contour was suggested by and taken from the figures of the Janney patent, and is given on the following page.

The model chiefly related to the side of the draw-head, and the size of the knuckle, and the length of the outer arm of the knuckle. It did not attempt to fix exactly the position of pivot on the knuckle with reference to the rear arm, nor did it make any requirements with respect to the form of the tail or inner arm of the knuckle, or the character of the locking device to be used. The outward contour or form of the coupler described in the patent in suit, as well as that of the alleged infringement, is according to the requirements of the Master Car Builders' Association, and is called, therefore, a coupler of the M. C. B. type.

We must begin the consideration of the questions in this case, therefore, with the full understanding that couplers of the general contour of the patent in suit were old before it was applied for; that the forked draw-head, with one arm to act as a buffer, and the other for the purpose of pivoting a coupling-head or knuckle having two arms, one to hook and the other with a tail which should lock the latch in the interior of the hollow draw-head, was old, and therefore that the only possible patentable novelty in a coupler of the M. C. B. type must be found in the shape of the tail of the coupling-head in

distance to strains by striking, pulling, and pushing much broader, and thus distribute the strain more evenly throughout the whole structure; second, that the placing of the locking pin exactly in the line of draught, made possible by the shape of the coupling-head, reduces the strain by leverage against the locking device to a minimum; third, that the locking by simple gravity, without the necessity for the use of any device for lifting the pin out of the rearward path of the tail, reduces the danger of a quick rebound of the tail before the locking pin can come to its locking position; fourth, that the recess, S, of the coupling-head, and the rib, S¹, of the draw-head, secure a solid bearing against the back side of the draw-head when the coupling-head is locked, such that, even if the pivot of the coupling-head be lost, the coupler will not open, but will continue to perform its function.

Let us examine the prior art, with the view to determining first the novelty of the shape of the coupler; secondly, the novelty in the place of pivoting the same; third, the novelty of the locking device; and, fourth, the novelty of the auxiliary locking device contained in the recess, S, and in the rib, S¹, in car couplers.

First, as to the U-shaped knuckle or coupling-head.

In the patent issued to Phillip Hien, dated July 26, 1881, No. 244,895, which was a car coupler of the M. C. B. and Janney type, it is admitted by the expert and the counsel for the complainant that the coupling-head was U-shaped, and this is manifest from Fig. 2 and Fig. 3 of the patent, which we give below:

FIG. 2.

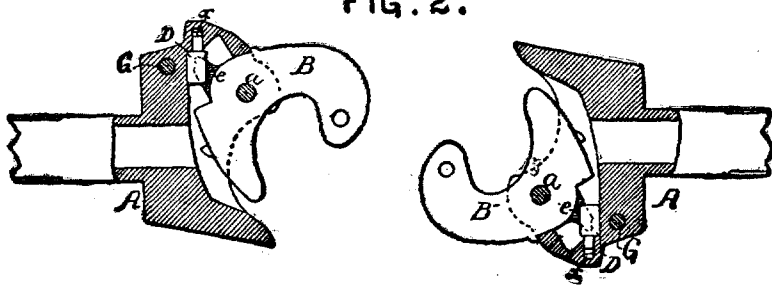
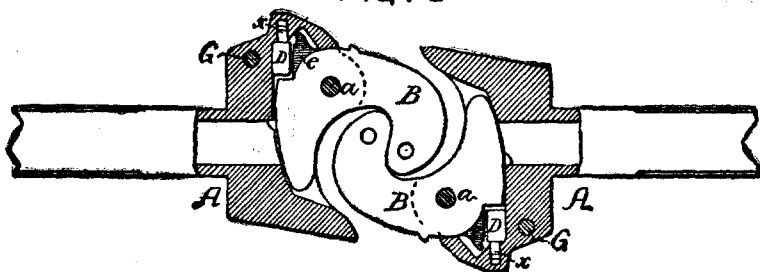
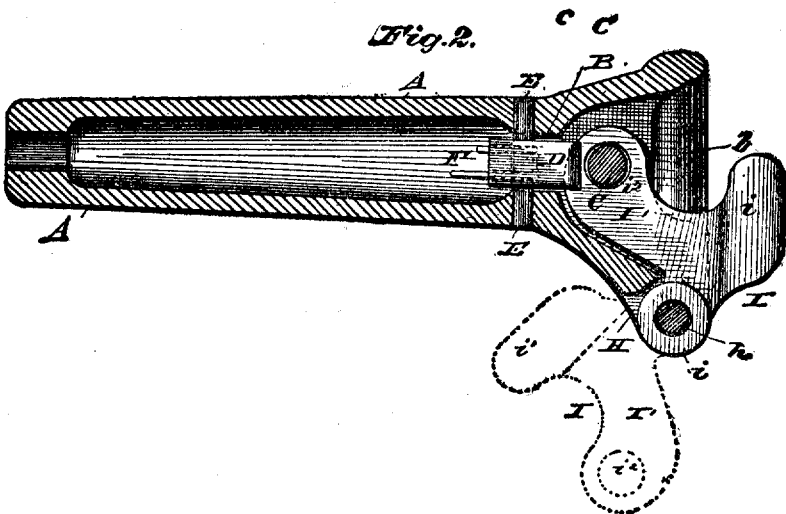
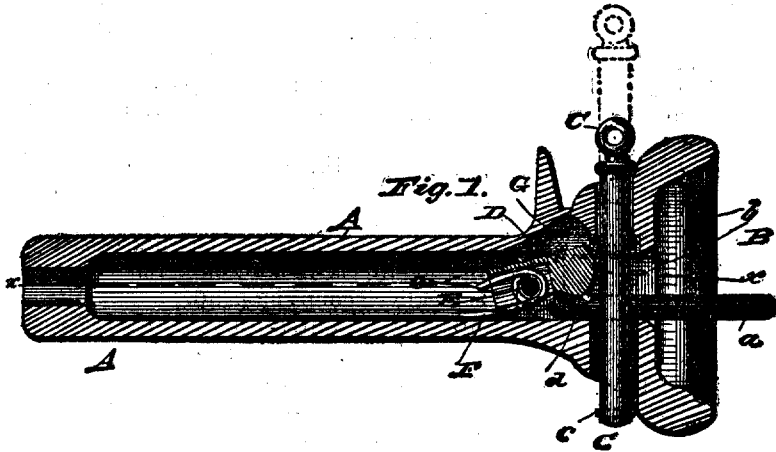
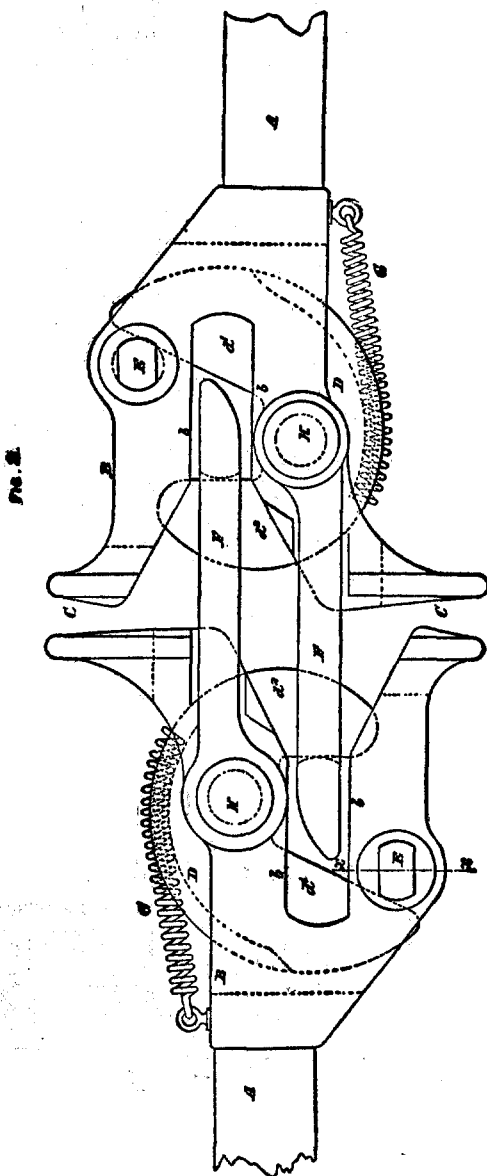


FIG. 3



Again in the Kling patent, which was applied for February 26, 1887, before the original patent of complainants was applied for, the knuckle or coupling-head is U-shaped, if by that is meant a parallelism between outer and inner arm of the coupling-head, which I understand to be the meaning claimed by the expert and counsel for the complainant.

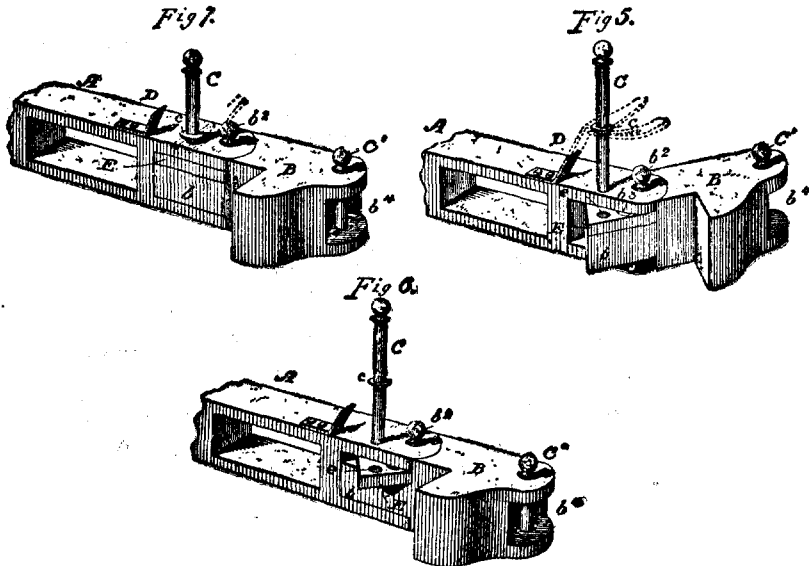




There are other patents which have the same U form, but the foregoing are sufficient to show it was not new when complainant's patent was applied for.

Secondly, were there any coupling-heads which were pivoted at the center? It is a little difficult to tell what is meant by "pivoting at

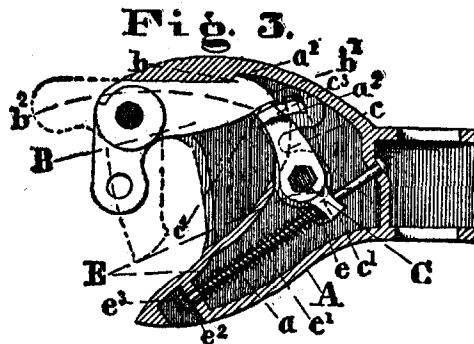
the center," but complainant's expert attempts to define it as pivoting at a point opposite to the gap between the arms. In the English patent, already referred to, the coupling-head is pivoted exactly opposite the gap. So it is in the Kling patent. But it is said that in these patents the shape and pivoting are not such as to permit part of the tail to protrude into the fork of the draw-head to receive the blow from the arm of the opposing coupler, and, on the other hand, to permit sufficient of the tail to remain inside of the draw-head to uphold the locking pin or locking device on the tail while the coupler is open and is being carried into the point where the pin drops through the tail and locks it. But the same thing is true of the Wineman patent, already referred to and described. In its part of the tail of the coupling-head protrudes, when open, into the fork of the draw-head, and there receives the blow from the forward arm of the opposing coupler; while upon the other part of the tail rides the locking piece, ready to fall in front of a part of the tail in its rearward movement, and lock it. Indeed, the locking device, by which a gravity pin is carried on the tail of the coupling-head while it is open and is dropped into a locking position when the coupling head is closed, is seen in several other couplers of the M. C. B. type. Thus it appears in the Dowling patent, No. 339,156, and in the Harrington patent, No. 376,713, both of which are M. C. B. couplers. It also appears in the Gray patent, No. 261,702, which is not of the M. C. B. type, though it might be easily adapted thereto. It was issued July 25, 1882. The feature referred to is evident from Figs. 5, 6, and 7, which we give below:



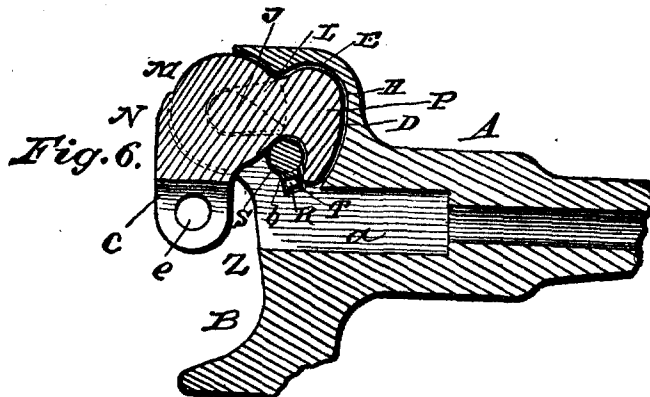
The little plate, E, and latch or catch plate, is a piece really cut off of the tail of the coupling-head, but fitted to it with a hole through it, in which the gravity pin registers and drops through into the tail

of the coupling-head, and into the bottom of the draw-head. The separation of the latch from the tail does not affect the principle, and this device plainly suggests the means for locking with a gravity pin which is shown in the complainant's device. The only difference is in the groove upon the tail of the complainant's patent, made for the purpose of more certain registry by the pin with the hole into which it is to fall. But the introduction of such a groove did not require invention. It is such an obvious device, and so often used in analogous cases, as not to constitute any patentable difference.

The use of the rib on the tail of the coupling-head, and the corresponding recess on the side of the draw-head, in order to make the bearing on the coupling-head solid when locked, we find in the Janney patent of 1881. This is shown in Fig. 3, below, at b and a¹.

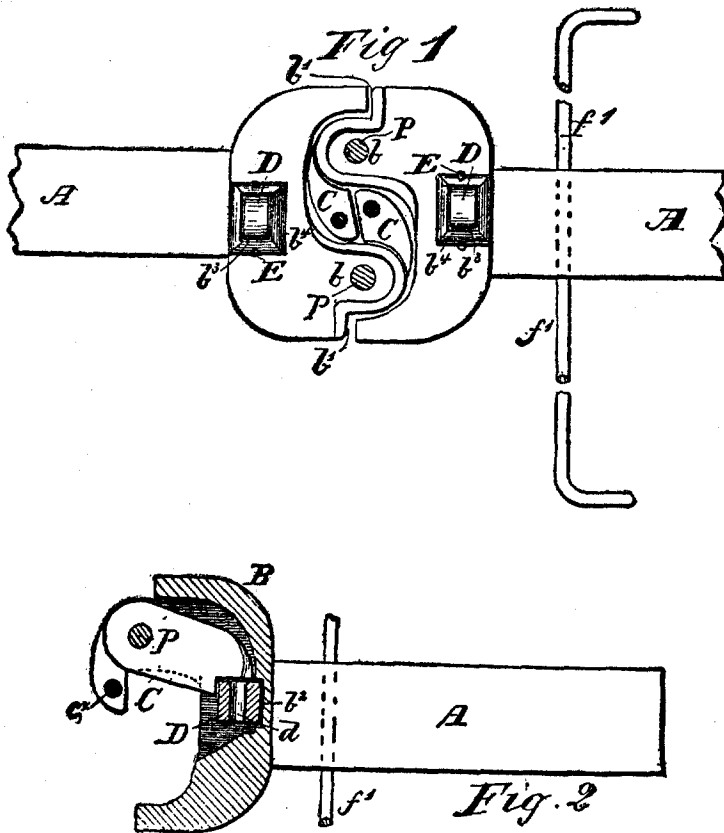


The same thing appears in the patent of Dowling, No. 379,888, which, though dated March 20, 1888, was issued on the application filed September 17, 1886, and prior to the application for the present patent. It is seen in Fig. 6 of the Dowling patent, as shown below at L.



Nor was it a new thing, at the time this patent was applied for and issued, in couplers of the M. C. B. type to have a locking device in the

line of the draught or in the longitudinal center line of the draw-head. This is shown in the Kling patent, already described, in which the strain is on a center gravity pin, just as in the patent in suit. It also is shown in the Thurmond car coupler, and appears in Figs. 1 and 2 of the patent, as given below:



D is a gravity pin with notches or inclined planes on its sides, so adjusted in relation to the tail of the coupling-head that, when the coupling-head is being closed, the tail strikes the pin, lifts it, passes under a wing of it, and, letting it fall, is locked behind it.

The automatic coupler art was not one in which a practical and successful coupler was yet to be invented when the inventors of complainant's patent entered the field. On the contrary, there were a dozen different types of such couplers in actual and profitable use. The Janney coupler is the one then and now most in use. Complainant has attempted to avoid the effect of some of the patents already referred to in suggesting features of the patent in suit by evidence that they were not practical couplers capable of successful use, but the evidence is not of sufficient weight to affect the conclusion I have reached. It

is perfectly evident, from this review of the devices which had been patented before the complainant's device was patented or applied for, that every part of complainant's coupler is old, and may be found performing substantially the same function in an automatic car coupler. There is no room for invention, therefore, except in the peculiar combination of the parts producing a new result. The additional buffing strength produced by the U shape of the knuckle claimed for the complainant's patent is not a new result, because we have the same thing in the Hien patent and in the Wineman patent, both practical couplers. The presence of the locking device in the center line of the draw-head, or line of draught, is, as we have seen, not a new result, because it appears in the Kling and Thurmond patents, and there are other patents in which the locking pin in its locking position is either in or near the line of draught. The capacity for receiving strains by reason of the auxiliary locking device, S and S¹, is, as we have seen, not new. It is possible that the adjustment of the parts in the complainant's patent, their contour, and their varying shape, lead to a better general result, including all the benefits stated by the complainant's expert. But the parts are so clearly a reproduction of similar parts used in other couplers of the same kind for the same purpose, and with the same functions, that no patentable novelty can be successfully asserted to exist in the complainant's combination, except in the exact form in which it appears in the specifications and drawings. It is a patent which, if valid at all, is entitled only to the narrowest construction, and any variation in any of the parts of the combination will prevent infringement. It is only "one in a series of improvements all having the same general object and purpose; and, in construing the claims of the patent, they must be restricted to the precise form and arrangement of parts described in his specifications and to the purpose indicated therein." *Fox v. Perkins*, 6 U. S. App. 200, 273, 3 C. C. A. 32, and 52 Fed. 205; *Bragg v. Fitch*, 121 U. S. 478, 483, 7 Sup. Ct. 978; *Caster Co. v. Spiegel*, 133 U. S. 360, 369, 10 Sup. Ct. 409; *Boyd v. Tool Co.*, 158 U. S. 260, 261, 15 Sup. Ct. 837; *Ney v. Ney Manuf'g Co.*, 37 U. S. App. 371, 16 C. C. A. 293, and 69 Fed. 405; *Miller v. Eagle Manuf'g Co.*, 151 U. S. 186, 207, 14 Sup. Ct. 310; *Wells v. Curtis*, 31 U. S. App. 123, 158, 13 C. C. A. 494, and 66 Fed. 318.

Coming, then, to compare the patent in suit with the alleged infringement, we find, first, that the coupling is not exactly U-shaped. It is a curved tail, which makes the whole piece almost resemble an S. Considering the very great variety in the shapes of the tails of the coupling-heads in previous patents, the difference in shape of the two tails here under consideration is quite enough to prevent infringement. The pivot in the alleged infringement is not exactly opposite the gap, though nearly so. The locking device of defendant is a most ingenious one, and in its normal operation does not involve the riding of the locking block upon the tail of the coupling-head, though this may occur exceptionally. The riding is generally done by the lower arm of the locking block in a groove in the bottom of the draw-head. The locking block is not a common gravity pin like that described in the patent of complainant, but is quite different in

form, and, while it does fall by gravity to do the blocking, it has other functions. A valuable one is the office and capacity it has for ejecting the tail of the coupling-head whenever the chain attached to it is pulled up by the brakeman. In the complainant's patent, after the pin is pulled, the tail of the coupling-head, by force of gravity working down an inclined plane, opens and remains open until it is forced back. This is a truly automatic opening. The opening of the defendant's coupling-head is by direct action of the brakeman through the locking block in lifting the same out of the locking position. The tail of the locking block acts directly upon the coupling-head, and by the radial motion given to it by the pull of the brakeman it thrusts the tail out through the opening of the draw-head. This is not an automatic opening like the complainant's. *Gould Coupler Co. v. Trojan Car-Coupler Co.*, 21 C. C. A. 97, 74 Fed. 794.

These general remarks as to the difference between the device of the complainant and that of the defendant, together with the conclusion that the claims of the complainant's patent are to be narrowly construed, dispense with the necessity of critically examining each of the claims, and comparing them with the alleged infringement. It suffices to say that any construction of any of the claims relied on which would include the defendant's device, or any combination of parts therein, would render the claim void for want of patentable novelty or invention in view of the prior art.

In reference to the first claim, defendant's coupling-head is not U-shaped, and is not exactly pivoted at the center, nor is the automatic locking pin the same as in the complainant's patent. In reference to the third claim, defendant's coupling-head is not the same, the groove, G, is not the same, and the locking pin is not the same, as in complainant's device. In reference to the sixth claim, the combination of the recess, S, with the shoulder, S¹, of complainant, is not found in the defendant's device. In the alleged infringement the tail of the coupling-head engages the tail of the locking pin, and that locking pin strikes against a shoulder in the side of the draw-head. Considering the fact that such devices are shown to be common in prior patents, this difference between the two patents is quite sufficient to prevent infringement by the defendant's analogous devices for rendering the coupling-head firm and secure when locked. Limiting the 7th and 8th claims, the 11th, 12th, 18th, 19th, and 20th, as we have done the previous claims, it is quite apparent that there is no infringement.

The defendant makes the point that the complainant does not show a proper title. I do not think it necessary to state the facts upon which this controversy arises. They seem to me to show that, even if the complainant has not a legal title, it has at least an equitable title, upon which it might obtain relief if it was otherwise entitled to it.

In view of the conclusion reached that there is no infringement, I do not deem it necessary or proper further to discuss this issue. Nor is it necessary to consider whether any of the claims of the reissue are void because an undue enlargement of the claims of the original patent. The bill is dismissed, at the costs of the complainant.

KANSAS CITY HAY-PRESS CO. v. DEVOL et al.
(Circuit Court of Appeals, Eighth Circuit. May 10, 1897.)

No. 808.

1. PATENTS—INFRINGEMENT SUITS—PLEADING—MULTIFARIOUSNESS.

Where devices covered by several patents are capable of embodiment and conjoint use in a single machine, a bill which seeks a recovery for infringement of all the patents is not multifarious.

2. SAME.

Where devices covered by several patents are capable of embodiment and conjoint use in a single machine, and all the patents are sued on in one bill, the failure of the complainant either to establish title to one of the patents, or to show infringement of one or more of them, does not affect his right to an injunction and an accounting in respect to the others, if the proof show that they are infringed. 72 Fed. 717, reversed.

3. SAME—PROOF OF ANTICIPATION.

A model of an alleged anticipating machine, made by a witness merely from recollection after 8 or 10 years, and which is introduced without disclosing the fact that it is not an original model until the same is developed on cross-examination, cannot be accepted as sufficient evidence to invalidate a patent.

4. SAME—ANTICIPATION—HAY-PRESSES.

The Sooy patent, No. 394,623, for a power mechanism for operating a hay press, in which the pitman is given its forward motion—First, by bringing antifriction rollers on the ends of cranks into contact with an inclined plane on the side of the pitman; and, second, by bringing the antifriction rollers into contact with the end of the pitman, thus giving a powerful forward thrust at the moment the greatest force is required,—*held* not anticipated by a press in which the power was wholly applied to the very end of the pitman, and also *held* not infringed.

5. SAME—INFRINGEMENT.

The Sooy patents, Nos. 363,012 and 386,360, relating to the construction of a draft pole or sweep for a hay-baling press, whereby the sweep is allowed to spring backward so as not to strike the horses when the strain on it ceases as the pitman is released, and which is accomplished by putting a link in the rod which re-enforces or strengthens the sweep, *held* not infringed.

6. SAME.

The Sooy patent, No. 358,898, for devices to permit the frame at the outer end of the baling chamber of a hay press to expand or contract when any hard substance happens to be mixed with the hay, is not infringed by a device which lacks the element of the coiled spring interposed between the nuts of the crossbars holding the frame together, and the lugs through which the crossbars pass.

7. SAME.

The Sooy patent, No. 456,239, covering a combination relating to hay-baling presses, is not infringed by a press which lacks the element of "a curved spring plate upon the vibrating end of said pitman."

8. SAME.

Patent No. 495,944, to Knight, Kelly, and Alderson, as assignees of Liven-good et al., for a hay-baling press, *held* infringed as to the fifth claim, which covers a combination consisting of "the traverser, pitman, means for operating the pitman, and a folding apron formed in sections pivoted to each other, and connecting the traverser with a stationary portion of the press."

9. SAME—TITLE TO PATENT—DEFECTIVE ASSIGNMENT BY CORPORATION—EFFECT AS TO INFRINGERS.

The fact that an assignment of a patent by a corporation was executed by its president and secretary, who owned all the stock, without any previous authorization by the board of directors, is no defense to an infringement

suit brought by the assignees against a third party, where the corporation itself has never questioned the validity of the assignment.

Appeal from the Circuit Court of the United States for the Western District of Missouri.

This suit was brought by the Kansas City Hay-Press Company, the appellant, against H. F. Devol, George Devol, and W. S. Livengood, the appellees, to restrain the infringement of the following letters patent, to wit: Patent No. 358,898, issued to Ephraim C. Sooy March 8, 1887; patent No. 363,012, issued to said Sooy May 17, 1887; patent No. 386,360, issued to said Sooy July 17, 1888; patent No. 394,623, issued to said Sooy on December 18, 1888; patent No. 456,239, issued to said Sooy July 21, 1891; and patent No. 495,944, issued April 18, 1893, to James E. Knight, Edward Kelly, and William A. Alderson, as assignees of Winfield S. Livengood, William H. Chadbourne, and James M. Gibbons. The bill showed that the patents had been duly assigned to the complainant company, that they related to a baling press for baling hay, that the several devices covered by the respective patents were capable of embodiment and conjoint use in a single baling press, and that they had been so embodied and used in a baling press that had been manufactured and sold quite extensively by the defendants. There was the usual prayer for an injunction to restrain the alleged infringement, and for an accounting. The defendants denied the complainant's title to patent No. 495,944, they pleaded several anticipatory patents, they denied infringement, and they denied, on information and belief, that the various devices covered by said patents were capable of embodiment and conjoint use in a single baling press.

Patent No. 394,623, issued to Sooy on December 18, 1888, which will be first noticed, covers the power mechanism whereby power is generated to compress the hay or other material as it is fed into the baling chamber. The baling press, as a whole, may be described with sufficient accuracy as follows: A long bedplate is mounted on wheels at both ends, whereby the press can be moved when necessary. At one end of the bedplate is the baling chamber. At the other is the power mechanism. Intermediate between the power mechanism and the baling chamber, and extending from one to the other, is a pitman which actuates the plunger or traverser in the baling chamber. The power mechanism consists of a revolving shaft set upright on the bedplate, which is supported by a C-shaped casting or frame. The shaft is revolved by a sweep or lever extending from the upper end thereof, and at right angles thereto, to which sweep a team is attached. Underneath the sweep two short cranks are rigidly attached to the revolving shaft, on opposite sides thereof, and extend therefrom a short distance at right angles thereto. These cranks have anti-friction rollers at their outer ends. On one side of the shaft are two arms which extend laterally beyond the radius of the aforesaid cranks, and serve to control the movement of the pitman, keeping it at all times in a proper relation to the aforesaid cranks. These laterally extended arms at their outer ends hold a guide roller which comes in contact with the outside of the pitman. The pitman, at the end which passes between the laterally extended arms, has an incline on one side, and its end is formed like the human foot with a slight curve or depression. The operation of the mechanism is as follows: When the upright shaft revolves, the anti-friction rollers in the outer ends of the short cranks come successively in contact with the incline at the end of the pitman, and by pressure thereon force the pitman outward, as well as forward, in the direction of the baling chamber. As each roller at the end of a crank comes in contact with the pitman, the roller travels down the incline at its side, passes around the heel of the pitman and into the depression at the outer end thereof, and eventually escapes from contact with the pitman, when the latter rebounds, owing to the pressure of the hay in the baling chamber. By the rebound, and the restraining action of the laterally extended arms, the pitman is thrown back to its former position, ready to come in contact with the next crank, and the operation last described is repeated. The pitman is thus driven forward twice, and twice rebounds at each revolution of the shaft. Moreover, by the contrivance aforesaid the power applied to the pitman is very much increased, upon the principle of the toggle joint, when the end of the crank and the end of the pitman come in contact, the operation of the power

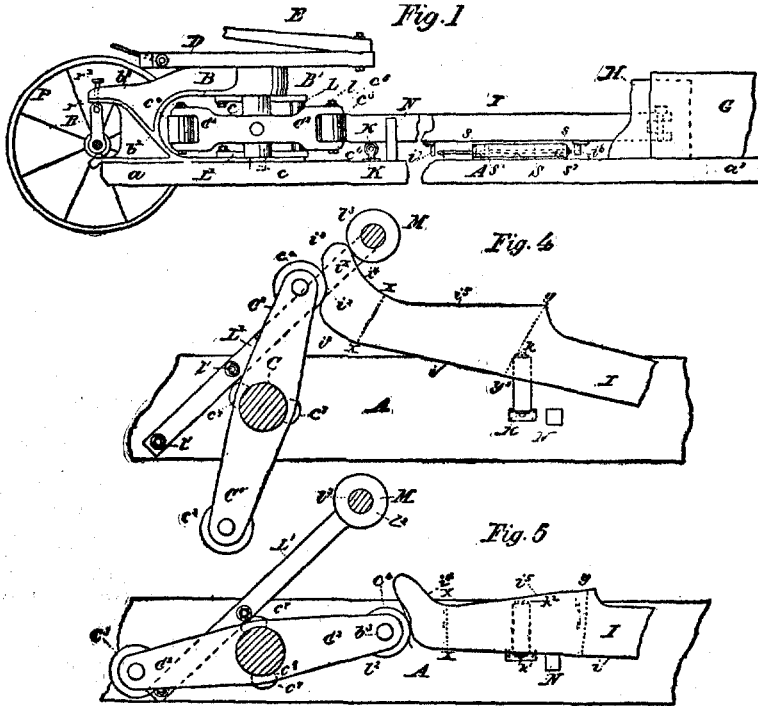
mechanism being to apply the greatest pressure when the hay in the baling chamber offers the greatest resistance. The power mechanism last described will be more fully understood by reference to the annexed drawings, Figs. 1, 4, and 5, which form a part of the specification of letters patent No. 394,623.

E. C. Sooy.

Baling Press.

No. 394,623.

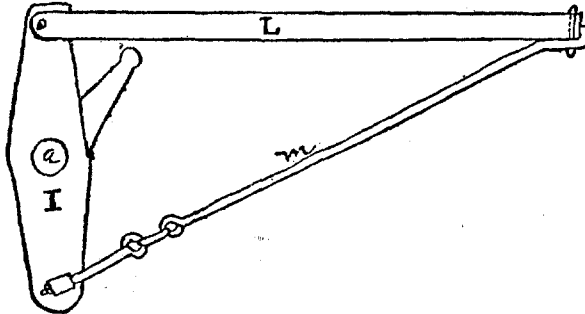
Patented Dec. 18, 1888.



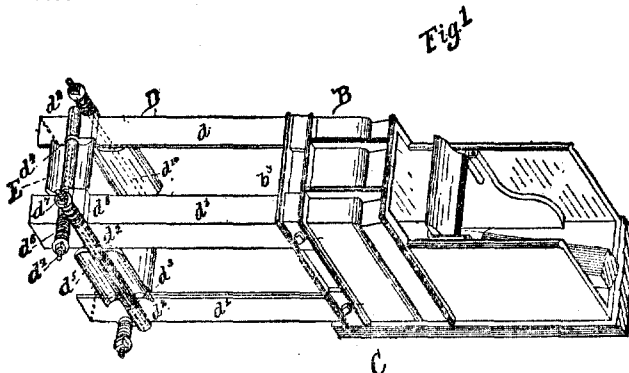
The claims in said patent which cover the device last described, and which are said to have been infringed, are as follows: "(1) In a baling press having a suitable bed, the combination, with a driving shaft and its cranks, of laterally extended arms provided with an antifriction guide roller extending beyond the radius of said cranks, a rebounding plunger, and a pitman adapted to rebound within the radius of said cranks, and provided with a contracted, inclined, vibrating end portion, adapted to come in contact with said guide roller, as described. (2) In a baling press having a suitable bed, the combination, with a driving shaft of cranks provided with antifriction end rollers, laterally extended fixed arms provided with an antifriction guide roller extending beyond the radius of said cranks, a rebounding plunger, and a pitman having a vibrating end portion adapted to rebound within the radius of said cranks, and an inclined outer edge portion declining toward its end adapted to come into contact with said guide roller, and retain the said end of the pitman in the path of the antifriction roller on the end of said cranks, for the purpose described."

The device covered by the complainant's patents Nos. 363,012 and 386,360, issued, respectively, May 17, 1887, and July 17, 1888, which is said to have been infringed by the defendants, relates to the sweep or lever by which the upright revolving shaft of the baling press is turned; the object of the patented device being to prevent the sweep from moving forward suddenly and striking the team attached thereto when the crank is released from contact with

the pitman, and the latter rebounds. To this end the inventor provided a rod to serve as a yielding support to the sweep, which rod had a link in the center, the design being that, when the strain on the sweep was released as the contact between the crank and pitman was broken, the link in the rod or yielding support would permit the sweep to spring backward, and prevent it, in a measure, from striking the team. The device in question will be readily comprehended by reference to the accompanying drawing, in which L is the sweep, M the rod or yielding support, and I the yoke attached to the top of the revolving shaft, which is indicated by the letter "a." The claim for this device is couched in patent No. 386,360 in the following language: "(2) The combination, in a baling press, with a driving shaft, of a yoke on said shaft and a draft pole pivotally attached thereto, and having a yielding support beyond the pivotal point of said pole on said yoke, adapted to permit an accelerated speed of the shaft in passing a dead center, to relieve the tension on the draft pole without shock, for the purpose specified."

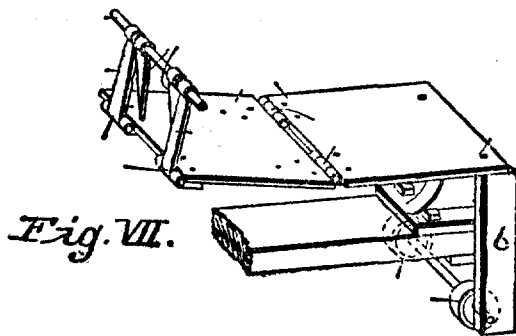


The device covered by the complainant's patent No. 358,898, issued March 8, 1887, which is said to have been infringed by the defendants, is disclosed by the annexed drawing, Fig. 1, which forms a part of the specification of said patent. It may be said, generally, that the device in question consists of a box or frame bolted to the baling chamber of the hay press, at the delivery end thereof, the outer end of this box or frame being so constructed, by means of lugs, nuts, bolts, and springs, as to permit the same to expand and contract to a limited extent when any hard substance happens to become mixed with the hay. The claim of the patent covering the device in question is as follows: "(1) In a baling press, the combination with a suitable baling chamber of a delivery portion of said press, pivoted at one end thereto, and an opposite, expandible end, and adjusting bolts in suitable lugs upon said expanding end, and nuts upon said bolts, and springs between said nuts and lugs for the purpose described."



The only device covered by patent No. 495,944, issued April 18, 1893, to James E. Knight and others, as assignees of Winfield S. Livengood and others, which

is involved in the present controversy, is the device covered by the fifth claim of the patent, which reads as follows: "(5) In a baling press, the combination of the traverser, a pitman, means for operating the pitman, and a folding apron formed in sections pivoted to each other, and connecting the traverser with a stationary portion of the press, substantially as and for the purpose set forth." The folding apron is illustrated in the annexed cut, which forms a part of the specification of the patent, and it may be said generally that this invention is designed to close the end of the baling chamber at which the pitman enters when the pitman rebounds. This function is performed automatically by making the apron in two sections, hinging them together, and attaching one section of the apron to the upper part of the traverser or plunger, and the other section to a stationary portion of the press. By this means, as the traverser moves forward the folding apron is extended, and when the pitman rebounds the two sections of the apron are partially folded, and the end of the baling chamber is thereby closed.



For reasons which will sufficiently appear in the opinion, no description need be given of the device covered by patent No. 456,239, issued to Sooy July 21, 1891. On the hearing of the case in the trial court the complainant's bill was dismissed. The case comes to this court on an appeal taken by the complainant from such decree.

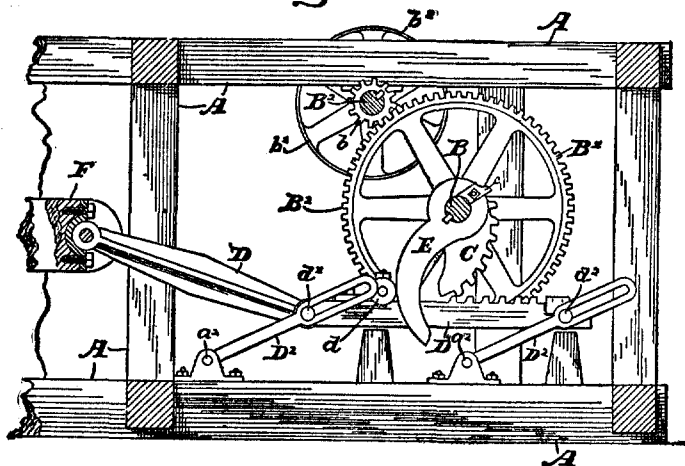
J. B. Johnson.

Baling Press.

No. 361,764.

Patented Apr. 26, 1887.

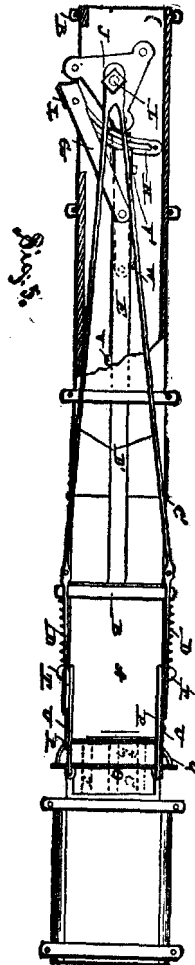
Fig. 3.



No. 354,517.

H. Purlier.
Baling Press

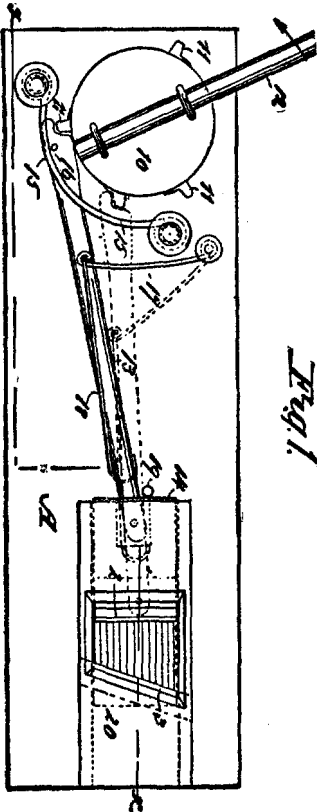
Patented Dec. 14, 1886.



No. 367,539.

G. McCann.
Power Mechanism for Reciprocating Plungers.

Patented Aug. 2, 1887.

Fig. 1.

Charles K. Offield and Charles C. Linthicum (James Scammon, John S. Crosby, Henry Stubenrauch, and Richard H. Manning on brief), for appellant.

George A. Neal and T. S. Brown, for appellees.

Before CALDWELL, SANBORN, and THAYER, Circuit Judges.

THAYER, Circuit Judge, after stating the case as above, delivered the opinion of the court.

The circuit court found that the complainant below, who is the appellant here, had not established its title to patent No. 495,944, issued April 18, 1893; and it accordingly dismissed the bill without considering the other patents, upon the theory, no doubt, that there

could be no recovery unless the complainant established its right to an injunction and an accounting as to each patent counted upon in the complaint. *Hay-Press Co. v. Devol*, 72 Fed. 717, 723. This was an error. The bill charges, and it is also obvious, that the devices covered by the several patents were capable of embodiment and conjoint use in a single hay press. Indeed, only one hay press made by the defendants was produced for the purpose of establishing an infringement of all the patents. Under these circumstances the bill was not multifarious because it sought a recovery in a single suit for the infringement of all the patents. Moreover, a failure of the complainant either to establish its title to one of the patents, or to show an infringement of one or more of the patents, would not affect its right to an injunction and an accounting with respect to the other patents, provided the proof showed that they had been infringed. *Nourse v. Allen*, 4 Blatchf. 376, 18 Fed. Cas. 459; *Gillespie v. Cummings*, 3 Sawy. 259, Fed. Cas. No. 5,434; *Horman Patent Manuf'g Co. v. Brooklyn City R. Co.*, 15 Blatchf. 444, Fed. Cas. No. 6,703; *Seymour v. Osborne*, 11 Wall. 516, 559; *Hayes v. Dayton*, 8 Fed. 702.

The patent of chief value which is involved in the present controversy is the one first described in the statement, No. 394,623, issued December 18, 1888, and it will be referred to hereafter as the "power patent." The other patents cover different parts of the balancing press, and, while they may be useful devices, the successful operation of the machine is not so vitally dependent thereon as it would seem to be on the mechanism described and claimed in the power patent. An attempt was made at the trial to show that the device covered by claims 1 and 2 of the power patent is disclosed substantially by several prior patents, and for that purpose reference was made more especially to the following patents, to wit: Patent No. 361,764, issued to J. B. Johnson April 26, 1887; patent No. 354,517, issued to H. Purrier December 14, 1886; and patent No. 367,539, issued to G. McCarn August 2, 1887. Certain drawings, forming a part of the specifications of these patents, which will suffice to show the alleged anticipatory devices, have been incorporated into the foregoing statement. By reference to these drawings it will be observed that in the Johnson patent the pitman was driven forward by means of a cam attached to a revolving drum or wheel, which meshed into cogs on the side of the pitman bar, and thus moved the pitman forward; that in the Purrier patent a forward motion was given to the pitman by a revolving triangular plate, in the three corners of which antifriction rollers were inserted, which rollers, as the triangular plate revolved, came successively in contact with the end of the pitman and forced it forward; and that in the McCarn patent three lugs were placed at intervals on the periphery of a revolving drum, which lugs, as the drum revolved, came successively in contact with the end of the pitman and moved it forward substantially in the same manner that the pitman was moved by the triangular plate in the Purrier patent. Neither of these devices made use of pressure upon an inclined plane for the purpose of moving the pitman, while the complainant's invention described in the power patent embodies the principle of giving the pitman a forward motion—First, by bringing the

antifriction rollers of the cranks into contact with an inclined plane on the side of the pitman; and, second, by bringing said antifriction rollers into contact with the end of the pitman, thus increasing the power and giving the pitman a powerful forward thrust at the moment the greatest force is required to compress the hay. It cannot be said, we think, that the complainant's invention is disclosed or anticipated by either of the patents aforesaid to which reference has been made. On the trial of the case a model of a hay press was introduced in evidence by the defendants which was said to be a correct model of a hay press that was constructed by the defendant W. S. Livengood during the year 1886, or prior thereto. The model was offered for the purpose of showing that Livengood had made a hay press, either during or prior to the year 1886, which anticipated the device covered by the complainant's power patent. With reference to this model, it is sufficient to say that it was proven on the trial of the case that it was not an original model of the press which it purported to represent, but was made by the defendant Livengood about six months after the institution of the suit at bar for the purpose of being used as evidence to invalidate the claims of the power patent. It was so made merely from the witness' recollection of the structure of the press that it purported to represent, which he had not seen for eight or ten years, and the fact that it was not an original model was not disclosed when it was offered in evidence, but was intentionally concealed until the fact was developed on cross-examination. Under the circumstances, we cannot accept the model in question as sufficient evidence to invalidate the claims of the power patent. Moreover, even if we were able to find that it was a correct model of a hay press constructed by the defendant Livengood, we should be of the opinion that in the hay press in question the power was wholly applied to the very end of the pitman, and that the principle embodied in the complainant's power patent of applying pressure to the incline on the side of the pitman was neither conceived nor applied in the older press which the model purports to represent.

It remains to be determined whether the defendant's baling press infringes claims 1 and 2 of the power patent. It will be observed that one element of the combination covered by those claims consists "of laterally extended arms provided with an antifriction roller extending beyond the radius of said cranks." It is contended by the defendants that this element is wanting in the infringing baling press which was introduced in evidence. None of the drawings which form a part of the power patent disclose the laterally extended arms very clearly, and for that reason it is necessary to say that these arms extend from the C-shaped casting, which supports the revolving shaft, at right angles to the shaft, one of the arms being above and one below the pitman; their sole function being to control the vibrating end of the pitman, and keep it in a position to be acted upon at the proper moment by the short cranks attached to the revolving shaft. These arms hold a roller at their outer end, which comes in contact with the outer edge of the pitman as it is pushed forward or rebounds, and thus lessens the friction. In the infringing device, on the other hand, an arm curving outwardly is firmly attached to the bedplate some distance from the re-

volving shaft, and extends backward in the direction of the shaft, outside of the radius of the cranks, to a point about as far as the pitman goes when it rebounds. An antifriction roller is pivoted to the bottom of the pitman, which presses against the inner side of the curved arm when the pitman is in motion, and thus controls the movement of the pitman, keeping it always in proper relation to the cranks. In the infringing device the pitman is prevented from moving upward or vertically, when it rebounds, by curved rods attached to the frame holding the revolving shaft, which pass over the pitman, and are attached to the axle which supports the bedplate of the press at a point outside of the radius of the cranks. The curved arm or curved way in the infringing device, against which the antifriction roller presses, which is pivoted to the pitman, undoubtedly performs the same function as the laterally extended arms and antifriction roller of the power patent. We cannot say that, as a means of controlling both the lateral and forward motion of the pitman, it is any improvement upon the mechanism designed for the same purpose in the power patent. It seems to be simply a mechanical deviation from the method of construction described in the latter patent, which neither involves a new principle of operation, nor produces a better or a different result. Our conclusion is, therefore, that the curved arm or way in the infringing device must be regarded as a mechanical equivalent for the laterally extended arms of the power patent. It results from this view that claims 1 and 2 of that patent have been infringed.

We are not able to say that the evidence discloses an infringement of the claims of patents Nos. 363,012 and 386,360, which are referred to and described in the statement. The only claim of these patents which is alleged to be infringed is the one quoted in the statement, which seems to be based upon a method of constructing the draft pole or sweep whereby it is allowed to spring backward slightly when the strain on the sweep ceases, as the pitman is released. This object is accomplished by putting a link in the rod which re-enforces or strengthens the sweep. In the infringing device it does not appear that the rod supporting the sweep is divided into sections by a link, or that it was designed to permit the sweep to spring backward to any marked extent. The rod in question is rigidly attached at one end to the sweep, and at the other to the yoke by which the shaft is turned. Its sole function would seem to be to strengthen or re-enforce the sweep. If it has any other function, it is not disclosed by the model of the infringing device which was offered in evidence.

We have also reached the same conclusion last announced with reference to the charge of infringement in so far as it respects complainant's patents Nos. 358,898 and 456,239. Without going into the subject in detail, as these patents do not seem to be of much value or importance, it will suffice to say that the means employed by the defendants in the infringing device to permit the frame attached to the outer end of the baling chamber to expand or contract are so essentially different from the means described to accomplish the same object in complainant's patent No. 358,898 that the claim of infringement as to the latter patent cannot be sustained. In the complainant's device a coiled spring is interposed between the nuts of the

crossbars which hold the frame together, and the lugs through which the crossbars pass. In this way the end of the delivery chamber is made to expand or contract as occasion requires. In the defendants' device no such coiled springs are employed. Besides, we entertain such grave doubt as to whether the device covered by claim 1 of patent No. 358,898 possesses patentable novelty that in any event the patentee should be limited to the precise form of construction described in his patent.

Complainant's patent No. 456,239 is not infringed by the defendants, for the reason that the combination covered by the claims of that patent which are said to have been infringed embrace, as one element thereof, "a curved spring plate upon the vibrating end of said pitman"; and there is no pretense that the hay press manufactured by the defendants employs such a spring plate on the end of the pitman, or anything equivalent thereto.

This brings us to a consideration of patent No. 495,944, which was issued on April 18, 1893, to James E. Knight, Edward Kelly, and William A. Alderson, as assignees of Winfield S. Livengood et al. The trial court held that the complainant company had no title to this patent which would enable it to complain of an infringement thereof. The hay press which is being manufactured by the defendants discloses a combination such as is covered by the fifth claim of patent No. 495,944, consisting of "the traverser, pitman, means for operating the pitman, and a folding apron formed in sections pivoted to each other, and connecting the traverser with a stationary portion of the press." The defendants are therefore guilty of an infringement of the fifth claim of this patent, and the only question to be considered is whether the complainant company has a title thereto. Its alleged title was thus derived: Livengood, Chadbourne, and Gibbons, the inventors, prior to the issuance of the patent conveyed the invention to a corporation, the Midland Manufacturing Company. The Midland Manufacturing Company conveyed the same to Edward Kelly by a written assignment which was signed by W. H. Chadbourne as president of the company, and attested by the signature of P. D. Myers, its secretary, with the corporate seal attached. Kelly then transferred a two-thirds interest in the invention to James E. Knight and William A. Alderson, and Kelly, Knight, and Alderson subsequently sold and assigned the patent, after it was issued to them, to the complainant, the Kansas City Hay-Press Company. It is the conveyance from the Midland Manufacturing Company to Kelly which is supposed to be defective, for the reason that it was not executed in pursuance of a resolution of the board of directors of the company. When the last-mentioned assignment was made, Chadbourne, the president of the company, and Myers, the secretary, were the owners of all the capital stock of the Midland Manufacturing Company. Livengood, it seems, had a lien on certain shares of the stock that were held in pledge for his benefit to secure a debt in the sum of about \$1,000 which Chadbourne owed him. The corporation to whom the invention belonged has never as yet questioned the validity of the assignment to Kelly, although that assignment was executed on March 23, 1893, and the patent was subsequently issued to parties who derived their right to the patent under

that assignment. Moreover, as we understand the evidence contained in the present record, the consideration received for the assignment of the invention to Kelly was the satisfaction of a certain indebtedness which the Midland Manufacturing Company owed Kelly, and which that company also owed Knight and Alderson for professional services that had been rendered for and in behalf of the company. It also appears from the testimony that, although the assignment was not formally authorized by the board of directors, yet that Chadbourne and Myers, who owned all the stock of the company, after a full consideration of the condition of the company concluded to execute the assignment, as the company was at the time insolvent and unable to further prosecute its business. In view of these facts, we are constrained to hold that the defendants in this suit cannot successfully challenge the complainant's title to patent No. 495,944. We are of opinion that the Midland Manufacturing Company is alone entitled to question the validity of the assignment which was executed by its president and secretary, and that none of the defendants occupy such a relation to that company as entitles them to complain of a sale of a corporate asset of which the company itself does not see fit to complain. It may be conceded that the sale of the patent in question to Edward Kelly was not within the scope of the ordinary powers of the president and secretary, but the act in question was not *ultra vires*, and it was clearly subject to ratification by the corporation. Inasmuch as four years have elapsed since the assignment was executed, and the corporation has shown no disposition to question its validity, and inasmuch as the assignment under which the complainant derives title is good and sufficient in form to transfer a legal title to the patent, we think that no third party—not even a person who has a lien on certain stock of the corporation—should be permitted to challenge the validity of the assignment in a collateral proceeding. 2 Mor. Corp. §§ 619, 626, 631, and cases there cited.

It results from these views that the decree dismissing the bill of complaint was erroneous. The decree of the circuit court is accordingly reversed, and the case is remanded to that court, with directions to enter a decree dismissing the bill at complainant's cost as to patents Nos. 358,898, 363,012, 386,360, and 456,239, and with further directions to enter a decree establishing the validity of patents Nos. 394,623 and 495,944 and the complainant's title thereto, with costs; also, with directions to award an injunction restraining the defendants from infringing claims 1, 2, and 3 of said patent No. 394,623, and claim 5 of patent No. 495,944; and also with directions to order an accounting as to the profits realized by the defendants and the damages sustained by the complainant in consequence of the infringement of the above-specified claims of the two patents last described.

BAILEY v. BERKEY et al.

(Circuit Court, N. D. California. July 12, 1897.)

No. 12,350.

1. TAXATION—LIABILITY OF ASSESSOR FOR MALICIOUS EXCESSIVE ASSESSMENT.

An assessor, though acting judicially when listing property for assessment, and not liable for mere errors or mistakes of judgment, is liable for damages resulting from an excessive assessment made maliciously or corruptly.

2. SAME—PLEADING.

In an action against an assessor to recover damages for an excessive assessment maliciously made, allegations as to the existence of a mortgage on the property assessed are material and germane.

Action at law against an assessor and the sureties on his official bond to recover \$10,000 damages for an excessive assessment alleged to have been made maliciously upon plaintiff's property. Demurrer that the complaint does not state facts sufficient to constitute a cause of action. Demurrer overruled. Motion to strike out parts of the complaint denied.

A. P. Catlin (J. H. McKune, of counsel), for plaintiff.
Elwood Bruner, for defendants.

MORROW, Circuit Judge. This is an action on the case to recover the sum of \$10,000 damages for an excessive assessment upon plaintiff's real property, situate in the county of Sacramento, state of California. The complaint alleges that the plaintiff is a citizen of the state of New York, and that the defendants are, and have been for more than four years next preceding the commencement of this action, citizens of the state of California. The defendant F. H. Berkey is alleged to have been the duly elected, qualified, and acting assessor in and for the county of Sacramento, state of California, and that the other defendants are the sureties on the official bond of the said Berkey as assessor. The complaint further avers that the defendant Berkey, as such assessor, listed the real property of plaintiff for the fiscal years 1896 and 1897, and in said list valued the improvements on said property at the sum of \$40,300, when in fact the value of the said improvements did not exceed the sum of \$20,000; that in making such valuation the defendant Berkey did not honestly or fairly fix in said assessment list said valuation at \$40,300 according to his judgment, but, on the contrary, well knowing that the said improvements were not of any greater value than \$20,000, fraudulently, and with a distinct intention on his part to oppress and injure the plaintiff and compel him to pay taxes on \$20,300 over and above the actual value of such improvements, listed the said improvements at the valuation of \$40,300, and returned said list so fraudulently and wrongfully made to the board of equalization of the said city of Sacramento; that plaintiff subsequently applied to the board of equalization to reduce the aforesaid wrongful valuation of said improvements, which application the said defendant Berkey, with the aforesaid intent to oppress

and injure plaintiff, did then oppose, and, moved thereunto by such opposition, said board refused to reduce said valuation, and the proper authorities of said county levied as a tax on said improvements the sum of \$1.45 on each \$100 of such valuation. It is further alleged that on the 30th day of January, 1895, the board of regents of the University of California loaned the plaintiff \$30,000 of the funds of said university in their charge as such regents, and to secure the payment thereof the plaintiff executed and delivered to said regents his mortgage, mortgaging to them the real estate hereinbefore described, which mortgage, before the first Monday in March, 1895, was duly recorded in the office of the county recorder of said county of Sacramento, where the same remains of record, and is in full force and effect, and unsatisfied in whole or in part, of which mortgage defendant Berkey at the time he made such list had actual knowledge; that said mortgage is not lawfully subject to assessment for taxation. It is further averred that the defendant Berkey, in listing the property of plaintiff as above stated, has been guilty of oppression, fraud, and malice, actual and presumed. Besides the actual damages complained of, the plaintiff asks for exemplary damages. A demurrer is interposed to the complaint on the ground that it does not state facts sufficient to constitute a cause of action. A motion is also made to strike out all that part of the complaint which avers the mortgaging of the property as contained in the ninth and tenth allegations.

The demurrer raises the important question whether an action can be maintained against an assessor for maliciously making an excessive assessment upon the plaintiff's property, with intent to injure and oppress him. There is undoubtedly considerable conflict of authority on the proposition. Such an eminent jurist as Judge Cooley maintains that, as the duty of an assessor in listing the value of property for taxation is of a judicial character, that officer is clothed with a complete immunity from private suits, not alone for mere errors of judgment, but for his willful, malicious, and corrupt motive in making an excessive assessment. Cooley, *Tax'n*, p. 556. To the same effect are Mechem, *Pub. Off.* p. 424, § 640, and the following cases: *Wilson v. Mayor, etc.*, of New York, 1 Denio, 595; *Weaver v. Devendorf*, 3 Denio, 117; *Gaslight Co. v. Donnelly*, 93 N. Y. 557; *Steele v. Dunham*, 26 Wis. 393. The only recourse, according to this line of authority, lies in a criminal proceeding against the delinquent assessor for his malicious and corrupt conduct. On the other hand, what seems, at the present day, to be the greater and better weight of authority supports the doctrine that while assessors are not liable to private suits for mere errors or mistakes of judgment in making excessive assessments upon property, so long as they had jurisdiction to make the assessment, they will be held liable in damages for making an excessive assessment with a malicious, corrupt, or other sinister motive. The general rule is thus summarized in 19 *Am. & Eng. Enc. Law*, p. 486:

"It may be laid down as a general rule that a judicial officer acting within his jurisdiction is not liable, in an action for damages, for any judgment he

may deliver. And for the purpose of exemption under this rule an officer who acts judicially for the time being is considered a judicial officer, although he may also perform ministerial duties. In order to be entitled to this protection, however, the officer must act within his jurisdiction, and in good faith, without fraud or malice; and the burden of proof is on the plaintiff to show that the officer acted maliciously and in bad faith."

The following cases recognize the general rule referred to: *Gould v. Hammond*, 1 McAll. 235, Fed. Cas. No. 5,638; *Gregory v. Brooks*, 37 Conn. 365; *Porter v. Haight*, 45 Cal. 631; *Green v. Swift*, 47 Cal. 536; *McCormick v. Burt*, 95 Ill. 263; *Elmore v. Overton*, 104 Ind. 548, 4 N. E. 197; *Gregory v. Small*, 39 Ohio St. 346; *Burton v. Fulton*, 49 Pa. St. 151; *Morgan v. Dudley*, 18 B. Mon. 693; *Chrisman v. Bruce*, 1 Duv. 63; *Ballerino v. Mason*, 83 Cal. 447, 23 Pac. 530; *Keenan v. Cook*, 12 R. I. 52; *Parkinson v. Parker*, 48 Iowa, 667; *Williams v. Weaver*, 75 N. Y. 30; *Apgar v. Hayward*, 110 N. Y. 225, 18 N. E. 85. See, also, cases cited in the above citation from 19 Am. & Eng. Enc. Law, p. 489. It may be observed, further, that there is another line of cases which makes a distinction between public officials who are judges and justices of the peace (that is, those who act in a distinctively and exclusively judicial capacity) and those other public officials who act merely in a quasi judicial capacity, such as assessors and the like. *Pike v. Megoun*, 44 Mo. 491; *Elmore v. Overton*, 104 Ind. 548, 4 N. E. 197; *Upshur Co. v. Rich*, 135 U. S. 467, 10 Sup. Ct. 651; *Cooley*, Torts (2d Ed.) p. 480, and cases there cited. In *Pike v. Megoun*, supra, it was said:

"An action, then, does not lie against judges or magistrates, or persons acting judicially, in a matter within the scope of their jurisdiction, however erroneous their judgment, or corrupt and malicious their motives. But there is a limit to this judicial immunity. The civil remedy depends exclusively upon the nature of the duty which has been violated. When duties which are purely ministerial are cast upon officers whose chief functions are judicial, and the ministerial duty is violated, the officer, although for most purposes a judge, is still civilly responsible for such misconduct. And the same rule obtains where judicial functions are cast upon a ministerial officer. But to render a judge acting in a ministerial capacity, or a ministerial officer acting in a capacity in its nature judicial, liable, it must be shown that his decisions were not merely erroneous, but that he acted from a spirit of willfulness, corruption, and malice; in other words, that his action was knowingly wrongful, and not according to his honest convictions in respect of his duty."

The distinction made appears to me to be a correct and logical one. It certainly tends to remove much of the perplexity that would otherwise attend the subject. The reasons why a judge, justice of the peace, or a juror should be completely exempted from private suits for their judicial acts are much stronger, from the standpoint of public policy, than apply to a public officer discharging quasi judicial functions, such as an assessor. As was well said in *Scott v. Stansfield*, L. R. 3 Exch. 220:

"This provision of the law is not for the protection or benefit of a malicious or corrupt judge, but for the benefit of the public, whose interest it is that the judges should be at liberty to exercise their functions with independence, and without fear of consequences."

Many of the cases cited by counsel for defendants involved suits where it was attempted to sue judges, justices of the peace, and jurors.

These cases are therefore to be distinguished from the case at bar. The authorities in this state—keeping in mind the distinction heretofore made between judicial officers and those acting in a quasi judicial capacity in connection with their ministerial duties—accord with the rule that where malice is expressly alleged, as in the case at bar, a suit can be maintained against an assessor for an excessive assessment. In *Ballerino v. Mason*, 83 Cal. 447, 23 Pac. 530, a suit was brought against a county assessor and the sureties upon his official bond, as in the case at bar, alleging that the assessor willfully and against law assessed a tract of land belonging to plaintiff at an unlawful and false valuation, which was largely in excess of a sum alleged to be its highest actual value for agricultural purposes. It was held that the averment of the value of the property, to wit, "highest actual value for agricultural purposes," was insufficient, and, further, that the averment that the assessment was willful and against law, without an averment that he acted maliciously and with intent to wrong or injure the owner of the property, did not negative the presumption that he simply erred in judgment, for which he was not liable to an action. In other words, it was there held that as the complaint did not aver, among other things, that the assessor had been actuated by malice, the demurrer should be sustained. The effect of this decision, so far as it is applicable to the present case, is to hold that, had there been an averment of malice in the complaint, the demurrer would have been overruled, and the suit could have been maintained; assuming, of course, that the complaint was sufficient in other respects. In *Porter v. Haight*, 45 Cal. 631, it was held that the board of state prison directors, in annulling a contract they had made for the employment of convict labor, acted in a judicial, and not a ministerial, capacity, for which, if they acted without fraud or malice, they did not incur any personal liability. In *Green v. Swift*, 47 Cal. 536, it was held that a board of commissioners appointed by an act of the legislature, with power to turn or straighten the channel of a river in order to protect a populous portion of the country from threatened inundation, are not liable for damages to others caused by the work, resulting from mere errors of judgment in the commissioners, provided they keep within the scope of their powers, and exercise their judgment honestly, and do not act maliciously, oppressively, or arbitrarily. Mr. Justice Wallace, in rendering the opinion of the court, said:

"They [the commissioners] were to exercise their judgment honestly, and to do the work, of course, with proper care and caution, and not maliciously, oppressively, or arbitrarily, to the injury of the rights of other persons. But, keeping within the scope of these powers, they are not to be held liable for mere errors of judgment, nor for injuries to others resulting from the work itself, if properly performed and with due care. Otherwise, as remarked by Lord Kenyon, every statute of this character 'would give rise to an infinity of actions,' " citing *Governor, etc., v. Meredith*, 4 Term R. 796.

In *Gas Co. v. January*, 57 Cal. 614, where it was sought to restrain the defendant from proceeding to enforce the collection of taxes upon the valuation as fixed by the assessor, it was said by the court:

"The duty of making the valuation was cast upon the assessor. The method of arriving at the valuation, the process by which his mind reached the conclusion (in case where, as here, it is not pretended that he acted fraudulently or dishonestly), is matter committed to his determination."

The case of *Gould v. Hammond*, a decision rendered in this court in 1857, and reported in 1 McAll. 235, Fed. Cas. No. 5,638, is also in point. In that case an action was brought against the defendant to recover damages arising from an alleged illegal sale of goods under his order as collector of the port of San Francisco. It is true that no fraud or other corrupt motive was imputed to the defendant, but Judge McAllister, in stating the general rule as to when suits could be brought against an officer acting judicially, said:

"Being pro hac vice a judicial officer, the defendant is not liable to an action if he falls into an error in a case where the act done is not merely ministerial, but one in relation to which his duty is to exercise his judgment and discretion, although an individual may suffer by his mistake. [Citing *Kendall v. Stokes*, 3 How. 87.] If a discretion was reposed in him by law, the defendant is not punishable, unless it be first proved either that he exercised the power confided in cases not within his jurisdiction, or in a manner not confided to him, as with malice, cruelty, or willful oppression."

The learned judge refers to the case of *Otis v. Watkins*, 9 Cranch, 339, in support of his reasoning. In that case the question arose whether a collector of port was justified, under the embargo law of April 25, 1808 (2 Stat. 499, § 11), in detaining a vessel if he in fact entertained an opinion that the law was about to be violated. It is obvious that the action of the collector in that case was discretionary, and of a quasi judicial nature. The case came up in the supreme court with reference to certain instructions which the court below gave, in its charge, to the jury. Mr. Justice Livingston, in delivering the opinion of the court, said:

"The charge is deemed incorrect in another respect. The jury was told that it was the collector's duty to have used reasonable care in ascertaining the facts on which to form an opinion. This instruction implies that the collector is liable if he form an incorrect opinion, or if, in the opinion of the jury, it shall have been made unadvisedly, or without reasonable care and diligence. But the law exposes his conduct to no such scrutiny. If it did, no public officer would be hardy enough to act under it. If the jury believed that he honestly entertained the opinion under which he acted, although they might think it incorrect and formed hastily or without sufficient grounds, he would be entitled to their protection. Such was the opinion of the court in the case of *Crowell v. McFadden*, 8 Cranch, 94, decided at the last term. This does not preclude proof on the part of the plaintiffs showing malice or other circumstances which may impeach the integrity of the transaction."

And Mr. Chief Justice Marshall, delivering a separate opinion in the same case, said:

"If it can be proved, either from the gross oppression of the case, or from other proper testimony, that the collector did not in fact entertain the opinion under which he professed to act, some doubt may be entertained of his being justified by law; but if the opinion avowed was real, though mistaken, a detention under that opinion is lawful."

See, also, *State v. Central Pac. R. Co.*, 7 Nev. 99, where it is strongly maintained that an assessor will not be protected for excessive assessments fraudulently made, and that, in a suit by the state to recover

taxes under a fraudulent assessment, this was good matter of defense. The case of *Turpen v. Booth*, 56 Cal. 65, cited by counsel for defendants, was a case where it was attempted to sue a grand juror for his alleged erroneous and malicious conduct as such. Manifestly, such a judicial officer should be clothed with a complete immunity from private suits. See, in this connection, the leading case of *Yates v. Lansing*, 5 Johns. 291.

Although the proposition is not entirely free from doubt, still I think the better rule to follow is that an assessor, although acting judicially when listing property for assessment, and not liable for mere errors or mistakes of judgment, is nevertheless liable to be sued for damages resulting from an excessive assessment made maliciously or corruptly. As the complaint in this case alleges specifically that the excessive assessment was made maliciously, with intent to oppress and injure the plaintiff, the demurrer should be overruled, and it is so ordered.

With reference to the motion to strike out the ninth and tenth allegations, relating to the mortgaging of the property alleged to have been excessively assessed, on the ground that such allegations are immaterial, it is sufficient to say that I regard the allegations as material and germane to the allegations of excessive assessment. The motion to strike out is therefore denied.

WADE v. TRAVIS COUNTY, TEX.

(Circuit Court of Appeals, Fifth Circuit. June 16, 1897.)

No. 527.

1. **VALIDITY OF COUNTY BONDS—CONSTITUTIONAL REQUIREMENT TO LEVY TAX TO PAY.**

The provision of Const. Tex. art. 11, § 7, that "no debt for any purpose shall ever be incurred in any manner by any city or county, unless provision is made at the time of creating the same for levying and collecting a sufficient tax to pay the interest thereon and provide at least two per cent. as a sinking fund," applies to all cities and counties, and is not restricted to counties and cities bordering on the Gulf coast, which, by the preceding sentence of that section, are authorized to levy and collect a tax for the construction of sea walls, breakwaters, or other sanitary purposes, and to create a debt therefor, and issue bonds in evidence thereof.

2. **FEDERAL COURTS—STATE DECISIONS.**

A decision of the highest court of a state construing a provision of the state constitution limiting the power of counties and cities as to the creation of debts, is binding on the federal courts.

Error to the United States Circuit Court for the Western District of Texas.

J. P. Blair, T. B. Cochran, Robt. G. West, and T. W. Gregory, for plaintiff in error.

Franz Fiset, for defendant in error.

Before PARDEE, Circuit Judge, and NEWMAN, District Judge.

NEWMAN, District Judge. Suit was brought in the United States circuit court for the Western district of Texas by the plaintiff in error against the defendant in error, Travis county, Tex., to recover upon interest coupons which had been detached from 47 bonds issued by Travis county for the purpose of building an iron bridge across the Colorado river. The coupons were for \$60 each. The defendant demurred to plaintiff's petition, the demurrer was sustained, and an exception duly entered. The question in the case is whether the bonds issued by the county of Travis, and from which the coupons sued on were detached, were issued in conformity to law and to the constitution of Texas on the subject. This question of the validity of the bonds depends first and mainly on the construction of a provision of the constitution of Texas,—section 7, art. 11. Section 7 is as follows:

"All counties and cities bordering on the coast of the Gulf of Mexico are hereby authorized, upon a vote of two thirds of the taxpayers therein (to be ascertained as may be provided by law) to levy and collect such tax for construction of sea walls, breakwaters or sanitary purposes as may be authorized by law, and may create a debt for such works and issue bonds in evidence thereof. But no debt for any purpose shall ever be incurred in any manner by any city or county, unless provision is made at the time of creating the same for levying and collecting a sufficient tax to pay the interest thereon and provide at least two per cent. as a sinking fund; and the condemnation of the right-of-way for the erection of such works shall be fully provided for."

The contention for the defendant in error is that the latter clause of this section, that "no debt for any purpose shall ever be incurred in any manner by any city or county, unless provision is made," etc., is applicable to the contract made by the county for the building of this bridge, and that, the petition of the plaintiff failing to show compliance with it, the contract is void, the bonds illegally issued, and the county not bound for their payment. The contention, on the other hand, is that the language of this last clause must be read in connection with the preceding portion of the section, and, taking that section together with existing conditions, and the action of the constitutional convention in connection with the adoption of this section, that this last clause must be held, as the former part of the section, to apply only to the counties bordering on the coast of the Gulf of Mexico. It is said that immediately preceding the action of the convention in placing this section in the constitution a great hurricane had swept over the Gulf coast, causing the city of Galveston to be submerged, and resulting in much destruction to life and property on the entire coast. It is said that this caused section 7 to be placed in the constitution, and that it must be read and construed in the light of the situation at that time. We do not understand this last clause to be so restricted. It seems to us to be entirely separate from the preceding part of the section, and to refer to all the cities and counties of the state. Judge Maxey so held in the court below, and we agree with him that this is the proper construction of the section. 72 Fed. 985. This is the view heretofore taken by this court of this section of the constitution of Texas, as will be seen by an examination of the cases of *Millsaps v. City of Terrell*, 8 C. C. A. 554, 60 Fed. 193, and *Quaker*

City Nat. Bank. v. Nolan Co., 14 C. C. A. 157, 66 Fed. 883. While the question made here was not distinctly made in those cases, the court seems to act in both cases upon the assumption that the construction which applies the latter part of the section to all cities and counties in the state is the correct one. But, even if the question was doubtful here, we would be controlled by the decisions of the supreme court of Texas construing this provision of the state constitution. An examination of the decisions of that court leaves no doubt that its construction is in accordance with that of the circuit judge in the case at bar.

In the opinion of the court in the case of *City of Terrell v. Dessaint*, 71 Tex. 770, 9 S. W. 593, this language is used:

"Section 7 of the same article contains this still more emphatic declaration: 'But no debt for any purpose shall ever be incurred in any manner by any city or county, unless provision is made at the time of creating the same for levying and collecting a sufficient tax to pay the interest thereon, and to provide at least two per cent. as a sinking fund.' In *Corpus Christi v. Woessner*, 58 Tex. 462, it was intimated that there might be a question whether the provisions quoted applied to cities other than such as have more than ten thousand inhabitants; but the determination of the point was not necessary to the decision of that case, and it was not decided. The question is presented in the case before us, and we are of opinion that they must be held to apply to all cities alike. It is true that section 5 relates mainly to cities having more than ten thousand inhabitants, and provides that they may be chartered by special acts of the legislature, and fixes the limits of their taxing power. Section 7 also relates in the first place to counties and cities upon the sea coast, and authorizes them to levy and collect taxes for the construction of sea walls, breakwaters, and sanitary purposes, and to create debts for these objects. But the provisions we have quoted contain no word or words which restrict their application to the cities previously mentioned in the same section. The language is general and unqualified, and we find nothing in the context to indicate that the framers of the constitution did not mean precisely what is said; that is, that no city should create any debt without providing by taxation for the payment of the sinking fund and interest."

In the case of *Nolan Co. v. State*, 83 Tex. 182, 17 S. W. 823, the latter clause of the section of the constitution under consideration is treated as applying to all counties of the state. Page 200, 83 Tex., and page 829, 17 S. W.

It is said that in deciding the case of *City of Waxahachie v. Brown*, 67 Tex. 519, 4 S. W. 207, the court took a different view of this clause of section 7, and in fact restricted its application to cities and counties bordering on the Gulf of Mexico; and that decision, it is argued, entered into and became a part of the contract for building the bridge and issuing the bonds in the case here. Without determining whether or how far that decision of the supreme court, even if it went to the extent claimed, would have the effect indicated, it is sufficient to say that an examination of that case shows that it was not the intention of the court to construe this clause of the constitution at all. The only mention made in that decision of this provision of the constitution was incidental, and only made in the summing up of the different constitutional provisions bearing upon the question under consideration in that case. The question made here was not made there, and there was evidently no intention on the part of the court to decide it. The

opinion we entertain of the proper construction of this clause of the constitution, the former decisions of this court, and the decisions of the supreme court of the state of Texas all combine to sustain the circuit judge in his decision on this question in the court below. The opinion in *Brazoria Co. v. Youngstown Bridge Co.* (recently decided in this court) 80 Fed. 10, is in harmony with, and fully supports, the conclusions herein announced. The judgment of the court below sustaining the demurrer to the plaintiff's declaration should be affirmed, and it is so ordered.

DEFRIER et al. v. THE NICARAGUA.

(District Court, S. D. Alabama. April 10, 1897.)

No. 764.

1. SHIPPING—TREATMENT OF PASSENGERS—LODGING, BEDDING, ETC.

Passengers who come aboard a vessel mainly engaged in the carriage of freight, after the cabin room is all taken, and who for two days, while loading is going on, make no claim to cabin accommodations or for bedding, are to be considered as impliedly agreeing that their ship room and quarters are to be on deck, and that such accommodations are to be deemed reasonable.

2. SAME.

A vessel is not bound, in the absence of special contract, to furnish bedding for steerage or deck passengers.

3. SAME—INSUFFICIENCY OF FOOD.

In the absence of special contract to the contrary, a vessel is bound to furnish a sufficient quantity of suitable food for deck passengers, and is liable in damages for the master's failure to do so when it is within his power.

4. SAME—DAMAGE TO BAGGAGE.

Deck passengers, whose baggage is not in trunks, and who keep it in their own possession, cannot hold the ship liable for its loss or damage.

This was a libel by Joseph Defrier and others against the steamship Nicaragua to recover damages suffered because of alleged insufficiency of food and accommodations furnished to them as passengers.

Smith & Gaynor, for libelants.

Pillans, Torrey & Hanaw, for claimant.

TOULMIN, District Judge. A person who undertakes, though only on that particular occasion, to carry for hire, without special contract, incurs the responsibility of a common carrier. 2 Add. Cont. p. 715, and note. A contract for passage by water implies something more than ship room and transportation. It includes reasonable comforts, necessities, and kindness, and suitable food and the common means of relief in cases of sickness. *Chamberlain v. Chandler*, 3 Mason, 242, 5 Fed. Cas. 413. It is the duty of the common carrier by water to provide his passengers with comfortable accommodations, and with a sufficient supply of wholesome food, unless there is a contract to the contrary or a fair understanding to the contrary; and the carrier must subject his passengers to no suffering or inconvenience which can be avoided by reasonable care and effort. While the carrier has no right to carry an additional passen-

ger when his vessel is already so full that by the additional passenger other passengers are made uncomfortable, yet the added passenger might have no right to complain, and would not if he knew what annoyance and discomfort he must encounter by going on board. 1 Pars. Shipp. & Adm. p. 615.

In view of these general principles, let us consider this case. The evidence does not establish to my satisfaction that there was any special contract for passage; that is, that the contract provided for any particular kind of passage, or specified the character of accommodations to be furnished. That first-class passage and accommodations were not to be furnished is clear, and that the libelants so understood it is equally clear. But the contract implied something more than transportation. It included reasonable comforts and food,—reasonable in view of the circumstances; reasonable in view of the fact that the vessel had only cabin accommodations for a few passengers, and these were for first-class or cabin passengers, and in view of the fact that the vessel was mainly a freight vessel, and on this occasion with a full cargo of fruit in her hold and below decks, with no berths or below-deck room for passengers. These facts must have been well known to the libelants before they engaged their passage; at least, before they paid their passage money and concluded their contract for transportation. They had been two days aboard the vessel. They had seen the cargo coming aboard and being stored away. They saw what the cabin accommodations were, and had not undertaken to occupy them, or to claim the right to do so. They saw that the vessel had no other comfortable accommodations for passengers, and they had contented themselves for the two days they had been aboard with deck passage and accommodations, as far as ship room was concerned. So far as the evidence shows, they made no inquiry as to where they were to lodge, or to be protected from the weather. When in the confusion and crowding by the presence of a large number of men engaged in loading the vessel, and also by the cargo itself, they did ask, when at Livingston, if they were not to be better treated, and were told that, when they got off to sea, they would be cared for, or something to that effect. But in all this we hear no complaint about the absence of bedding and their lodging place, and no demand for cabin accommodations. Now, in view of all these circumstances, my opinion is that there was a fair understanding that their ship room and quarters were to be on deck, and that these, under the circumstances, were to be deemed reasonable accommodations. They doubtless would have been comfortable accommodations, at least reasonably so, and would have been satisfactory to libelants, had it not been for the rain and wind that was encountered on the voyage. Notwithstanding this, the master should have subjected these passengers to no suffering or inconvenience which could have been avoided by reasonable care and effort. There is no allegation that the inconvenience and discomfort to which libelants were subjected could have been avoided by reasonable care and effort. But it is alleged that, by the contract, the master undertook, and it was his duty, to furnish bedding and lodging. Under the

law, and according to the usage as proved, the libelants, even if they had been steerage passengers, were not entitled to have bedding furnished by the vessel, and, as I have said, there was no special contract providing for it in this case. It is also alleged in the libel that libelants were exposed to the burning sun, and that the master refused to allow them the use of an awning. The proof shows that the awnings were up every day during sunshine, but it tends to show that they were taken down when it rained. The testimony, however, is not altogether harmonious on this point. There is some evidence that the awnings were taken down whenever it rained, and that it usually rained at night, and there is evidence that they were taken down only when there was a squall or an unusually strong wind. There was no cabin accommodation for these passengers, and no room in the below decks for them. The former was for the first-class passengers, and in the latter the cargo occupied the space. From this state of the evidence, I find some difficulty in determining whether the suffering and discomfort to which the libelants were subjected could or could not have been avoided by reasonable care and effort, so far as ship room and lodging were concerned. The defense has failed to aid the court in the consideration of this question by any evidence on the subject. But I have no such difficulty so far as the food was concerned. The evidence shows that a sufficiency of good or suitable food was not furnished, and that the master failed in his duty in this regard.

The main difficulty I have had in the case is to determine the question of damages. What amount of damages should be awarded to the libelants? There is no real ground of complaint, no right of action, unless the passenger has really been a sufferer from an insufficient supply of food, or from a failure to supply good and wholesome food. I find from the evidence that there was a failure to supply a sufficiency of good and wholesome food, and that the libelants were sufferers therefrom, some more and some less. Those who were sick must naturally have suffered more, but I am not satisfied that the master's failure to supply a sufficiency of proper food was the cause of their sickness. It might have rendered them less able to resist the effects of their sickness, but I do not find that bad food or the insufficiency of suitable food was the natural or direct cause of their sickness. I cannot therefore discriminate between the libelants on account of the sickness of some of them. I do not think this is a case for exemplary or punitive damages against the vessel and owners, and I shall award none. But it was within the power of the master to have given the libelants better food, and it was his duty to do so, and his refusal or failure to do it was a breach of duty under his contract, for which the vessel and owners are liable. They are liable to make compensation for the whole injury suffered by the libelants in body and mind, not as a punishment to the defendants, but as compensation to the libelants. *Railway Co. v. Prentice*, 147 U. S. 101, 13 Sup. Ct. 261.

Baggage belonging to a steerage passenger is in his exclusive possession, and the owners of the vessel are not liable for its loss or dam-

age (*Cohen v. Frost*, 2 Duer, 335; *The St. Mary*, 2 Blatchf. 330, Fed. Cas. No. 12,242), and any passenger taking baggage under his own control carries it at his own risk (2 Add. Cont. p. 733, par. 991; *Henderson v. Railroad Co.*, 123 U. S. 61, 8 Sup. Ct. 60). The proof is that the libelants, except Mrs. Edith Defrier and Joe Defrier, kept their baggage in their own possession. Those named had trunks, and they were not protected or properly cared for by the vessel. Their contents were damaged by water, and the vessel is liable therefor. I award Mrs. Defrier \$88 for the damage to her baggage, as shown by the evidence. She was allowed to occupy the cabin, and was fed from the master's table, and she makes no claim for damages other than for the damage to her baggage. I award Joe Defrier \$50 for the damage to his baggage, and to each of the libelants, except Mrs. Edith Defrier, I award the sum of \$50 as damages for their treatment, on the count as to the supply of food. A decree will be entered accordingly.

NORTH AMERICAN COMMERCIAL CO. v. UNITED STATES.

(Circuit Court of Appeals, Ninth Circuit. June 7, 1897.)

No. 337.

FORFEITURE OF VESSEL TO UNITED STATES—LIENS FOR SUPPLIES.

The forfeiture of a vessel to the United States does not cut off liens of innocent parties for supplies furnished in a foreign port prior to the act for which the forfeiture is declared. 74 Fed. 246, reversed.

Andros & Frank and Williams, Wood & Linthicum, for appellant.
Daniel R. Murphy, for appellee.

Before GILBERT and ROSS, Circuit Judges, and HAWLEY, District Judge.

GILBERT, Circuit Judge. The schooner *Louis Olsen* was on November 25, 1895, condemned as forfeited to the United States, for having, on September 2, 1895, killed fur seals within the prohibited zone of 60 miles around Pribilof Islands, in violation of the act of congress approved April 6, 1894. Under the decree of condemnation, the schooner was sold, and the proceeds of the sale were paid into the registry of the court. On December 9, 1895, the North American Commercial Company filed its libel of intervention against the vessel and the proceeds, alleging that in July, 1894, at the port of Dutch Harbor, a foreign port, at the request of the master of the *Louis Olsen*, and on the credit of the vessel, the company had furnished the vessel with provisions, supplies, and other necessities, amounting to \$400; that the vessel was then about to go upon a sealing voyage, and the said supplies were used by the vessel on the voyage upon which she was engaged when she was seized; that they were essential for such voyage, and were furnished in good faith, and without knowledge that any illegal venture or voyage was about to be undertaken. The United States filed an exception to the libel, as impertinent. The

exception was sustained, and a final decree was entered, dismissing the bill.

The intervener appeals from the decree, and on the appeal presents the question whether the condemnation of a vessel as forfeited to the United States defeats a maritime lien created in good faith prior to the illegal act for which the forfeiture is declared. This precise question does not appear to have been before presented for decision, except in the single case of *The Florenzo*, Blatchf. & H. 52, Fed. Cas. No. 4,886, to which reference will be made hereafter. Both the appellant and the appellee cite and rely upon the decision of the supreme court in the case of *The St. Jago De Cuba*, 9 Wheat. 410, in which it was held that forfeiture does not overreach maritime liens which attached between the date of the illegal act and the subsequent seizure of the vessel for forfeiture on account thereof. In that case, an American vessel, whose owner resided at the port of Baltimore, was sent out in ballast to Cuba. There she was colorably conveyed to a resident of that island, and was furnished with a Spanish coasting license, and thence she proceeded on a voyage to Havana, thence to Matanzas, where she was equipped for the African trade. On her voyage to the coast of Africa, she was pursued by hostile vessels, and was compelled to put into Baltimore to refit. While there, she was libeled by the United States for violation of the slave-trade acts, and was condemned as forfeited. On the appeal to the supreme court, the question arose whether the liens of material men who refitted her in Baltimore upon her return, and subsequent to the illegal acts for which she was forfeited, were subsisting liens upon the vessel, the material men claiming to have furnished the supplies upon the belief that the vessel was, as she claimed to be, a Spanish vessel, and that they were ignorant of the fact that in reality her home port was Baltimore. In discussing the question whether the prior forfeiture of the vessel to the United States should preclude the general rights of the material men, and place them on the footing of subsequent purchasers, whether with or without notice of the forfeiture, the court said:

"These questions are all solved by a reference to the nature, origin, and objects of maritime contracts. The precedence of forfeiture has never been carried further than to overreach common-law contracts entered into by the owner, and it would be unreasonable to extend them further. The whole object of giving admiralty process and priority of payment to privileged creditors is to furnish wings and legs to the forfeited hull, to get back for the benefit of all concerned; that is, to complete her voyage. There are two considerations that fully illustrate this position. It is not in the power of any one but the shipmaster—not the owner himself—to give these implied liens on the vessel; and in every case the last lien given will supersede the preceding. The last bottomry bond will ride over all that precede it, and an abandonment to a salvor will supersede every prior claim. The vessel must get on. This is the consideration that controls every other; and not only the vessel, but even the cargo, is sub modo subjected to this necessity. * * * We concur, then, in the opinion of the court below that the fair claims of seamen and subsequent material men are not overreached by the previous forfeiture."

Upon the part of the appellee it is urged that it is only because the supplies were furnished subsequent to the illegal act in the *St. Jago*

De Cuba Case that the lien therefor was protected by the court, and that the purpose of such protection was to sustain the ship's credit, and enable her "to get back for the benefit of all concerned; that is, to complete her voyage." If such were the reason upon which the decision in that case was based, the facts to sustain it did not exist in the record which was then before the court. At the time when the supplies were furnished the vessel, she was in her home port. It was there that she was seized, upon the libel of the United States. So far as the libellant was concerned, there was no benefit to be gained by her being fitted out to proceed thence to any other port. Indeed, the supplies were furnished to enable her to leave the jurisdiction of the United States, and proceed a second time upon an illegal voyage. The only ground on which a lien for supplies furnished after forfeiture can be favored is that it is for the benefit of the new title which vests in the United States. It certainly cannot be asserted as a general principle that all supplies furnished after the illegal act will result in benefit to the new title, or that it will be of advantage to the United States to enable a vessel to get on, no matter where she may be. We do not think it was the intention to place the lien upon so narrow a ground. The general principles announced in that case are broad enough to cover all cases where materials and supplies have been honestly furnished a vessel in a foreign port, to enable her to proceed. They apply as well to maritime liens created before the commission of the illegal act as to those subsequent thereto. The language above quoted, "The precedence of forfeiture has never been carried further than to overreach common-law contracts entered into by the owner," excludes from its operation all liens of material men, no matter at what date they may have attached.

In the later case of *The Siren*, 7 Wall. 152, the supreme court clearly intimated that such was the scope of its prior decision. Referring to the liens of material men, which were held to be protected in the *St. Jago De Cuba* Case, it said: "These claims arose subsequent to the illegal acts which created the forfeiture; yet they were not superseded by the claim of the government." It is the clear implication of this language that, if the claims had arisen prior to the illegal acts, in the opinion of the court still stronger reason would have existed for their protection, as against the claim of the government.

The Florenzo, Blatchf. & H. 52, Fed. Cas. No. 4,886, was a case of seizure for violation of the act of December 31, 1792, under which it was declared that "such ship or vessel, together with her tackle, apparel and furniture, shall be forfeited." It was held that the forfeiture, under the statute, does not avoid the liens of seamen and material men existing at the time of the forfeiture.

There are in other cases expressions of the opinions of admiralty courts upon this subject, which, while they fall short of actual adjudications, nevertheless indicate the views of judges learned in the law. In *U. S. v. Wilder*, 3 Sumn. 308-314, Fed. Cas. No. 16,694, Judge Story, in delivering the opinion of the court, said:

"It is by no means true that liens existing on particular things are displaced by the government becoming or succeeding to the proprietary interest. The lien of seamen's wages and of bottomry bonds exists in all cases as much against the government becoming proprietors, by way of purchase or forfeiture or otherwise, as it does against the particular things in the possession of a private person."

This language was quoted with approval by the supreme court in *The Siren*, 7 Wall. 160.

In *The Mary Anne*, 1 Ware, 104, Fed. Cas. No. 9,195, referring to the lien of an attaching creditor, whose lien was created prior to the seizure on which the vessel was forfeited to the United States, the court said:

"It is not a claim like that of seamen's wages, or that of material men, which overreaches the forfeiture. The attachment operates only to the extent of the debtor's interest, to whose rights, so far as his lien goes, the attaching creditor succeeds, while the maritime lien of seamen for their wages, and of material men for supplies and repairs, is a species of proprietary interest in the thing itself, which is independent of the title of any particular individual. It inheres in the thing, whoever may be the general owner."

The Maria, Deady, 89, Fed. Cas. No. 9,075, was a case of forfeiture, under section 27 of the registry act of December 31, 1792. The court said:

"Nor do I wish to be understood as admitting that a forfeiture of a vessel affects the lien of the crew thereon, unless such forfeiture is caused upon or by the voyage on which such wages are earned; and that, too, by the vessels being employed in some transaction or voyage which is made a crime for any one to aid or participate in, or the unlawful purpose of which is manifest to the commonest understanding."

In *The Ranier*, Deady, 438, Fed. Cas. No. 11,565, the same learned judge said:

"But if the forfeiture of the boat or an interest therein was absolute, and transferred the property therein from the time of the violation of the act to the United States, still it seems that it would be subject to the claims of the seamen and material men. The United States would take it as a purchaser cum onere."

In *The City of Mexico*, 28 Fed. 207, in a case of a seizure and forfeiture of a vessel, it was held that where the seamen have been ignorant of the character of the illegal voyage, and innocent of knowingly participating in the wrong, their wages will be paid in preference to the claim of the government, although the vessel may be forfeited.

In *The Jennie Hayes*, 37 Fed. 373, which was a case of seizure to recover penalties for violation of certain provisions of the Revised Statutes, the court said:

"The question for determination is as to the priority of the liens. The fact that the government has, by purchase, forfeiture, or otherwise, become the owner of a vessel, does not, ipso facto, displace or defeat liens in favor of seamen or material men, is settled by the decisions of the supreme court in the cases of *The St. Jago De Cuba*, 9 Wheat. 409, and *The Siren*, 7 Wall. 152."

Counsel for the appellee cites the case of *Six Hundred Tons of Iron Ore*, 9 Fed. 595, in which the court divides the statutes providing for

forfeitures into two classes,—the one forfeiting the offending res without reference to liens of innocent holders or the claims of bona fide purchasers without notice; the other only condemning the interest of the guilty owner, and preserving the rights of honest lienors or purchasers. In that case the court said:

"Whether the statute falls within one class or the other depends upon the phraseology used by congress in its enactment. Where it makes the forfeiture absolute, it is within the former class, and the forfeiture is incurred at the time of the commission of the act which works the condemnation, and the title is vested in the United States from that date. No matter how long afterwards proceedings are taken to enforce the forfeiture, the right of the government runs back, by relation, to the time of the commission of the wrongful acts, and cuts out all intervening claims, however innocent."

It is not to be supposed that, in expressing thus broadly the effect of a forfeiture, the court intended to include the material man's lien among the "intervening claims" which are extinguished thereby, for the *St. Jago De Cuba* Case holds directly to the contrary.

The light afforded by these decisions and the expressions of the courts, added to that to be derived from a consideration of the nature and purpose of the material men's lien and the policy of the law in recognizing the same, leads us to the conclusion that the right of a lienor, who in good faith has furnished supplies and materials to a vessel, in ignorance of any purpose on the part of her master or owners to devote her to an illegal use, should not be overreached by a subsequent forfeiture of the vessel. The lien, as has often been said, is created for the benefit of the ship, to enable her to reach her destination. It would seriously impair the power of her master to procure supplies in a foreign port upon her credit if the material man is to hold his lien subject to the contingency that the vessel may incur forfeiture under one of the many provisions of law, the violation of which would render her liable thereto. It would be of little avail to bestow such a lien, and at the same time to give the lienor so uncertain a tenure. We think that the exceptions should have been overruled. The decree of the court below will be reversed, and the cause remanded for further proceedings not inconsistent with these views.

McDONALD v. SELIGMAN et al.

(Circuit Court, N. D. California. June 22, 1897.)

No. 12,365.

1. FEDERAL COURTS—JURISDICTION—ANCILLARY PROCEEDING.

A bill in equity filed in the circuit court against the parties to an action at law, which has proceeded to judgment in said court, to enjoin the enforcement of such judgment, and for permission to the complainant to intervene in said action and set up a defense, is ancillary to the original action, so far as the question of jurisdiction is concerned, and may be maintained without regard to diversity of citizenship.

2. JUDGMENT—RES JUDICATA—EQUITY.

One who has filed a petition to be allowed to intervene and defend in an action at law in the circuit court between citizens of another state and a municipal corporation of which he is a citizen and a taxpayer, and whose petition has been denied on the ground that his status as a taxpayer did not entitle him to intervene, cannot afterwards maintain a bill in equity in said court to enjoin further proceedings in the action at law, and for leave to intervene therein.

C. N. Clement and T. O. Judkins, for complainant.

Jesse W. Lilienthal and J. W. Goodwin, for respondents.

MORROW, Circuit Judge. This is a bill in equity by Mark L. McDonald, a citizen of the state of California, against James Seligman and Isaac N. Seligman, residing and carrying on business as co-partners in the city and state of New York under the firm name and style of J. & W. Seligman & Co., and the city of Santa Rosa, a municipal corporation of the county of Sonoma, state of California, within the Northern district of California, to enjoin the respondents, James and Isaac N. Seligman, from further prosecuting an action at law pending in this court, and entitled "Seligman et al. v. City of Santa Rosa," until the final determination of this suit; and, further, that the complainant be permitted to intervene in said action at law, so that he may set up facts alleged in his bill to constitute a defense to said action, in order that the same may be tried and adjudicated upon its merits, and that such further and other relief may be granted to the complainant as he may, in equity and good conscience, be entitled to. The case now comes up on an order to show cause why the injunction prayed for, restraining the action at law referred to, should not be granted. The respondents, James and Isaac N. Seligman, have appeared specially, through their solicitor, Mr. Jesse W. Lilienthal, to resist said motion. The action at law, which it is now sought to restrain and enjoin, was brought in this court by James and Isaac N. Seligman, the two respondents in the present suit, against the city of Santa Rosa, the other respondent in this suit, to recover the sum of \$10,395, alleged to be due the plaintiffs on account of 5 bonds, with 190 coupons, issued by the city of Santa Rosa. That case was submitted to the court on the complaint and the answer, and, after due consideration, judgment was entered in favor of the plaintiffs, James and Isaac N. Seligman, the respondents in the present suit, for the sum of \$10,131. See opinion filed April 10, 1897. 81 Fed.

524. Subsequent to the submission, and previous to the rendition of the decision, of that case, Mark L. McDonald, the complainant in this suit, applied to the court for leave to intervene in that action, on the ground that he was a resident and taxpayer of the city of Santa Rosa, and desired to resist the payment of the bonds and coupons in controversy in that case; it being claimed that said bonds were illegal, and that a proper defense was not being made by the defendant the city of Santa Rosa. This motion was opposed by the plaintiffs on the grounds, among others, that the motion came too late; that, even if it were in time, the court would have no jurisdiction over the intervention, for the reason that the intervenor was a citizen of this state, and that, as between him and the city of Santa Rosa, there would be a lack of diversity of citizenship; that the status of McDonald, as a taxpayer, did not entitle him to intervene and object to the payment of the bonds. The motion for leave to intervene was denied, and with respect to the last two grounds urged in opposition to the motion to intervene this court said:

"This is an action over which the circuit court has jurisdiction by reason of the diverse citizenship of the parties. The complainants are citizens of New York, and the respondent is a municipal corporation of this state. The proposed intervention is by a citizen also of this state, and his controversy is with the respondent. His complaint is that the respondent is not properly defending the action. In the case of United Electric Securities Co. v. Louisiana Electric Light Co., 68 Fed. 673, it was determined that the circuit court has no jurisdiction over such a controversy unless the controversy between plaintiff and defendant is one which draws to the court the possession and control of defendant's property, in which the intervenor claims some interest. It is contended, however, that this case does draw to the court the possession of property in which McDonald, as a taxpayer, has an interest, namely, the fund out of which the bonds and coupons are to be paid. But I do not understand that the doctrine of the case cited has any such scope. It certainly does not mean that any person may come into a case as an intervenor who has an interest in a fund provided by a corporation for the payment of a debt, the possession of which fund is retained by the corporation, but it must mean that the property of the corporation in which the intervenor claims an interest must be property that the court has obtained possession and control of for some purpose connected with the case. That is clearly not this case. The next objection is that the status of McDonald as a taxpayer does not entitle him to intervene in this case. It appears by the complaint that the money to pay these bonds and coupons has been raised by taxation, and is in the treasury for that purpose, but the payment has been enjoined by proceedings in the state courts. This is admitted by the answer. A taxpayer may intervene to stop an illegal levy while his property is subject to taxation, because such a levy would cast a cloud upon the title to his property. But I do not understand that this principle can be extended to an intervenor where the money has been collected and is in the treasury for the purpose of paying a specific debt. In *Kilbourne v. St. John*, 59 N. Y. 21, the court said: 'To permit every taxpayer in the state who believes that a tax for an unconstitutional purpose had been imposed by the legislature to commence an action in equity against the state treasurer to restrain him from applying the proceeds in his hands to the purpose directed, and compel him to distribute the fund among the taxpayers of the state, and, upon the same principle, every taxpayer of a city, county, town, or other municipal corporation to maintain a like action for like purposes against the official custodian of its funds, upon the ground that the tax, or some portion, was not authorized by law would, I think, lead to most alarming results. It would be the direct opposite of one of the acknowledged sources of equity jurisdiction, which is that it exists when necessary to prevent a great number of suits. This would, I think, inevitably cause an immense number.' There is nothing in the statement of this motion that in my judgment shows any right of intervention."

The motion for leave to intervene having been denied, McDonald thereupon brought this bill to enjoin the action at law, and to obtain leave to intervene and defend in that action. In other words, it is sought by the bill in equity to accomplish what this court determined could not be done by intervention. It may be observed, further, that no appeal was taken from the order of this court, in the action at law, denying the motion to intervene, and it therefore stands unreversed.

It is objected by counsel appearing specially for the respondents, James and Isaac N. Seligman, in opposition to the motion for the injunction, that the court has no jurisdiction of this suit, as the complainant and the city of Santa Rosa, one of the respondents, are both citizens of the state of California. The bill, on its face, conclusively shows this to be the fact, and it is the well-settled rule that, in order to give the circuit court jurisdiction on the ground of diverse citizenship, this diversity of citizenship must exist between the complainant and all of the respondents. If one or more of the complainants and one or more of the respondents are citizens of the same state, it is fatal to the jurisdiction of the circuit court on the ground of diversity of citizenship. *Coal Co. v. Blatchford*, 11 Wall. 172; *Case of the Sewing Machine Companies*, 18 Wall. 553, 574; *Vannevar v. Bryant*, 21 Wall. 41; *Removal Cases*, 100 U. S. 457, 469; *Thayer v. Association*, 112 U. S. 717, 5 Sup. Ct. 355. But it is contended by counsel for complainant that this defect is immaterial, so far as the present suit is concerned, as it is an auxiliary, and not an original, suit; it being claimed that it is but ancillary to, and a continuation of, the action at law referred to. It therefore becomes necessary to determine whether the bill is original or ancillary. The bill seeks to stay the enforcement of the judgment rendered in favor of the respondents, James and Isaac N. Seligman, who were the complainants in the case of *Seligman et al. v. The City of Santa Rosa*, until the complainant in the present suit can intervene in, and present his defense to, said action. The bill further shows that the defense to be made to said action is that the issue of the bonds in question was illegal and void, and that this defense was not presented in the action at law by reason of the collusion and fraud of the defendant in that action, the city of Santa Rosa, and the plaintiffs therein, James and Isaac N. Seligman. The suit is, in effect, one to impeach a judgment for fraud. It seems to be just such a suit as is described in *Jones v. Andrews*, 10 Wall. 327, 333, where the supreme court, speaking through Mr. Justice Bradley, said:

"The suit is, in its nature, not an original, but a defensive or supplementary. suit, like a cross bill, or a bill filed to enjoin a judgment of the same court. The bill is filed for an injunction against the garnishee proceedings under the suit at law for the delivery up of the complainant's notes, and for the establishment of his set-off against Andrews. This is, in substance, its character; and if the facts charged furnish a sufficient ground of equity for the relief asked,—as to which the court refrains from expressing any opinion,—the complainant had a right to file it against the defendants, and the court had a right to take cognizance of it as a defensive or supplementary proceeding, growing out of, and having direct reference to, the proceedings of the defendants in the same court against him. The case, in this respect, as before said, is analogous to that of a cross bill or bill of review, or a bill for injunction against a judgment at law in the same court, of which the court has jurisdiction irrespective of the residence of the parties.

[Citing *Logan v. Patrick*, 5 Cranch, 288; *Simms v. Guthrie*, 9 Cranch, 25; *Clarke v. Mathewson*, 12 Pet. 164; *Dunlap v. Stetson*, 4 Mason, 349, Fed. Cas. No. 4,164.] As to bills for injunction against judgments at law rendered in the same court, Justice Story, in *Dunlap v. Stetson*, says: 'I believe the general, if not universal, practice has been to consider bills of injunction upon judgments in the circuit courts of the United States not as original, but as auxiliary and dependent, suits, and properly sustainable in that court which gave the original judgment, and has it completely under its control. The court itself possesses a power over its own judgments, by staying execution thereon, and it would be very inconvenient if it did not possess the means of rendering such further redress as equity and good conscience required.' "

It was accordingly held that, the suit described being ancillary and supplemental to the action at law pending in the same court, it could be instituted without respect to the residence or citizenship of the parties. In *Minnesota Co. v. St. Paul Co.*, 2 Wall. 609, 633, a bill in equity was filed to obtain a construction of the orders, decrees, and acts made or done by the same court in other proceedings, and to prevent an undue and unjust advantage which it was claimed would otherwise be obtained, to the detriment of the complainant. A demurrer was interposed to the bill on the ground, among others, that the parties were citizens of the state; and the question arose as to whether or not the bill was an original or a supplementary proceeding, and, if the latter, whether the jurisdictional requisite of diversity of citizenship could be dispensed with. Mr. Justice Miller, in disposing of this question, said:

"It is objected that the present bill is called a 'supplemental bill,' and is brought by a defendant in the original suit, which is said to be a violation of the rules of equity pleading, and that the subject-matter and the new parties made by the bill are not such as can properly be brought before the court by that class of bills. But we think that the question is not whether the proceeding is supplemental and ancillary or is independent and original, in the sense of the rules of equity pleading, but whether it is supplemental and ancillary, or is to be considered entirely new and original, in the sense which this court has sanctioned with reference to the line which divides the jurisdiction of the federal courts from that of the state courts. No one, for instance, would hesitate to say that, according to the English chancery practice, a bill to enjoin a judgment at law is an original bill, in the chancery sense of the word. Yet this court has decided many times that, when a bill is filed in the circuit court to enjoin a judgment of that court, it is not to be considered as an original bill, but as a continuation of the proceeding at law; so much so that the court will proceed in the injunction suit without actual service of subpoena on the defendant, and though he be a citizen of another state, if he were a party to the judgment at law."

In *Pacific R. Co. of Missouri v. Missouri Pac. Ry. Co.*, 111 U. S. 505, 522, 4 Sup. Ct. 583, the bill was there described as follows:

"The bill, though an original bill, in the chancery sense of the word, is a continuation of the former suit, on the question of the jurisdiction of the circuit court."

The general rule as to when a lack of diversity of citizenship will not divest the circuit court of its jurisdiction over the cause will be found well stated in the case of *Conwell v. Canal Co.*, 4 Biss. 195, Fed. Cas. No. 3,148, as follows:

"In many instances where the jurisdiction originally depends on the citizenship of the parties, if the proceedings happen to affect the interests of other persons, not original parties, the latter may often be brought before the court and made parties, irrespective of their citizenship. Thus, for example, if a judgment be rendered in this court between parties whose citizenship gave the jurisdiction,

and if any circumstances afterwards arise entitling some third party to have such judgment modified or enjoined, he may, in many instances, maintain a bill for that purpose in this court without reference to his citizenship. This rule arises from the necessity of the case, and to prevent a failure of justice; for since, when a court has once obtained jurisdiction of a cause, it cannot suffer any other court to disturb its proceedings or interfere with property in its custody, a party aggrieved, if he could not be heard in the court where the judgment was rendered or in which the property is held, would be without redress."

See, also, the cases of *Freeman v. Howe*, 24 How. 450; *Christmas v. Russell*, 14 Wall. 81; *Krippendorf v. Hyde*, 110 U. S. 276, 4 Sup. Ct. 27; *Pacific R. Co. of Missouri v. Missouri Pac. Ry. Co.*, 111 U. S. 505, 522, 4 Sup. Ct. 583; *Webb v. Barnwall*, 116 U. S. 193, 6 Sup. Ct. 350; *Root v. Woolworth*, 150 U. S. 401, 14 Sup. Ct. 136. See, on the general proposition of suits in equity to enjoin actions and judgments at law, 3 Pom. Eq. Jur. pp. 2095-2107, §§ 1360-1365.

Counsel for respondents, in support of his contention that the suit must be regarded as an original one, and that, therefore, the lack of diversity of citizenship between the complainant and the city of Santa Rosa is fatal to the jurisdiction of the court, cites the cases of *Barrow v. Hunton*, 99 U. S. 80; *Marshall v. Holmes*, 141 U. S. 599, 12 Sup. Ct. 62; *Davenport v. Moore*, 74 Fed. 945. I do not think that these authorities militate against the rule enunciated by the cases previously cited—that such a suit as the one in the case at bar must be regarded as ancillary to the action at law, and not an original proceeding, if certain principles of jurisdiction are kept in mind. In *Marshall v. Holmes*, supra, Mr. Justice Harlan, after reviewing the authorities, said:

"These authorities would seem to place beyond question the jurisdiction of the circuit court to take cognizance of the present suit, which is none the less an original, independent suit, because it relates to judgments obtained in the court of another jurisdiction."

But because the supreme court has held that suits instituted in the circuit court to enjoin and impeach for fraud judgments obtained in the courts of other jurisdictions, are original, independent suits, it does not follow that a suit brought in the circuit court to enjoin and impeach for fraud a judgment rendered in that same court is also to be considered an original, independent suit. Where the original action, which it is sought by a bill in equity in the circuit court to enjoin, was instituted in that court, it is manifest that the requisite diversity of citizenship must have existed, otherwise the circuit court could not have taken cognizance of the case. A subsequent suit in the same court, to enjoin the judgment rendered in the former action, is therefore ancillary and supplemental to the original action, and does not depend on the citizenship of the parties, for this jurisdictional requisite was satisfied when the original action was brought. But the situation is entirely different where the original action, which it is sought to enjoin, was instituted in the court of another jurisdiction; for example, a state court. In the state court the jurisdictional requisite of diversity of citizenship does not exist, and no presumptions in that direction can therefore be indulged. So far as the jurisdiction of the state court is concerned, the parties may all be residents and citizens of the state

where the action is brought. But, to give the circuit court jurisdiction where no other ground of jurisdiction exists, a diversity of citizenship must first exist. When this prerequisite is satisfied, and the amount involved is sufficient, there is no limitation to the kind of action that may be instituted in the circuit courts. As was well said in *Gaines v. Fuentes*, 92 U. S. 10, 18:

"The constitution imposes no limitation upon the class of cases, involving controversies between citizens of different states, to which the judicial power of the United States may be extended; and congress may therefore lawfully provide for bringing, at the option of either party, all such controversies within the federal judiciary."

Therefore, when a bill in equity is brought in the circuit court to enjoin and impeach the judgment rendered by a state court, the jurisdictional requisite of diversity of citizenship must first exist before the suit is cognizable in that court. It is in this respect that the suit is deemed to be an original, independent suit. If this were not so, the circuit courts would, by means of bills to enjoin actions and judgments rendered in state courts, draw to themselves a jurisdiction which they do not possess under the constitution of the United States and the various judiciary acts, unless the requisite diversity of citizenship exists. That is, I take it, what the authorities referred to by counsel for respondents in this connection mean when they speak of the suit as an original, independent, and not an auxiliary, suit. It is significant that all the cases which describe the bill to enjoin as an original suit involved judgments of state courts, and not of the same circuit court. As the present suit is brought to enjoin a judgment rendered, not in the state court, but in this court, in an action at law, where the jurisdictional requisite of diversity of citizenship was satisfied, it may therefore properly be considered as ancillary to that action.

It is, however, further contended by counsel for respondents that this suit must be deemed original, as to the complainant, as he was not a party to the action at law; and the case of *Dunn v. Clarke*, 8 Pet. 1, is cited to support this contention. In that case, which involved a bill praying for an injunction to restrain a judgment rendered in an action at law in the same circuit court, the supreme court said:

"The injunction bill is not considered an original bill between the same parties, as at law; but if other parties are made in the bill, and different interests involved, it must be considered, to that extent, at least, an original bill, and the jurisdiction of the circuit court must depend upon the citizenship of the parties."

This language is perhaps a little broader than the true limits of the rule permit, and was criticised in the case of *Freeman v. Howe*, 24 How. 450, where Mr. Justice Nelson used the following language:

"The case in 8 Pet. 1, which was among the first that came before the court, deserves, perhaps, a word of explanation. It would seem from a remark in the opinion that the power of the court upon the bill was limited to a case between the parties to the original suit. This was probably not intended, as any party may file the bill whose interests are affected by the suit at law."

It will be noticed, however, that when the court said in *Dunn v. Clarke*, *supra*, that the bill would be considered original when new parties are brought in, it added the phrase, "and different interests

involved." Undoubtedly, if different interests are involved by the bill to enjoin the action at law from those adjudicated in that action, the "jurisdiction of the circuit court must depend upon the citizenship of the parties." Where, however, the same interests are involved, or the bill relates to the same subject-matter adjudicated upon in the action at law, any party who has such an interest in the matter litigated in the action at law, which it is sought to enjoin, as permits him to sue therefor, has the right to file a bill to protect his interest; otherwise, in many instances, he would be without any remedy whatever. I am therefore of the opinion that the bill in the present suit is, to all intents and purposes, ancillary to the action at law pending in this court, and that, therefore, the lack of diversity of citizenship between the complainant and the city of Santa Rosa is not fatal to the jurisdiction of the court. I am also of the opinion that the fact that the complainant in this suit was not a party to the action at law can make no difference with respect to his right to maintain the present suit, provided that in other respects his status as a taxpayer gives him the right to sue. This last phase of the case was decided upon the motion of complainant for leave to intervene in the action at law. Having determined that the present action is in the nature of a defensive or supplementary suit, and ancillary to the action at law, the status of the plaintiff as a complainant again becomes important; and we find him here, as before, seeking to maintain this action on the ground that he is a taxpayer of the defendant the city of Santa Rosa. With respect to this feature of the controversy, I held that his status was not sufficient to entitle him to intervene in that case. If he could not intervene then, how can he maintain this action now? If I was correct in determining that he could not, by his petition, become an intervener in the original action, how can it be said that he may become an intervener by virtue of this supplementary bill? Is it not clear that my previous determination is equally applicable and conclusive against the right of the plaintiff to bring the present suit? No appeal was taken from my decision in the action at law, and the determination of the court in this respect remains unreversed. It may therefore be considered the law of this case, and is fatal to the motion for an injunction. The motion upon the order to show cause will therefore be denied, and the order to show cause discharged, and it is so ordered.

DILLINGHAM v. MORAN et al.

(Circuit Court of Appeals, Fifth Circuit. June 23, 1897.)

No. 556.

RECEIVERS—COMPENSATION—OBJECTIONS TO REPORT.

Where an order of court is made that a railroad receiver shall be paid a monthly salary for his services until he shall be discharged, and he continues to act as receiver, making quarterly reports showing the payment to himself of such compensation each month, and such reports are confirmed without objection, and no steps are taken by those interested to have him

discharged, objections afterwards filed to his reports and compensation, on the ground that he ought to have been discharged years before, should be overruled, and the compensation allowed as long as he continues to act.

Appeal from the Circuit Court of the United States for the Northern District of Texas.

George Clark and D. C. Bollinger, for appellant.

L. W. Campbell, for appellees.

Before PARDEE, Circuit Judge, and NEWMAN, District Judge.

NEWMAN, District Judge. Charles Dillingham was the receiver of the Texas Central Railway under order of the United States circuit court for the Northern district of Texas at Waco. He was appointed such receiver on the 4th day of April, 1885. On December 4, 1886, the court directed that the receiver, Charles Dillingham, be placed on the pay roll of the receivers (there was a joint receiver) at \$150 per month as an allowance upon his compensation as receiver in the cause, which allowance was to date from the possession of the receivers, and to continue while Mr. Dillingham gave his personal attention to the business of the company, until the further order of the court. On the 22d day of April, 1891, the railway property was sold. This sale did not embrace certain property which was not part of the railway proper, the parts not sold consisting of five lots, lands, notes, etc. At the time of the sale of the railway property, under a compromise arrangement, the receiver Dillingham was paid \$20,000. On August 28, 1891, at the close of the decree in confirming the sale, this occurs:

"That nothing in this decree contained is intended to affect, or shall be construed as affecting, the status of any pending or undetermined litigation in which said receivers appear as parties. Such litigation shall continue to determination in the name of said receivers, with the right reserved to said purchasers, should they be so advised, to appear and join in any such litigation; and nothing in this decree contained is intended to affect, or shall be construed as affecting, the receivership of any of the property of the defendant railway company other than the property so transferred to said purchasers, possession of which said property other than that so transferred is retained for further administration, subject to the orders of this court."

At the conclusion of a petition for a modification of the decree of confirmation, this appears:

"It is further ordered, adjudged, and decreed that nothing contained in this decree is intended to affect, or shall be construed as affecting, the receivership of any of the property of the defendant railway company other than the property so transferred to said purchasers; possession of which said property, other than that so transferred, is retained for further administration, subject to the orders of this court, in like manner as if this decree had never been entered or rendered."

Dillingham continued to act as receiver up to April, 1895, apparently, from the record, attending to such matters as were necessary to be disposed of in winding up the affairs of the receivership; and continued to draw and to pay himself the \$150 per month until April, 1895. After the railway was sold, Receiver Dillingham filed regular quarterly accounts for each quarter, ending, respectively, on the 1st days of April, July, October, and January, for the years

1891, 1892, and 1893, and no objection or exception was made to the same, and the special master, John G. Winter, reported favorably upon the same, and they were confirmed. In March, 1894, the receiver filed with Special Master Winter accounts for the quarter ending September, 1893, and after notice by the special master to counsel interested in the matter a hearing was had upon these accounts. Counsel for the Texas Central Railway Company and for the purchasing trustees objected to the payment by Dillingham to himself of \$150 per month for the months of April and May, 1893. In disposing of these objections the special master found that Dillingham had, since the sale of the railway property, continued to give, and was still giving, his personal attention to the management of the property in his custody, being all of the property of the defendant corporation not embraced in the sale of 1891. He also found that Dillingham had reported the \$150 per month in his accounts regularly since the order made in 1886; that these accounts had been regularly passed upon by the master, after due notice to counsel; and that there had been no objection by any one at interest until the objection then being heard. He found that the parties to the litigation had taken no steps to close the receivership, and had refrained from so doing pending the adjustment of the claims of the Trust Company and the Morgan Company to the property remaining in the hands of the receiver, and that they had, without objection, on full notice, acquiesced in the payment of the salary to Dillingham. He also found that Mr. McHarg, one of the purchasing trustees, had written a letter in March, 1894, to Receiver Dillingham, in which he had recognized the fact that the receiver was under pay until discharged. The special master also found that the objections to the allowance of this amount to Receiver Dillingham were not well taken, and that the receiver was entitled to be compensated for his services, and the responsibilities incident to his position as a bonded officer of the court, and he therefore allowed the items objected to, to wit, two items of \$150 each, paid to Receiver Dillingham as salary for the months of April and May, 1893. He also found that the parties at interest, the Morgan Company, the Trust Company, and the Texas Central Railway Company, had made no objection to the compensation of Receiver Dillingham, although duly advised thereof. The special master further found that the receiver was entitled to receive this compensation until the courts shall revoke the order allowing the same. Similar objections were made to the allowance of the special master to Receiver Dillingham of his salary for the months of May, July, August, September, October, and November, 1893. These objections were also overruled by the special master, stating in his report that as to these months he referred to the facts stated in his former report. The reports of the receiver, which embrace this same allowance to himself, were subsequently approved without objection up to April 1, 1894. The accounts from April, 1894, to April 1, 1895, it appears, were being heard by the special master on April 8, 1895, when an order was passed referring the same to Abner S. Lathrop as special master. The exceptions thus referred, together with an amendment, subsequently filed, at-

tacked the right of Receiver Dillingham to receive the \$150 per month after the sale of the railway property in 1891; and also charged that, as he was vice president of a bank in which the funds he controlled as receiver were deposited, and that \$1,000 per annum had been paid him, as pretended compensation as vice president of the bank, when, in fact, the payment of said \$1,000 per annum was a mere pretense, and was made by the bank, and received by Dillingham as interest upon the fund deposited by him, as receiver, in the bank. Special Master Lathrop filed his report on September 26, 1896, in which he found that Receiver Dillingham should be allowed a compensation of \$150 per month from the time of the sale of the railroad up until April, 1893, for the reason that no objections were filed to his accounts which embraced the allowance of this item to himself up to that time, and under the rules of court they stood approved; but that from the time that objections were entered, namely, April 1, 1893, down to the last amount allowed him, he found that he was not entitled to the allowance of \$150 per month. He found "that the compromise made in September, 1891, allowed C. Dillingham, receiver, \$20,000, was intended as revoking the order of December 4, 1886, allowing him \$150 per month, and was intended as full compensation for the services up to the time the receivership terminated." He found, therefore, that the amount paid to the receiver from September, 1891, to April, 1893, had more than compensated the receiver for any labor he had performed from September, 1891, to the time of his report, and he therefore recommended that the exceptions to said receiver's report, wherein he had retained \$150 per month from April, 1893, up to April 8, 1895, be sustained, and that the said Dillingham be ordered to pay into the repository of the court the amount so received as follows: For 1893, nine months, \$1,350; for 1894, twelve months, \$1,800; for 1895, three months, \$450,—making in all \$3,600. He found that the charge made against Dillingham, as to his receiving the \$1,000 per year from the bank as interest, was not sustained by the proof, and said: "I consider that the testimony clearly exonerates him from acting in any way in an improper manner with the funds in his hands belonging to said railway company, or that he has, either directly or indirectly, benefited by the same. I would therefore recommend that the exceptions to his manner of using said funds be overruled." This report was subsequently approved by the court, to which action of the court approving the same exceptions were duly reserved, and the question presented here for determination is the correctness of the action of the special master and of the court in requiring Receiver Dillingham to repay the \$3,600 received by him after April, 1893.

The case, as shown by the foregoing statement, presents somewhat remarkable facts. In the first place, those who are most interested in the matter of the receiver's compensation appear to have made no objection at all to his receiving the \$150 per month at any time. And, next, conceding the purchasing committee to have been interested in this question of compensation, they stood by for years, and allowed the receiver Dillingham to pay himself this amount,

simply objecting during the last two years, and having their objections overruled, without any further action. No effort seems to have been made to have the receiver discharged; no motion appears to have been made to have the court reduce the amount of his compensation; the orders fixing his compensation originally were allowed to stand; the orders passed at the time of the sale of the road and the confirmation of the sale directing the continuance of the receivership stood unchanged; and yet, after the receiver had proceeded until 1895, with all the responsibilities, obligations, and duties of the receivership upon him, and after he had retained, under the still existing order of the court, the amount allowed him by that order, a motion is made to require him to refund the money, and to pay it into the registry of the court, accompanied with damaging, but wholly groundless, charges affecting his honor and honesty. Why the receiver should have been permitted to go on and receive this \$1,800 per annum without any movement on the part of those interested to change the existing status, is difficult to understand, except upon the theory that his services were valuable and necessary. When the purchasing committee excepted to the master's report, and their exceptions were overruled, they seem to have acquiesced all along, until suddenly, in 1895, this proceeding was instituted. The payment of the \$20,000 as a compromise for the receiver's services was proved to have been based on the understanding that the receivership was then to be wound up and the receivership discharged, and did not in any way, so far as we can see, affect the order of the court making the monthly allowances to Dillingham; and, if it could have been so construed, why was it not brought to the attention of the court at the time, certainly at the end of the first quarter after the sale, when the receiver's accounts were filed? It was well known, or should have been well known, that he was receiving this compensation. His accounts were on file in the clerk's office, showing that fact. The finding of the special master is that up to April, 1893, the compensation should be allowed, because the accounts having been filed, and there being no objection, they stood presumably approved by the court under the rule. If the approval of the court is presumed up to April, 1893, why is it not equally true that the approval of the court is presumed to the receiver's continued receipt of this amount? If the compensation was to run at all after the sale of the railroad and the payment of the \$20,000, there was no reason for stopping it in April, 1893. If it continued rightfully, it continued by virtue of the original order allowing it in 1886, and it continued until the receiver was discharged; and so, instead of the approval of the court operating to justify the allowance up to April, 1893, and no longer, its effect would be to approve the allowance under the original order so long as Dillingham continued to act as receiver. It is difficult to determine from the record exactly what services beyond perfecting land sales and preserving the fund the receiver rendered after the sale of the railway, but it is certainly true that, if the purchasing committee, or any one interested, had moved in the matter before the court, the monthly compensation Dillingham was receiving, if too large, would have

been reduced to the proper amount, or he would have been discharged, and some other arrangement made for winding up the outstanding business. Nothing of this sort was done, however, and he was allowed to go on as receiver, with all the responsibilities attached to that position and to the business in hand, and, if entitled to compensation at all after the sale of the railway, we see no reason why he is not entitled to it up to 1895. We are of the opinion that the report of the special master, and the decree of the court below confirming the same were erroneous. The decree of the circuit court is reversed, and the cause is remanded, with directions to overrule and discharge the motions attacking the receiver's accounts.

CHAPPELL v. UNITED STATES.

(Circuit Court of Appeals, Fourth Circuit. July 10, 1897.)

No. 212.

EMINENT DOMAIN—CONDEMNATION PROCEEDINGS BY UNITED STATES—JURISDICTION OF FEDERAL COURTS.

The manner in which the power of eminent domain of the United States shall be exercised is a matter of legislative discretion, and congress, by Act Aug. 1, 1888 (25 Stat. 357), has vested in the United States circuit and district courts of the district in which land is situated jurisdiction of proceedings authorized to be instituted by any public officer to condemn such land for public purposes. By Act Aug. 18, 1890 (26 Stat. 316), the secretary of war is authorized to cause proceedings to be instituted for the condemnation of land for military purposes "in any court having jurisdiction of such proceedings." *Held*, that said acts are in pari materia, and upon an application by the secretary of war under the latter act the attorney general may, at his election, cause proceedings to be instituted for the condemnation of land for military purposes in either the state or federal courts.

In Error to the District Court of the United States for the District of Maryland.

W. Cabell Bruce, for plaintiff in error.

W. L. Marbury, U. S. Atty.

Before SIMONTON, Circuit Judge, and HUGHES, District Judge.

SIMONTON, Circuit Judge. This case comes up by writ of error to the district court of the United States for the district of Maryland. Certain lands of the plaintiff in error, lying at Hawkins Point, Anne Arundel county, in the state of Maryland, were required by the United States as the sites for forts and other works of defense. To this end proceedings for condemnation of the land were instituted in the district court of the United States for the district of Maryland by the district attorney. The district attorney files with his petition a letter of instruction from the attorney general of the United States to institute the proceedings, pursuant to the request of the chief engineer, indorsed by the secretary of war, and directing him to confer with Col. Peter C. Hains, corps of engineers, referring him to Act Aug. 1, 1888, c. 728. He also files an authorization under seal from the secretary of war to Col. Peter C. Hains, in the matter of applying under article

96, Code Pub. Gen. Laws Md., for the condemnation of and for acquiring by condemnation proceedings this land. Upon filing the petition and its exhibits, an order of publication was issued, giving full notice of this application, and calling on all persons interested to come in by a day certain, and file objections, if any they had. The plaintiff in error did come in, filed exceptions to the jurisdiction of the court, then filed objections to the condemnation proceedings, then a demurrer to the petition; all of which were overruled, and the plaintiff in error excepted. He then filed his answer. The court then passed an order directing a jury to be impaneled for the purpose of assessing the damage the owner of the land will sustain by reason of its acquisition by the United States for the purposes stated, and in the proceeding it made the United States of America the actor. After a motion on the part of the plaintiff in error to dismiss the proceeding for want of jurisdiction, he filed a plea that no previous attempt had been made to him to agree upon a price for his lands. A motion for continuance and an exception to the array and to the impaneling of the jury, and numerous exceptions and prayers during the progress of the case, were made and overruled. An inquisition and award were had, and an assessment of \$4,500 made for the enjoyment in perpetuity of the fee simple in this land by the United States. This was followed by many motions for a new trial and exceptions of every character, and finally the court confirmed the inquisition and finding of the jury. At the hearing on this last occasion, an objection was made because the authorization of the secretary of war to Col. Hains was limited in its nature, as it instructed him to take proceedings under the Maryland statute. This was met by a letter from the secretary affirming and confirming all that was done. The final order of the court having been entered, leave was given to sue out a writ of error, and the cause comes here on 33 assignments of error.

It is unnecessary to go into these in detail. The controlling question in this case is, had the district court of the United States for the district of Maryland any jurisdiction in the case? There can be no doubt that in exercising its sovereignty the United States are clothed with the right of eminent domain; that, putting this right into operation, the United States alone are the judges of the necessity for it, and that it is not dependent on state comity. *Kohl v. U. S.*, 91 U. S. 371; *Boom Co. v. Patterson*, 98 U. S. 406. The mode of exercising it, whether by a tribunal created directly by act of congress or by one already established by the states, is a mere matter of legislative discretion. *U. S. v. Jones*, 109 U. S. 513, 3 Sup. Ct. 346; *Secombe v. Railroad Co.*, 23 Wall. 108. Congress has legislated on this subject. Act Aug. 1, 1888 (25 Stat. 357), is in these words:

"Section 1. That in every case in which the secretary of the treasury or any other officer of the government has been or hereafter shall be authorized to procure real estate for the erection of a public building or for other public purposes, he shall be and hereby is authorized to acquire the same for the United States by condemnation under judicial process, whenever in his opinion it is necessary or advantageous to the government to do so; and the United States circuit or district courts of the district wherein such real estate is located, shall have jurisdiction of proceeding for such condemnation; and it shall be the duty of the attorney-general of the United States, upon every application of the secretary of the treasury under this act, or such other officer, to cause proceedings to

be commenced for condemnation within thirty days from the receipt of the application at the department of justice.

"Sec. 2. The practice, pleadings, forms and modes of proceeding in causes arising under the provisions of this act shall conform as near as may be to the practice, pleadings, forms and proceedings existing at the time in like causes in the courts of record of the state within which such circuit or district courts are held; any rule of the court to the contrary notwithstanding."

And also Act Aug. 18, 1890 (26 Stat. 316). The act of 1890 provides:

"Hereafter the secretary of war may cause proceedings to be instituted in the name of the United States in any court having jurisdiction of such proceedings for the acquirement by condemnation of any land or right pertaining thereto needed for the site, location, construction or prosecution of works for fortifications and coast defenses, such proceedings to be prosecuted in accordance with the laws relating to suits for the condemnation of property of the states wherein the proceedings may be instituted."

These two acts are in *pari materia*. The first act gives jurisdiction to the courts of the United States only, and prescribes that the form of the proceeding shall, as near as may be, conform to the practice, pleading, form, and mode of procedure in like causes in the state courts. The second act authorizes proceedings in any court of competent jurisdiction to be presented in accordance with the laws relating to the condemnation of property of the states wherein the proceeding may be instituted. The government may proceed under either act, in its own discretion. When proceedings are taken under either of these acts, strict compliance must be had with all the provisions of law made for the protection of the landowner, or the proceedings are ineffectual; and these proceedings must show affirmatively that the requirements of the law have been fulfilled. In *re Buffalo*, 78 N. Y. 366. Now, what are the requirements of the law? Any officer of the government who is authorized to procure real estate for a public purpose is authorized to acquire the same for the United States by condemnation under judicial process. This authority is specially vested in the secretary of war by Act Aug. 18, 1890 (26 Stat. 316), of which the courts take cognizance. It is the duty of the attorney general of the United States, upon every application of such officer of the government, to cause proceedings to be commenced for condemnation within 30 days after the receipt of the application. These proceedings on their face show that the attorney general has received an application for this purpose from the secretary of war, and that these proceedings were instituted thereon. The papers show that the instructions of the attorney general to the district attorney were given certainly within five days after the receipt of the application of the secretary of war. This commenced the proceedings. The act of congress does not authorize the secretary of the treasury, nor any other officer of the government desiring such proceedings to be instituted, to instruct the attorney general in what court or in what mode to conduct the proceedings. These are left wholly to his discretion. No action on the part of the secretary of war, after having made the application provided by law, and no limitation of authority to Col. Hains, no instruction of Col. Hains, can affect the discretion of the attorney general in carrying out the purposes of the application, and in condemning the land. The proceedings on their face thus showing the authority

in the secretary of war to procure by condemnation this land, and his application to the attorney general to commence proceedings therefor, has the attorney general proceeded in the proper way? The act requires the practice, pleadings, form, and mode of procedure to conform, as near as may be, to those existing at the time in like causes in the courts of record of the state in which the land is situated. "As near as may be,"—that is to say, as near as may be practicable, not as near as may be possible, with discretion in the judge of construing and deciding how far to go. *Railroad Co. v. Horst*, 93 U. S. 301; *Phelps v. Oaks*, 117 U. S. 239, 6 Sup. Ct. 714. In the case at bar, the petition was filed, stating clearly the case of the petitioner. Notice of the object of the petition was given in accordance with the Code of Public General Laws of Maryland. The claimant of the land came in, and was heard patiently as he raised question after question, and finally the question was left to a jury. It is true that this jury was not composed of residents of Anne Arundel county. But the jurisdiction of the court over the subject-matter is expressly given by the act of congress, and, even if it were not so given, the federal court could have taken jurisdiction. "If by the law obtaining in a state suits can be maintained in a state court, they may be maintained by original process in a federal court when the parties are citizens of different states." *Chicot Co. v. Sherwood*, 148 U. S. 529, 13 Sup. Ct. 695. The United States can always vindicate their rights in their own courts. This being the case, and the jury being a part of the court, the question of damages was properly submitted to the jury. And the experienced judge who tried the case observed all the formalities necessary. All the requirements of law were fulfilled. We see no error in the action of the district court. The judgment of that court is affirmed.

HOWELL COTTON CO v. CITIZENS' NAT. BANK OF WACO.

(Circuit Court of Appeals, Fifth Circuit. June 11, 1897.)

No. 581.

PLEADING—PETITION ON ACCOUNT—FAILURE TO ITEMIZE.

In a suit for the recovery of a balance due on a large running account consisting of many items, a paragraph of the petition which gives the aggregate of the charges and credits constituting the account, but contains no itemized statement, is insufficient, and a special exception to it should be sustained.

In Error to the Circuit Court of the United States for the Northern District of Texas.

W. W. Evans and W. W. Brookes, for plaintiff in error.

A. C. Prendergast, for defendant in error.

Before PARDEE and McCORMICK, Circuit Judges, and NEWMAN, District Judge.

NEWMAN, District Judge. This is a suit by the Citizens' National Bank of Waco, Tex., against H. C. Howell and A. S. Johnson and the Howell Cotton Company, the latter a Georgia corporation, for \$11,541.30, besides interest. Suit was originally brought

in the state court of Texas, and removed to the United States circuit court for the Northern district of Texas. The bank declined to prosecute against Howell and Johnson, but proceeded against the cotton company, and recovered a verdict and judgment for \$11,541.30 principal, with interest. It appears that the subject-matter of the suit was money furnished by the bank to buy cotton from November 7 to December 15, 1893. About December 16, 1893, a question having arisen as to the authority of Howell and Johnson, doing business under the firm name of A. S. Johnson & Co., to bind the Howell Cotton Company for advances thus made, an agreement was entered into which will be sufficient to an understanding of the case so far as a decision is now made:

"The State of Texas, County of McLennan. Know all men by these presents that this contract, made and entered into by and between Citizens' National Bank, of Waco, Texas, party of the first part, and Howell Cotton Company, party of the second part, both parties being corporations, witnesseth:

"First. Whereas, the firm of A. S. Johnson & Company, in the name of Howell Cotton Company, has been engaged in the cotton business at Waco, Texas, during the season of 1893, keeping an account with the party of the first part, in the name of the Howell Cotton Company, a large amount of money, to wit, about \$29,558.12 principal and \$229.00 interest thereon, besides interest hereafter to accrue thereon, is due said party of the first part on said account; and whereas, a controversy has arisen between the parties hereto, as to whether the Howell Cotton Company is liable to the party of the first part for said amount above named, the said Howell Cotton Company disclaiming any liability to said Citizens' National Bank, and said Citizens' National Bank claiming that the Howell Cotton Company is liable for said indebtedness: Now, therefore, without either party hereto in any way waiving any rights they may have by reason of the status of parties and the claims set up by each of them respectively, said party of the second part does hereby agree and obligate itself to guaranty and pay to said bank the sum of \$3,000.00 on said account at Waco, Texas, on or before ninety days from this date, in case said account is not liquidated and satisfied before this from other sources, and such balance remaining unsatisfied amounts to the sum of \$3,000.00; and, if such balance does not amount to said sum of \$3,000.00, then the party of the second part is to pay such balance.

"Second. The party of the second part agrees to take immediate charge of all the cotton business at Waco, Texas, which has been heretofore handled in the name of A. S. Johnson & Co., and by them in the name of Howell Cotton Company, and to use its best efforts in handling said cotton business so as to realize the greatest amount of money therefrom, including collecting all amounts due from railroads at Waco, that can be done with careful and energetic handling of said business for a period of time ending on the first day of April, 1894; and all the amounts and profits realized out of said cotton business so handled and carried on by the party of the second part shall be paid to said party of the first part on the account above named; and if the money so paid shall satisfy said account in full, then, and in that event, the party of the second part shall not be liable to the party of the first part in any sum whatever, but, in case the money so paid shall fail to satisfy said account in full, then, and in that event, the party of the second part shall be liable and shall pay to the party of the first part such balances, according to the terms, stipulations, and conditions named in the preceding paragraph of this contract.

"Third. The party of the second part does not agree to take charge of the 170 bales of cotton which has not yet been loaded on the cars at Waco, although bills of lading therefor have been issued in the name of A. S. Johnson & Co., which cotton is now on the platform of the Brazos Compress Company in Waco, and which said bills of lading have been executed by the W. N. W. Ry. Co. As to these 170 bales, said party of the second part agrees to use its best efforts to induce H. C. Howell to turn over to said bank the proceeds thereof by bills of lading, with drafts thereto attached, if he can procure them; or, in

case he cannot do this, to sequester the same for the benefit of said bank, or to take whatever other proceedings may be deemed advisable to protect it in the matter; and whatever is or can be realized by careful management out of the same shall be for the benefit of said bank.

"Fourth. It is further agreed and understood by and between the parties hereto that this agreement does not exclude or estop the party of the first part from any legal right it may have to hold said party of the second part liable, and of suing said party of the second part, for any and all of said sums of \$29,558.12 and interest accrued and to accrue thereon that is not realized by said bank under this agreement after ninety days from this date; and the party of the second part does not by this contract in any way admit or confess its liability for said amount, or any part thereof, save and except said \$3,000.00 above named, or so much thereof as it may become liable to the party of the first part for under the first paragraph of this contract. And the party of the second part does not by this contract admit that A. S. Johnson & Co. were the agents of said party, or had any authority to represent it in said cotton business; it being understood and agreed by and between the parties hereto that the rights of the respective parties shall remain in the same status as they were prior to the signing of this contract, save and except so far as those rights are expressly modified or changed by the execution hereof.

"Fifth. In consideration of the premises, the party of the first part agrees not to attach any of the cotton belonging to the business of said A. S. Johnson & Co., and not to sue and attach said cotton as the cotton of said Howell Cotton Company, and agrees that said party of the second part shall take charge of said business above named.

"Sixth. It is further agreed and understood by and between the parties hereto that the account hereafter kept with the party of the second part in the management of said cotton business shall be in the name of the Howell Cotton Company, and that said company will place a duly-authorized agent in Waco for this purpose.

"It is further agreed and understood by and between the parties hereto that this agreement takes the place of any other agreement that may have been entered into on this date.

"Witness our hands in duplicate this 16th day of December, 1893.

"[Signed]

The Citizens' National Bank, pr. J. S. McLendon, Pres.

"[Signed]

Howell Cotton Company, by J. N. King, Mngr."

The point on which the case turns is one of pleading, which renders it unnecessary to enter into the real merits of the case. The sixth paragraph of plaintiff's petition was as follows:

"That in accordance with said contract, agreement, and understanding said defendant Howell Cotton Company, between the dates on November 7, 1893, and March 24, 1894, did purchase at Waco and surrounding towns a large number of bales of cotton, to wit, six thousand, and drew checks and drafts on the plaintiff to pay for the same, which were during said time presented to plaintiff, and paid by it; that the amount so paid by plaintiff at said defendant's instance and request aggregated a large sum, to wit, two hundred and ten thousand (\$210,000) dollars; that during said time, and since then up to the filing of this suit, said defendant had from time to time repaid to plaintiff various sums and amounts, so that at the time of the institution of this suit said defendant was due to plaintiff, a balance of \$14,541.30 principal, besides interest, and since the institution of this suit said defendant has paid plaintiff \$3,000 in the aggregate; that it was also a part of said contract, agreement, and understanding that defendant would pay plaintiff interest on the amounts daily due plaintiff at the rate of ten per cent. per annum; that defendants are in possession of all said checks and drafts so paid by plaintiff for defendant, they having been delivered to said defendant by it from time to time, when defendant had its pass book balanced; and the defendants are hereby notified to produce all of said checks and drafts, and also its said pass book, on the trial thereof."

This paragraph was especially excepted to by defendants as follows:

"Defendants specially except to paragraph six of plaintiff's first amended original petition, because plaintiff undertakes to declare on aggregated amounts, and

to sue on balances, without giving any itemized statements of any amounts, or showing by any itemized statement the balance claimed to be due plaintiff by defendant, and said first amended original petition shows that said sums of money sued for are composed of a great number of smaller items, and said smaller items are not set out in plaintiff's said petition, and there is no itemized statement thereof attached to said petition, or anywhere shown thereon."

This exception was overruled by the court. We think this action of the court was erroneous. There had never been what could be properly called an account stated between the parties. In the agreement entered into in December, 1893, it was stated that about \$29,558.12 principal, besides interest, etc., was due. Even this is not an agreement as to a specific amount. It was stated to be "about" the amount named. Subsequently the amount was reduced, and, even if there had been an agreement absolutely as to the \$29,558.12, the defendant, we think, would have been entitled, on a special exception, such as it made, to have been furnished with an itemized statement of the reductions, so that it could be put on notice as to why and how it was charged. Whether the general practice would require a plaintiff, under circumstances such as these, to furnish the defendant with a bill of particulars or an itemized statement, such certainly seems to be the practice in the state of Texas.

In the case of *Boynton v. Chamberlin*, 38 Tex. 604, this is held:

"In a suit upon an account, a petition failing to contain a bill of particulars does not set out the plaintiff's cause of action in a clear and intelligent manner, and is defective."

In the case of *Wood v. Evans*, 43 Tex. 175, there was a suit for a balance due on a promissory note. There was a demurrer to the petition. The court says:

"The demurrer to the petition should have been sustained. It is alleged in the petition that the defendant had failed to pay the note therein described, except the amount credited on the note, and that there was still a large amount due thereon. But neither the amount of credits nor the amount claimed to be due and unpaid is averred. The mere statement of some indefinite and uncertain amount being due to the plaintiff, for which he asks judgment, is not such a full and clear statement of his cause of action and prayer for relief which the facts authorized him to ask of the court as will warrant a judgment on his behalf. The cause of action and its breach should be distinctly averred and set forth. The facts sufficient to warrant a judgment should be directly and clearly alleged. It is not sufficient that they may, by argument and inference, be decided as conclusions from the facts which are averred."

Article 1187 of the Revised Statutes of Texas of 1879 is as follows:

"The pleadings shall consist of a statement in logical and legal form of the facts constituting the plaintiff's cause of action or the defendant's ground of defense."

Article 1195 states that the petition must set out clearly and fully the cause of action.

In this case there arose a controversy as to the liability of the Howell Cotton Company to the bank. It was afterwards agreed that the amount of such doubtful liability was about twenty-nine thousand and odd dollars. A plan was also agreed upon for the reduction or extinguishment of this indebtedness. Now, where suit was subsequently brought for a balance of \$11,541.30 as due on this same transaction, and the court, on exception, refused to require the plaintiff to itemize

its claims, we think error was committed. This item of plaintiff's petition perhaps would not be subject to general demurrer, but on special exception in the specific language set out above we are clear that the defendant was entitled to have the items which made up this aggregate furnished it. It may be said that all this came out on the trial, and that no substantial wrong was done. But this does not appear. In the unfortunate condition of this record, we are only able to consider such exceptions as, under the practice, arise on the pleadings. And why is there not a real and substantial difference to a defendant in making his defense to a suit of this sort between having the items of the account on which he is sued furnished him in advance of the trial and suddenly having them handed him on the trial? Of course, harm may or may not have resulted on this trial for this reason. That we cannot determine, but certain it is that the request made by the defendant when it filed this special exception for a bill of particulars was a legal right, and should have been sustained, and in refusing to grant it the court erred; and it was such substantial error as, in our judgment, requires a reversal of the case, and it is so ordered.

McCORMICK, Circuit Judge (concurring). I concur in the opinion of my Brother, Judge NEWMAN, and his announcement of the conclusions of a majority of the court in its decision of this case. I go somewhat further than he does. In my opinion, the contract declared upon does not, in any sense known to the law of pleading, admit even approximately the amount of the balance due on the account that had been kept by A. S. Johnson & Co. in the name of Howell Cotton Company with the plaintiff. It does admit a liability for \$3,000, and, as I read it, for that amount alone. The reference to the amount of the balance on the other account should only be construed to mean and to say that the bank claimed a balance of about that amount, which the cotton company disclaimed any interest in or liability for beyond the \$3,000 which it engaged to pay, and, before the judgment in this case, had paid. The sixth clause of the agreement declared on provides for the keeping of a running account, and implies that that running account may be considered as a continuation of the account which the bank already had; and it is manifest that it is the balance claimed to be due on this continuation of the account for which this action is brought. According to my view of the settled practice in Texas, and the requirements of the statute, and the decision of the courts thereon in reference to the pleadings of the plaintiff, this action should not be maintained without the plaintiff's being required to embody in its petition or attach to it an itemized statement of the particulars of the transactions between the parties, duly set out in the form of an itemized account. To state in general terms that all the items are well known to the defendant, and are set out in its bank pass book, and that the drafts for each of the items have been returned to the drawers, and are now in the possession of the defendant, does not in any degree meet the requirements of the statutes, and the early uniform and continued decisions of the courts on that subject. The cases are not numerous in the Texas reports, because, by the early cases, the practice became so well settled that the matter has not since been con-

tested. The opinion of the majority refers to cases considered nearest in point, and those cases refer to others that had gone before. I have not taken the time to look for later cases. We have been referred to none, and I am satisfied that there can be none in conflict with the early decisions of the court, and what I deem to be the settled practice in that state.

CENTRAL TRUST CO. OF NEW YORK v. LOUISVILLE, ST. L. & T. RY.
CO. (HENNEN, Intervener).

(Circuit Court, D. Kentucky. June 1, 1897.)

Nos. 6,345, 6,346.

1. RAILROAD MORTGAGES—CLAIMS FOR PURCHASE MONEY OF RIGHT OF WAY—PRIORITIES.

Railroad mortgage bondholders, who, by virtue of a future-acquired property clause in their mortgage, obtain an interest in or lien upon lands condemned for the use of the company, hold subject to the claim of the prior owner for the purchase money.

2. SAME.

Holders of railroad bonds secured by a mortgage made after certain property has been taken for the use of the road, but before compensation has been made, take subject to the compensation which may be adjudged therefor, and are bound by the judgment, though they were not parties to the suit in which it was rendered.

3. SAME—FORECLOSURE SUITS—PRIORITIES—STATE JUDGMENTS.

H. owned a lot, which originally formed part of a large tract owned by T., and the only means of access to the lot was a highway running across the front of the original tract. The highway was discontinued by the county court without making any other provision for access to the lots fronting thereon. The strip that had formed the highway was thereafter condemned by a railroad company in proceedings brought against the heirs of T., on the theory that the land had reverted to them, and the compensation adjudged to them was paid. The railroad having been constructed with an embankment which interfered with H.'s ingress and egress, she sued the company for damages thereto, and obtained a money judgment; the court holding that when the fee reverted, if it did revert, to the heirs of T., it was subject to a contractual easement for ingress and egress, which had previously arisen in favor of the various purchasers of lots constituting part of the original tract, and for injury to this easement damages were adjudged. A suit having been brought in a federal court to foreclose mortgages on the railroad, H. intervened, setting up her judgment as a preferred claim. *Held*, that the mortgage bondholders were bound by the judgment of the state court, though their trustee was not a party thereto, and that the judgment was entitled to priority over the bonds.

Sweeney, Ellis & Sweeney and Kinney, Gregory & Kinney, for intervener.

Helm & Bruce, for Central Trust Co. of New York.

BARR, District Judge. The court, on demurrer to the intervening petition, filed by Mrs. Hennen herein, indicated in a general way its view of the law as applicable to her claim. The case has come before me again, as the parties do not seem to have agreed upon what are their respective rights, and from the briefs filed there is an indication that both the petitioner and the railroad company are not quite satisfied with the law which the court thought applicable in the opinion heretofore rendered.

The case is, briefly, this: Mrs. Hennen had a residence adjoining the town of Hawesville, but not within the limits of the town. Her lot contained about four acres of land, upon which she had a handsome residence, and where she and her family lived. At the time of her purchase, some years ago, there was a public highway along the entire front of her lot,—some 315 feet. On the back of the lot there was a precipitous cliff, which prevented any access from that direction, and on either side were lots owned by other parties. This public highway seems to have been the only mode of egress and ingress to her residence and property. This highway was the road running between Hawesville and Cloverport, both on the Ohio river, and is called in the evidence the "State Road." The defendant railroad built its line on this highway, and in doing so made an embankment in front of the plaintiff's lot and residence of some 5 or 6 feet in height. This embankment was some 55 or 60 feet from the residence of the petitioner, and perhaps about 120 feet from the Ohio river. Previous to the building of the railroad, the space between what was called the "State Road," which ran from Hawesville to Cloverport, and the Ohio river, was open and unfenced, and was used as a skiff landing by the petitioner; and trees had been planted upon it by the petitioner for the purpose of improving the view from the front of her residence. A short time before the construction of the railroad the Hancock county court, by a proceeding taken in that court, discontinued so much of this state road as commenced at the town limits of Hawesville, and ran to a place called "Price's Store." The precise distance is not stated in the record, but presumably, from other facts, only a short distance. There is nothing in the record indicating that there was any other road or highway established by the county court, or any other provision made for those fronting upon this old state road to get egress and ingress from their property and homes. The homestead of the petitioner was part of an 80-acre tract which belonged originally to one of the Trabue heirs, and the 80 acres itself was part of a tract much larger,—probably 200 and odd acres,—which belonged to Trabue. After the discontinuance of that part of the state road, a proceeding of condemnation was had against the Trabue heirs, and what was formerly the state road was condemned under this proceeding instituted by the railroad company, and \$500 paid for the strip of land originally the state road, and the distance of which is not stated in the record, but was the frontage of 205 acres of land which was originally owned by Trabue. This proceeding was had upon the theory that the fee of the old state road, when discontinued, reverted to the Trabue heirs, and that it was only necessary to take condemnation proceedings against them. Mrs. Hennen, in October, 1889, sued the defendant railroad for damages done her property by the construction of its road and the embankment immediately adjoining her homestead. The damage claimed was the destruction or impairment of her egress and ingress, and for causing water to stand on her lot. Subsequently she amended, and claimed for injury done for the impairment of her view, and for the soot and smoke which was caused by the passing trains, and also

for the injury done by the shaking of her walls. The case was most earnestly fought, and three jury trials were had. The first jury found for the defendant, and its verdict was set aside upon a motion for a new trial. The second jury found for the plaintiff in \$1,800 damages. The defendant road took the case to the superior court, and it was reversed by that court because of some instructions which were given on motion of the plaintiff, and some refused which were asked by the defendant. The case went back to the circuit court of Hancock county, and was retried, and again a jury found for the plaintiff in the sum of \$1,800 damages. The case was again taken to the superior court of the state, and affirmed, and after this litigation in the state court Mrs. Hennen intervened by petition, and asked that her judgment should be a preferential claim to that of the bondholders. In the litigation in the state courts the trustees of neither of the mortgages were before the court; and it is now insisted by the defendant railroad that the bondholders are not bound by the judgment in the state court, and that this court should consider the claim as an original one, and dispose of it as such.

The first mortgage on this road was made anterior to the building of the road, and the second mortgage after the road was completed. We think, if any of this recovery shall be considered in the nature of a taking of private property for public use, then the bondholders, though not parties to the litigation, are bound to the extent which may be regarded as a taking. As to the prior mortgage, we think this is clearly so, because the bondholders took by reason of the future-acquired property clause, and would take subject to the purchase money, whether that would be in the nature of condemnation proceedings or by contract. As to the last mortgage, we think it is also to be bound because of the constitutional provision that private property cannot be taken for public uses without just compensation previously made. The right and title of property taken, whether by an entry without condemnation proceedings or whether by an entry under condemnation proceedings, should not vest in the mortgagor until the just compensation is actually paid. The Hennen suit was pending in the state court against the railroad company when it executed this mortgage. The case of *Hassall v. Wilcox*, 130 U. S. 494, 9 Sup. Ct. 590, cited by counsel, is entirely consistent with this view. If we are right in thinking that the bondholders are bound by the adjudication in the state courts, then the contention of the counsel that Mrs. Hennen had no right of ingress or egress after the discontinuance of the state road in front of her lot, and that according to the Kentucky law she had no right to damages for the destruction of the egress and ingress to her property, is not applicable, since it is quite clear that the superior court decided that she had a right of egress and ingress to her property, notwithstanding the discontinuance of the state road, and that she had a right to recover damages for the destruction or impairment thereof; and the case was returned, and tried upon that distinct adjudication. The court says, in its opinion:

"It is shown that the plaintiff's title extended only to the edge of the highway, but it is also shown that she derived her title from the persons whom the de-

fendant claims to have been the owners of the highway. The boundary of the property was fixed by the conveyance to the edge of the public road, and the road has been used as such by the plaintiff and the owners before her under similar conveyances for more than 30 years. They had no possible way of ingress or egress to the property except over this highway. Under these conditions, it is too plain for controversy that the plaintiff was vested with an easement which she cannot be deprived of by the owners of the fee in the highway or by condemnation proceedings against them. It is equally clear that the railway company had the right to build its railway in the highway, and is answerable to the plaintiff for such damages only as she suffered by reason of the destruction of her egress and ingress over the highway, the throwing of smoke, sparks, and cinders upon or into her house, and the injury done to the walls of her house by jarring or shaking caused by passing trains, and the injury from standing water caused by the railroad embankment."

Again, in another part of the opinion, the court says:

"The only damages which the pleadings allow by reason of the embankment are the obstruction to the ingress and egress, and the standing of water on her lot, and the instructions should have been confined to the damages caused by the embankment,—to these two elements. In this connection we will say that there can be no question but that the plaintiff was entitled to an easement in the highway, and the instruction should have so told the jury, instead of leaving it to them as a fact to be found from the evidence."

The lower court had instructed the jury that she was entitled to an easement, and that was one of the errors which were complained of. Whatever may be the Kentucky law in regard to the right of compensation generally to owners of property on a public highway in the country when that highway has been discontinued by proper authority, as decided in the case of *Railroad Co. v. Applegate*, 8 Dana, 289, and *Turnpike Co. v. Dye*, 18 B. Mon. 761, and *Bradbury v. Walton*, 94 Ky. 163, 21 S. W. 869, it can have no application to the present case, since the superior court of Kentucky in this case decided that she had a contractual right arising from the fact that this highway was over the lands of the persons who were the original owners, and to whom the fee reverted. The Trabue heirs, when the fee reverted, if it did revert, held it subject to the easement, which had previously arisen over that ground in favor of the various purchasers under them; and this right of egress and ingress—a most valuable one itself—was the one that the court decided was in Mrs. Hennen, and had not been taken from her by condemnation proceedings. In that view she was a proper party to those proceedings, and should have been made a party, if the railroad company desired to divest her of this easement.

The effect of the suit in the state court, and the judgment when paid, would be to cover any injury or damage done this right of egress and ingress, and the other elements of damage alleged not only for the past, but for the future. The record clearly shows that in estimating the damage it was to the property, past, present, and future, and that the compensation when paid would cover future as well as past damage, so far as the right of egress and ingress is concerned. In the present condition of the record, I find some difficulty in apportioning the several damages which were covered by the judgment for \$1,800 between that which is in the nature of a taking of private property and that which is not. Assuming that \$1,800 covered the entire damage, I think \$1,500 would be a reason-

able amount to allow for the destruction or impairment of the ingress and egress. This would be five-sixths of the judgment, and I think the costs and the damages which have been allowed should be divided in that proportion. A judgment will therefore be entered giving a preference over the bondholders as herein indicated.

LATIMER v. EQUITABLE LOAN & INVESTMENT CO. et al.

(Circuit Court, W. D. Missouri, C. D. July 9, 1897.)

No. 2,181.

1. BUILDING AND LOAN ASSOCIATIONS—PAYMENT OF STOCK.

Under Rev. St. Mo. § 2810, which provides for the payment of the capital stock of building associations in installments, as the by-laws shall prescribe, but authorizes the directors, in their discretion, to allow interest not exceeding 8 per cent. "on such installments as are paid in advance," such an association has authority to receive full payment in advance, and issue paid-up stock bearing interest at 7 per cent.

2. SAME—RIGHT OF WITHDRAWAL.

The statutory right of a stockholder in a building association to withdraw therefrom after giving 30 days' notice, and to receive back the amount paid in by him, together with his share of the profits (Rev. St. Mo. § 2810), is one evidencing a public policy, and cannot be waived, even by an express declaration in the certificates that there shall be no right of withdrawal until 100 months from the issuance of the stock.

3. SAME—PREFERRED STOCK.

Building associations are established on a system of perfect equality and mutuality between all their members, and hence an association organized under Rev. St. Mo. art. 9, c. 42, has no power, in the absence of express provision to that effect, to pledge part of its assets for the payment of one class of its stock in preference to others.

This was a bill in equity by W. A. Latimer, receiver of the First National Bank of Sedalia, against the Equitable Loan & Investment Company and Adam Ittel, to enforce the alleged right of a stockholder to withdraw from the association. The cause was heard on demurrer to the bill.

Wm. S. Shirk and Montgomery & Montgomery, for plaintiff.

G. W. Barnett and J. H. Rodes, for defendants.

ADAMS, District Judge. The defendant is a loan and building association, organized under and subject to the provisions of article 9, c. 42, Rev. St. Mo. Section 2810 of such statutes enacts as follows:

"The capital stock of any corporation created under this article shall at no time consist of more than 10,000 shares of not less than \$100.00 each. The installments on these shares are to be paid at such time and place as the by-laws shall appoint. The by-laws or the board of directors may, if they deem it advisable, allow interest not exceeding eight per cent. on such installments as are paid in advance. Every share of stock shall be subject to a lien for the payment of unpaid installments, fines and other charges incurred thereon, under the provisions of the charter and the by-laws. The by-laws may prescribe the form and manner of enforcing such lien. New shares of stock may be issued in lieu of the shares that have been redeemed, forfeited or matured. The stock may be issued in one or in successive series, in such amount and at such time as the board of directors, the shareholders or the by-laws may determine. Any shareholder, or the legal representative of any deceased shareholder, wishing to with-

draw from the said corporation, shall have the power to do so, by giving thirty days' notice of such intention to withdraw, such notice being given at a regular meeting of the board of directors. On the day following the next regular meeting or at any time thereafter, the member so withdrawing, or, if deceased, his legal representative, shall be entitled to receive, on demand, the amount paid in by him or her, and such proportion of the profits as the by-laws may determine, less all fines and other charges. Should there have been, however, a net loss, instead of a net gain, then such withdrawing shareholder shall receive the actual amount paid less his proportion of such net loss."

From the foregoing it seems plain that the general legislative scheme contemplates the subscription for stock, after the act of incorporation, in several successive series, such as may be determined by the shareholders, board of directors, or by-laws. These subscriptions are payable in installments, according to the requirements of the by-laws. These installments may be paid by subscribers in advance, and, when so paid, the subscribers, in the discretion of the board of directors, or as provided by the by-laws, may receive interest on such advance payments at a rate not exceeding 8 per cent. per annum. A peculiar feature of this scheme permits any stockholder who may have paid one or more installments to withdraw from the association at any time after having given 30 days' notice of his purpose so to do, and, on so withdrawing, to receive back from the association the amount paid in by him, with his proper proportion of the profits if any may have been made, or less his proper proportion of loss if such loss has been sustained. Apart from some other peculiar features, not necessary now to refer to, corporations created under this law are subject to the general principles of statutory and common law governing corporations.

The defendant, claiming to act under the power conferred by the statute of Missouri, on the 4th of September, 1890, issued its series of stock B, containing 500 shares, each for \$200, representing an aggregate of \$100,000 in par value. This series was issued as full-paid stock. It was not paid in installments of any kind, but in advance, for the full amount of its par value. The certificates representing this series recited, in substance:

(1) That dues in full for all the shares represented by them, at the rate of \$1 per month on each share for the full period of 200 months, had been paid, or, in other words, that the par value of \$200 per share had been paid by the holder.

(2) That the shareholder was entitled to redemption of his share at par on, and not before, 100 months from September 4, 1890, the date of the certificates, and also to receive, as his share of the profits and earnings of the business, interest at the rate of seven per cent. per annum.

(3) That there had been deposited with a trustee, of whom the defendant Ittel is successor, securities, consisting of stock of the defendant corporation and deeds of trust on real estate, of the actual value of \$110,000, to secure the ultimate redemption of this series of stock, and the payment of the agreed interest accruing thereon, semiannually, prior to its redemption.

The complainant is the owner of four of these certificates, each calling for five shares, or \$1,000 in par value of stock. In his amended bill, the complainant sets forth the facts already detailed, and avers, further, that, by the provisions of the by-laws of the defendant company, the owners of full-paid shares of stock, like those owned by complainant, were entitled to withdraw from the association, and receive back the amount paid in by them, at any time, on giving 30 days'

notice of their intention to withdraw, in like manner as is provided for stockholders on the installment plan. Complainant next avers that he has given the required notice of his intention to withdraw, and that the defendant has refused to pay him back the amount paid in by him, and refused to recognize that he had any interest in the trust fund referred to in the certificates as pledged for the payment of the face value of these certificates. The bill prays for judgment against defendants, in favor of complainant, for the face value of his certificates, and that the trust fund aforesaid be specially charged with the payment of such judgment. To this bill a demurrer is interposed. This demurrer raises these questions: (1) Whether the certificates in question are for stock, and, if so, whether the defendant had power to issue full-paid stock, and obligate itself to pay a certain rate of interest thereon in lieu of profits. (2) Whether the holder of the full-paid stock has a right to withdraw from the company, and receive back his money paid, on giving the 30 days' notice prescribed by the statute, or whether he is concluded by the provisions found in the certificates to the effect that he is entitled to do so "on and not before 100 months" from September 4, 1890, the date of the certificates. (3) Whether the holder is entitled to any preferential right to the property undertaken to be pledged to secure the payment of these certificates.

Answering the first of these questions, it appears clearly that the parties to these certificates intended them to be capital stock, as distinguished from an evidence of money loaned. They are denominated capital. In the first place they confer upon the corporation power, averments of the bill, have, from the beginning, been treated as stock, with all the rights, in their holders, incident to ordinary stock, except as expressly limited in the certificate. This intention of the parties, unless outside the power of the defendant corporation, should be recognized and enforced. The question, then, is, did the defendant corporation have power to issue and deliver full-paid, interest-bearing stock? The legislation already adverted to, constituting the organic law under which the defendant is organized, provides a scheme primarily and prominently for paying the capital in installments, so long as such payments, taken in connection with other income, arising from fines, dues, interest, and profits, are necessary in order to bring the stock, in actual value, to par. But I do not think this primary and prominent feature or method of paying for stock is exclusive. The statute *supra*, in terms, provides that "the installments on these shares are to be paid at such time and place as the by-laws shall appoint." The by-laws or the board of directors may, if they deem it advisable, allow interest not exceeding 8 per cent. on such installments as are paid in advance. These provisions clearly contemplate a variation from the primary and prominent method of paying in the capital. In the first place, they confer upon the corporation power, in and by its by-laws, to fix the time and place of paying the installments. Obviously, under this grant of power, the installments might be few or many, and payable at one time or more. It appears from the bill that, pursuant to this grant of power, the defendant adopted a by-law referring to and recognizing paid-up shares of stock, and pro-

viding for their treatment and final disposition. Again, a large and probably the largest source of income of associations like the defendant is in loaning their money. They are relieved from the usury laws of the state, and may, in the form of premiums and otherwise, receive interest far in excess of the legal rates otherwise permitted. A necessary prerequisite to loaning money is to get it. Accordingly, investors are encouraged to take stock, and pay the installments in advance. They are allowed a fixed rate of interest, not exceeding 8 per cent., and the association receives the installments, some or all of them, in advance, and loans them out at a greater rate of interest than it pays, and in this way hastens the day of maturity of the stock, for the general benefit of its members. The general scheme thus indicated, the clear reference to advance payment of stock found in the statute, the provisions relating to full-paid stock found in the by-laws, clearly establish the abstract power on the part of the defendant to receive payment of its stock in advance, and issue certificates of full-paid stock therefor. If this power exists, reasonable terms and conditions of its exercise may be fixed by the by-laws or board of directors. The payment of stock in installments confers many possible advantages upon its holder. He participates in the large premiums and interest received for money loaned, in the fines and other charges imposed upon associate members. He receives a share in all the profits of the association, and this goes to expedite the maturity of his stock, or the profitable winding up of his financial venture. These advantages or chances for gain do not appertain to the holder of paid-up stock. In the nature of the case, he cannot apply his share of profits to the payment of his stock. He takes no interest in the speculative feature of the venture. He has money to invest, and is content with a reasonable interest thereon. Considering all these things, I cannot doubt it was a reasonable exercise of power on the part of the defendant to fix the rate of interest payable to this class of conservative investors at 7 per cent. per annum. I shall therefore hold that the defendant had power to receive payment in advance for the stock in question, to issue for it the certificates in question, and to obligate itself to pay interest thereon at the rate of 7 per cent. per annum, in lieu of permitting the holders of such certificates to participate in the profits of the business of defendant corporation. This view finds ample support in authority. *Hohenshell v. Association*, 41 S. W. 948; *Missouri v. Equitable Loan & Investment Co.* (Mo. Sup.; not yet officially reported) 41 S. W. 916; *Towle v. Association*, 75 Fed. 938; *People v. Preston* (N. Y. App.) 35 N. E. 979; *Kent v. Mining Co.*, 78 N. Y. 159; *End. Bldg. Ass'ns*, § 462.

The next question to be considered is whether the complainant, as the owner of this full-paid stock, is entitled to exercise the right conferred by the statutes of Missouri upon stockholders, to withdraw from the association. The statute provides, as already seen, that any shareholder wishing to withdraw from the association shall have power, first giving 30 days' notice of his intention, to do so. Upon complying with this requirement of the statute, the shareholder is entitled to receive, on demand, the amount paid in by him, together with his share of profits. It is contended by the plaintiff that he is

entitled to withdraw from the defendant corporation the amount of money paid on his certificates, to wit, the full face value, notwithstanding 100 months have not elapsed since the date of his certificates, and notwithstanding the special clause found in his certificates that they are not payable for 100 months from their date. This contention raises the question whether the statute permitting withdrawal at any time is to be treated as forming a necessary part of the contract, or whether the acceptance of a certificate with a clause curtailing the right of withdrawal to a period less than 100 months from date is binding upon a holder of such certificate. This right of withdrawal, and thereby ending one's relation to a corporation, is peculiar to building and loan associations. It does not appertain to corporations generally. The holder of stock of ordinary corporations must either transfer his membership to some purchaser of his certificate, or must retain his membership till the end of the corporate life of his company, or to such time as, by unanimous consent of the stockholders, liquidation may be agreed upon. He cannot force his company to purchase it, or otherwise, at his pleasure, withdraw his capital and portion of profits, and retire from the corporation.

The novelty and importance of this right of withdrawal are well expressed in Thompson on Building and Loan Associations. He says (page 64):

"One of the most important rights conferred upon a stockholder is the right of withdrawal. This right is incorporated in all statutes. A distinguishing difference between the stockholders of a building association and the stockholders in an ordinary private corporation is the right of the former, upon giving notice, to terminate future liability on his stock. He can arbitrarily divest himself of his membership, cut loose from the association, and end his duties and liabilities. In an ordinary corporation a subscriber for stock cannot obtain a cancellation of his subscription except by the unanimous consent of the other subscribers, and then he cannot do it if there were creditors whose rights would be jeopardized. Even a majority of the stockholders cannot withdraw and refuse to proceed further in a corporate enterprise; and these rules are said to be just, and based upon a sound public policy. The liberality of the legislative policy can be readily seen in making such a radical change in the law of corporations by investing the building association stockholder with the personal right of withdrawal."

The right of withdrawal, by the provisions and clear meaning of the statutes of Missouri in question, appertains to all shareholders, whether holders of installment-paying or full-paid stock. No distinction in this respect is made between them. By the organic law, the complainant, therefore, has a right to withdraw from the defendant company at his pleasure, and this right of withdrawal is the fundamental feature distinguishing defendant corporation and others like it from ordinary corporations. The question, therefore, is whether this important fundamental right conferred by statute can be waived by receiving certificates containing a curtailment of this right. I think not. If the corporation can issue one certificate or one series of stock curtailing this right of withdrawal, it can issue all of its certificates and all of its series of stock in the same way, and thus practically repeal the statute under which they take their corporate life.

Greenh. Pub. Pol. p. 502, declares the rule to be, in effect, that any contract by which the owner of corporate stock deprives himself of im-

portant rights secured to him by the statute, and which he acquires by virtue of his ownership of the stock under the statute, is void, and that such shareholder cannot waive it or contract it away.

In *State v. Edwards* (Me.) 29 Atl. 947, a customer agreed to pay more toll than the statute permitted the miller to take, and the court held the contract void, on the ground that the customer could not waive or contract away his rights under the statute upon which the miller was permitted to do business.

In the case of *Insurance Co. v. Leslie* (Ohio Sup.) 24 N. E. 1072, a question in relation to the waiver (by agreement found in the policy) of certain statutory provisions was considered. In deciding the case, the court, referring to these provisions, says:

"These sections were in force when the policy in suit was issued and entered into, and became part of the contract of insurance, fixed the measure of the obligation created by it, and control its construction and operation. * * * The statute rests upon considerations of public policy. * * * The statute cannot be treated as conferring upon the assured a mere personal privilege, which may be waived or qualified by agreement. It has a broader scope; it molds the obligation of the contract into conformity with its provisions, and establishes the rule and measure of the insurer's liability."

A large number of pertinent authorities are gathered together in this last-mentioned case, and they satisfactorily establish the general principle announced by the supreme court of Ohio.

See, also, to the same effect, *Havens v. Insurance Co.*, 123 Mo. 416, 27 S. W. 718.

In the case of *Wall v. Society*, 32 Fed. 273, a question arose whether a statute of Missouri, providing that a policy of insurance should be nonforfeitable after two annual premiums had been paid, should prevail in a suit on a policy (executed in Missouri, while this statute was in force) which, by its terms, required the payment of three annual premiums before the policy became nonforfeitable. In other words, the question was very much like the one now before the court, namely, whether the contract of the parties as written should prevail, or whether the statute then in force should be so read into the contract as to prevail over its language. Judge Brewer, after announcing that he was disposed to rest his conclusion upon considerations of public policy, observes:

"It was evidently intended by its [the state's] legislation to provide a fixed and absolute rule, applicable to all cases,—absolute and universal,—because, if it applied only in cases in which the policies were silent, or if it could be waived or changed, a child can see that it would protect only so far as the insurance companies were willing. So, although no words of penalty are attached, no express denial of the right to waive, in fact no words of negation in any direction, yet it seems to me fair to say that the affirmative language of this statute discloses a public policy, which no court ought to question or refuse to enforce. The legislature has by this language declared a rule in respect to forfeitures in life insurance policies. It has thus established the policy which it believes should obtain in this state, and it is my duty to administer the laws of this state in the spirit in which they were enacted, and to uphold both their spirit and their letter."

The same conclusion is reached and expressed in the case of *Society v. Clements*, 140 U. S. 226, 11 Sup. Ct. 822.

In the light of these and many other authorities to which my attention has been directed, I am constrained to hold that the statutory

right of ending a stockholder's relation to a loan and building association, by withdrawal therefrom, is a fundamental right, evidencing a public policy, which cannot be waived or contracted away by any one or more members of such association, and that the plaintiff in this case, having given the prerequisite notice, is entitled to recover the face value of his stock, notwithstanding the terms of his certificates postponing the exercise of this right until an unexpired term of 100 months shall have elapsed.

The next and last question to be considered is whether the complainant, as the holder of the certificates in question, is entitled to any preferential right in and to the property undertaken to be pledged to secure their payment. This must be answered by determining whether the defendant association had power to make the contract so pledging such property. "The elementary working principle of the building association scheme," according to Endlich (section 122, *supra*), is "a system of perfect mutuality and reciprocity and equality of all members." No provision is found in the organic law authorizing an association like the defendant to pledge any of its assets for the retirement or payment of any of its stock, nor is there any general power conferred by statute upon loan and building associations to issue preferred preferential stock, from which authority for pledging its assets to secure the payment of any of its stock may be inferred. Under such state of facts, it must, in my opinion, be held that the pledge of corporate assets for the retirement or payment of a certain class of its stock, in preference to others, is so violative of the elementary requirement of equality and mutuality as to be absolutely void. Again, loan and building associations, like other corporations, may impair their capital and incur obligations to creditors. Capital is in all cases a trust fund, primarily for creditors. If the defendant association can be sustained in the issue of series B of its stock, amounting to \$100,000, or one-tenth of its capital, and securing the payment of the same at par, with annual interest thereon at 7 per cent., by pledging sufficient of its capital therefor, I see no reason why it cannot issue all the balance of its stock in similar series, and in like manner secure the payment thereof. If this can be done, the creditors' trust fund is entirely diverted to the security of its stockholders. The fund which the law devotes primarily to creditors is, by action of others, diverted to a class which, under the law, is made second in the right to the fund. These last observations concerning the rights of creditors are not made because any creditors are now complaining of the conduct of the defendant company, but merely to illustrate the awkward predicament in which the views of complainant's counsel might involve the defendant company.

I feel largely relieved from an exhaustive consideration of this last question by the action of the supreme court of Missouri in the recent officially unreported case of *State v. Equitable Loan & Investment Co.* (Mo. Sup.) 41 S. W. 916. This was a proceeding by quo warranto to oust the defendant of its corporate franchise, because of its alleged unauthorized assumption of power in issuing full-paid stock, and securing the payment thereof by pledges of its assets. Sherwood, J., announcing the opinion of the court, says:

"It is quite apparent that the defendant association assumed and usurped franchises and privileges not granted it by the laws of Missouri in issuing full-paid stock, secured by pledges of other stock of said association, and also by deeds of trust to secure the redemption and payment of said full-paid stock; * * * that, though the defendant association had the right to issue full-paid or prepaid stock, there is nothing in the law under which the association was chartered that will authorize it to make this full-paid stock preferred stock, by using certain securities of the association to guaranty the payment thereof."

The foregoing is a construction placed upon the statute in question by the highest court of the state; and even if it were not in harmony with my views, which is not true, it would, under well-recognized principles, control my action. The plaintiff therefore is not entitled to any preferential right to the assets alleged to have been pledged to secure the payment of his stock. It appears from the foregoing that, if this were an action at law, the demurrer would not be well taken. The plaintiff would be entitled to a judgment against the defendants for the face value of his certificates. This action being in equity, and it appearing that the complainant is not entitled to equitable, as distinguished from legal, relief, the demurrer, for that reason, must be sustained.

UNITED STATES ex rel. INTERSTATE COMMERCE COMMISSION v.
CHICAGO, K. & S. R. CO.

(Circuit Court, W. D. Michigan, S. D. June 23, 1897.)

INTERSTATE COMMERCE ACT—LOCAL ROADS—REPORTS.

A railroad lying wholly within a state, which transports freight, whether coming from within or without the state, solely on local bills of lading, under a special contract limited to its own line, and without dividing charges with any other carriers or assuming any other obligations to or for them, does not come within the provisions of the interstate commerce act, and is not bound to make any report of its business to the interstate commerce commission.

Hearing on Petition for Mandamus to compel respondent company to file annual report under the provisions of the interstate commerce act.

John Power, U. S. Dist. Atty., for relators.

Howard, Roos & Howard, for respondent.

SEVERENS, District Judge. In this case I am of opinion that the question is not so wide as seems to be assumed or contended in the briefs and argument for the commission; that is to say, it is not whether a railway carrier operating a line wholly in a single state, which "hauls traffic in process of transportation to or from another state," is subject to the power of congress to regulate commerce, but is whether by the interstate commerce act it is, by that test alone, made subject to its regulations. The question here, therefore, must be determined by the provisions of that act. It appears from the answer and amended answer, which are taken by the parties as showing the facts of the case, that both the termini of the defendant's railway are within the state of Michigan, that it transports freight, whether shipped upon its line for destinations out of the state or from abroad to stations on its own line, upon

local bills of lading under a special contract of carriage limited to its own line. It does not do such business upon through rates, which it divides with other carriers, or assume any obligation to or for them in respect of such carriage; and the delivery which it makes to other carriers, and its reception from them of freight, is not substantially different from a delivery to or reception from any consignee or consignor. If it is possible for a domestic railroad company, located and doing business wholly within a state, to so limit its business as not to be embraced by the act as one engaged in interstate commerce, it would seem as though it were done in this instance. Without going into a discussion of the general subject, it appears to me that the case is covered by what was said by the supreme court of the United States in *Cincinnati, N. O. & T. P. R. Co. v. Interstate Commerce Commission*, 162 U. S. 184, 16 Sup. Ct. 700, and by the decision of Judge Sage in *Interstate Commerce Commission v. Bellaire, Z. & C. Ry. Co.*, 77 Fed. 942. The result is that the defendant is not subject to the requirement of the commission to make report to it of its business under section 20 of the interstate commerce act, and that the motion for a mandamus to compel it to do so must be denied.

SANTANA LIVE-STOCK & LAND CO. et al. v. PENDLETON et al.

(Circuit Court of Appeals, Fifth Circuit. June 7, 1897.)

No. 567.

1. PUBLIC LANDS—HEADRIGHT CERTIFICATE ISSUED TO HEIRS—ASSETS OF ESTATE.

A headright certificate for land, issued by the proper officers of the republic of Texas, to the heirs of a deceased settler entitled thereto by prior settlement, under the laws of Mexico, became assets in the hands of the administrator of such settler, and subject to be applied by the proper probate court to the payment of his debts.

2. SAME—SALE OF LANDS BY ADMINISTRATOR—SUBSEQUENT RELOCATION OF CERTIFICATE.

The sale by an administrator, under order of the probate court, to pay debts, of land located under a headright certificate issued to the heirs of the decedent, passed all right and title of the estate to such certificate, and, on its subsequently becoming floated on account of a conflict with a prior location, the grantee took title to land patented to the heirs by virtue of said certificate, on its subsequent relocation, under Rev. St. Tex. 1879, art. 3961, providing that such title shall vest in the heirs or assigns of the original settler according to their interest in the certificate. In such case, the misdescription of the land in the administrator's deed becomes immaterial.

3. ADMINISTRATOR—SALE OF LAND TO PAY DEBTS.

An order made, on application by an administrator, to sell 600 acres of land, or so much as necessary to pay debts, to be taken from one half league and labor owned by the estate, authorizes the sale of so much of the half league and labor as may be required, though more than 600 acres.

4. PRESUMPTION OF REGULARITY.

After the lapse of 50 years, every reasonable presumption will be indulged in to support titles acquired at administrators' sales, made under orders of courts of competent jurisdiction; and where the records show that such sales were duly reported, and deeds executed, a confirmation will be presumed, when necessary.

In Error to the Circuit Court of the United States for the Northern District of Texas.

The defendants in error, Mary Ann Pendleton and other heirs at law of Creed T. Pendleton, deceased, instituted their action of trespass to try title in the United States circuit court at Waco, against D. S. McDaniel and the other plaintiffs in error herein, on February 6, 1896, claiming one league and labor of land lying in Coleman county, Tex., patented to the said Creed T. Pendleton on the 9th day of January, 1874, by virtue of headright certificate No. 21, issued by the board of land commissioners of Washington county, Tex., on the 14th of March, 1839. Subsequent to the filing of the original petition, to wit, on November 24, 1896, the plaintiffs below filed their first amended original petition, wherein they brought their action of trespass to try title against the plaintiffs in error as defendants, for said land, and in which they claimed rents in the sum of \$2,000 per annum from the 1st day of March, 1893. On November 26, 1896, the defendants, who are plaintiffs in error here, filed their first amended original answer, wherein they demurred generally, and pleaded not guilty. The defendant the Santana Live-Stock & Land Company, as to 844 acres of the land sued for, and 134 acres, 178 acres, and 140 acres particularly described, pleaded the three, five, and ten years' statutes of limitation. The Santana Live-Stock & Land Company also suggested improvements in good faith, setting them forth, to the amount of \$1,100. The defendant D. S. McDaniel claimed 140 acres of the land in controversy by answer, describing it, and pleaded the three, five, and ten years' statutes of limitation, and also suggested improvements in good faith to the amount of \$362.50. The defendant J. D. Smith claimed in his answer 355.8 acres of the land sued for, pleaded the three, five, and ten years' statutes of limitation, and suggested improvements in good faith to the value of \$307.20. The defendant J. R. McMillin claimed 54 acres of the land sued for, pleaded the three, five, and ten years' statutes of limitation, and suggested improvements in good faith to the value of \$25. The defendant W. M. Newman claimed 640 acres of the land in controversy, pleaded the three, five, and ten years' statutes of limitation, and suggested improvements in good faith of the value of \$1,100. The defendant S. J. Pieratt claimed 160 acres of the land in controversy, pleaded the three, five, and ten years' statutes of limitation, and suggested improvements in good faith to the value of \$770.97. The defendant Henry Braun claimed 120.3 acres of the land sued for, pleaded the three, five, and ten years' statutes of limitation, and suggested improvements in good faith to the value of \$183. The defendant W. B. Braun claimed 359.8 acres of the land in controversy, pleaded the three, five, and ten years' statutes of limitation, and suggested improvements in good faith of the value of \$1,020. The case was called for trial on the 15th of December, 1896, and verdict and judgment were rendered and entered in favor of the plaintiffs (defendants in error), on the 18th of December, 1896. The verdict of the jury, under a peremptory instruction of the court, found for the plaintiffs, the heirs of Creed T. Pendleton, a three-fourths undivided interest in the land sued for, and also found the rental value of the land without improvements for two years preceding the institution of the suit to be five cents per acre per annum, and its rental value from October, 1883, up to two years preceding the institution of the suit, to be five cents per acre per annum without improvements. They further found the value of the land without improvements to be \$2.50 per acre, and that the land was increased in value by the improvements only to the extent of said improvements. They also found for the defendants for improvements in good faith as follows, these amounts being three-fourths of the value of said improvements: Santana Live-Stock & Land Company, \$840; J. D. Smith, \$230.40; J. R. McMillin, \$18.75; W. M. Newman, \$832.50; S. J. Pieratt, \$492.66; Henry Braun, \$106; W. B. Braun, \$661.87. There was no finding in the verdict as to the claim of defendant D. S. McDaniel for improvements, or upon any other special issue. Thereupon the court entered its judgment adjudging an undivided three-fourths interest in the lands sued for to plaintiffs, the heirs of Creed T. Pendleton, and further adjudged that the premises sued for were of the value of \$2.50 per acre, without improvements, and that the rental value of the premises for two years preceding the institution of the suit was 5 cents per acre. It further adjudged that the rental value of the premises, without im-

provements, from the time possession was taken of same by the defendants and their vendors, to wit, in October, 1883, had been five cents per acre per annum. It further adjudged the value of the improvements to each of the defendants as found by the jury, and, after deducting therefrom the rents from October, 1893, they adjudged the net balance remaining in favor of defendants for improvements. The judgment proceeds to recite the fact that the verdict omitted to find in favor of the defendant D. S. McDaniel on his claim for improvements in good faith, and that plaintiffs, by counsel, in open court, requested the court to render judgment for said defendant McDaniel for his entire claim for improvements, as set up in his answer, irrespective of rents, which the court proceeded to do. The judgment then proceeds to set out the particular tracts claimed by each of the defendants, and then entered the statutory judgment ordering and adjudging that no writ of possession should issue for one year, unless the plaintiffs should pay into court for the defendants the amounts of the judgments rendered in favor of each defendant for their improvements, and upon neglect to do so within the term of one year the defendants, or any of them, could, within six months after the expiration of the year, pay into court the sum of \$2.50 per acre for the amount of lands recovered by plaintiffs, together with other provisions as provided by the statutes of Texas relating to the action of trespass to try title and suggestion of improvements in good faith. The court further adjudged that the plaintiffs Benjamin Pendleton and his daughter, Nannie F. Adams, and her husband, Richard Adams, were barred by the statutes of limitations as pleaded in the cause, which was admitted by their counsel.

Upon the trial, the plaintiffs offered in evidence the patent to the heirs of Creed T. Pendleton, bearing date January 9, 1874, for the land in controversy, in Coleman county, Tex., which patent recited that it was issued by virtue of certificate No. 21, issued by the board of land commissioners of Washington county, Tex., on March 14, 1839, for one league and labor of land. And, after offering evidence tending to prove that the plaintiffs were the only heirs at law of Creed T. Pendleton, deceased, plaintiffs proved that said Creed T. Pendleton was a native, and resided for a number of years previous to 1828 or 1830 in Buckingham county, Va.; was there married, and had six children by his then living wife; that about 1828 or 1830 he left his wife and family in Virginia, declaring his intention to come to Texas, and make a home in Texas, so that he could bring them there to live with him; that after reaching Texas somewhere between the years 1830-1833, he wrote to his wife and family in Virginia, requesting them to come to Texas, and join him there; he also wrote from Tennessee, on his way to Texas, stating his intention of making his home in Texas, and bringing them there; that about 1835 a man came back to the neighborhood in Virginia where the family resided, and stated that Creed T. Pendleton had married in Texas, and was dead, and that it was the general understanding that he had married and died in Texas. Neither the wife of Creed T. Pendleton in Virginia, nor any of her children ever came to Texas. It was admitted by plaintiffs that Adams and wife, who claimed one-fourth of the land, were barred by limitation, and plaintiffs showed that the other plaintiffs were not so barred.

Defendants proved by G. R. Seward: That he (the witness) emigrated to Texas in December, 1833, and resided in Cole's settlement, in the state of Coahuila and Texas, and in Washington county, Tex., from its organization up to 1892. That he knew a man by the name of Creed T. Pendleton in 1834, at said Cole's settlement, in Austin's colony; that Creed T. Pendleton boarded with Shubal Marsh, and afterwards with witness' father. That said Pendleton was a single man, so far as witness knew and believed, but in 1834 or 1835 he married a Miss Elizabeth Goodnoe (or Goodnow). Witness was present at the marriage, and it was performed in witness' father's house. Pendleton and his wife lived together on witness' father's place after they were married. That according to witness' belief and knowledge said Pendleton did not bring any family to Texas, and witness never heard of his having any other wife or family in Texas. He left no children that witness knew of. Said Pendleton died in 1835, on witness' father's place, in said Cole's settlement, Austin's colony, leaving his wife surviving him. She left Cole's settlement shortly after the death of her husband, for Missouri. They had no children when she left. Witness also knew Shubal Marsh, who lived in said Cole's settlement, and knew him until his death, many years afterwards. Marsh was always looked upon as an honest, upright, and

honorable man as long as he lived. Defendants next offered in evidence an order from the board of land commissioners of Washington county, Tex., to the following purport and effect: That Shubal Marsh, administrator, had proved that C. T. Pendleton, deceased, was a citizen previous to December; that he came to Texas in 1833, married and resided here with his family, and remained until his death, which occurred in June, 1835; certificate issued to Shubal Marsh, his administrator, for one league and labor of land, 14th of March, 1839. Defendants next offered in evidence certified copy of land certificate No. 21, issued by the board of land commissioners of Washington county on the 14th of March, 1839; and also a receipt for taxes from the treasury department of the republic of Texas, dated June 14, 1841, acknowledging receipt of taxes paid by S. Marsh in full upon one league and labor of land lying in the county of Robertson. Defendants also proved that Shubal Marsh was administrator of the estate of Creed T. Pendleton, and acting as such as late as 1852. After the introduction of the original patent in evidence, defendants also introduced and read in evidence the following probate proceedings in Washington county, Tex., duly certified: (1) Petition of Shubal Marsh, administrator, to the probate court of Washington county, September term, 1839, reporting that he had administered all the estate which had come into his hands or knowledge, which would appear by account that day rendered, and had paid out more money than he had received, and that there was still from \$400 to \$600 outstanding indebtedness; that he had obtained, after much trouble, the land certificate for a league and labor, and had it located in Robertson county, and that this land was the only property belonging to the estate available to pay the debts. The administrator prayed for an order to sell so much of said league and labor as would be sufficient to pay all the debts of the estate, and clear the same. (2) An order from the probate court of Washington county, passed September 30, 1839, ordering the administrator, Shubal Marsh, to sell one-half of the league for cash. (3) Report of sale by Shubal Marsh, administrator, November 26, 1839, reporting that he had sold one-half the league to W. Y. McFarland for 27 cents per acre, Texas money, the same being the south half of said league. (4) Petition of Shubal Marsh, June 29, 1840, to probate court of Washington county, reporting that there was still \$100 and upwards of debts due by the estate of Creed T. Pendleton, and praying for an order to sell 600 acres of land, or as much as will pay all debts due from the estate, out of the remaining one-half league belonging to said estate, to wit, the north half of his headright league. (5) Order of sale by probate court to sell, using same language as the petition, and made June 29, 1840. Report of sale, August 4, 1840, by the administrator, that he had sold one-half league and labor of land belonging to the estate of Creed T. Pendleton, deceased, to J. D. Giddings, at six cents per acre. This report was apparently accompanied with an account current, showing that for the two sales to McFarland and Giddings the administrator had realized the following sums: From McFarland \$119.55, and from Giddings \$143.40. The account current was examined and approved by the court. The defendants also proved by O. A. Seward, county clerk of Washington county: That he had been such clerk for nearly six years, and that there was a skip in the probate minutes from January 1, 1839, to February 28, 1842. That there were certain books, known as "Final Records of Estates" in the office in which probate proceedings were recorded in a desultory way for the years 1835 to 1842, inclusive, there being no regularity as to dates, but there were probate minutes recorded for 1837, 1838, and 1842, but none for 1836, 1839, 1840, and 1841. The first record book of probate proceedings was marked "Probate Minutes, Book A," and the first order therein is dated January 13, 1837, and the last dated December 31, 1838. The second book is styled "Probate Minutes, Book B," in which the first order is dated February 28, 1842. That he knew there is now no record of any probate proceedings had in Washington county for the years 1839, 1840, and 1841 to be found in his office, from having examined the records, and repeatedly made search for the same. That he did not know what became of the records. Knows of no tradition except that it is generally known that said records are missing. That there was a number of papers in the estate of Creed T. Pendleton on file in his office, and others which bear no file mark, copies of which he attached to his depositions. That the probate records and minutes in Washington county are designated by letters beginning with the letter "A" and continuing with the letters "B," "C," etc. Rec-

ords of probate minutes "A" and "B" were in his office. The last order in Book B is of date April, 1851. There is no skip in the lettering. It is usual to begin with A and number the books in alphabetical order, and, if one such book were lost after being so lettered, it would certainly be shown though it is possible that there was a skip in the proceedings. Book A, before mentioned, contained 461 pages, exclusive of index. The last order is partly written on pages 460 and 461. That in the books called "Records of Estates" probate proceedings were recorded during the years 1836 to 1846, inclusive, in a desultory way, and in Book B, the first final record, the first proceedings recorded are January, 1839, and the last was marked "Filed March 3, 1846." In Book C, Final Records, the first proceedings are dated November 21, 1836, and on page 470 proceedings recorded of date April 11, 1837. Witness knew nothing of any proceedings during any year except as previously stated. He never saw any probate record than those there now, if any such ever existed. The attached copies he made as nearly as possible fac similes of originals. The papers are old, ragged, torn, and blotted, and he considers it nearly a physical impossibility to show all minute marks and blots, but the copies are as nearly correct as he can make them. Exhibit A, attached to Seward's deposition, contained the following papers: Order giving administrator of Pendleton three months to finish and finally close the administration. This order is dated January 2, 1838. Defendants then offered in evidence Exhibit B, which consisted of copies of a large number of accounts against the estate of Creed T. Pendleton, amounting to upwards of \$700, inventories and sales of personal property amounting to \$272.93, and the following other papers, all of which were certified by the county clerk of Washington county, Tex., as being true copies as appears from the original papers in his office: (1) The application of Shubal Marsh, administrator, September term, 1839, to sell the league and labor of land in Robertson county; hereinbefore stated. (2) The order of sale of September 30, 1839, previously stated. (3) Report of sale of one-half league to W. Y. McFarland, dated November 26, 1839, previously stated. (4) Petition of Shubal Marsh, administrator, dated June 29, 1840, for leave to sell 600 acres of the remaining land, or as much as would pay all debts, which also is previously set forth. (5) Order of sale hereinbefore set out, dated 29th day of June, 1840. (6) Report of sale by Shubal Marsh of one-half league and labor to J. D. Giddings, dated August 4, 1840, before set out. (7) Account due by Creed T. Pendleton, the deceased, to Dr. William P. Smith, for medical services for self and wife, amounting to \$40.50, with receipt to S. Marsh for balance paid by him. (8) Account due by Creed T. Pendleton, deceased, to Dr. H. H. Kone, for medical services rendered self and wife, amounting to \$7.75. These services seem to have been rendered in the month of June in the year 1835. (9) Order of the probate court of Washington county, dated September 1, 1835, ordering Shubal Marsh to make sale of the property and estate, with other orders that need not be specifically set out. After proving by D. C. Giddings certain facts which tended to establish the loss of record books, and further proof tending to show that upon the death of Creed T. Pendleton his estate was indebted in divers accounts in the amount of more than \$700, which indebtedness was paid and satisfied by Shubal Marsh, administrator, which indebtedness included bills for physician's services to wife and self on various dates in June, 1835, the defendants offered in evidence two locations of said league and labor land certificate No. 21, in Robertson county, Tex. This location of the certificate in Robertson county was not contested, and for some reason, supposed from the map to be a partial conflict with a prior 11-league grant, said certificate was floated in accordance with the laws of the state of Texas and relocated upon the lands in Coleman county, Tex., in controversy in this suit. Thereupon defendants offered in evidence deed from Shubal Marsh, administrator, to W. Y. McFarland, dated December 10, 1839, reciting the order of sale, the sale of one-half league after due advertisement, for cash, and the payment of the purchase money conveyed to said McFarland one-half league of land described, located in Robertson county, Tex., and all the right, title, claim, interest, and property which said Pendleton estate had in and to the same, and to the headright certificate under which it was located. The plaintiffs objected to the introduction of said deed on several grounds, not necessary to recite, and because the report of sale showed a conveyance of the south half of a league in Robertson county, and the deed conveyed the western half of said league, and therefore there was a

failure of description, and the lands conveyed could not be identified. This objection was sustained by the court, and the deed excluded.

The defendants also offered in evidence a deed from Shubal Marsh, administrator, to J. D. Giddings, for the other half, "being all the remaining portion of said headright of Creed T. Pendleton, located in Robertson county, Texas," the deed reciting that the entire remaining part of said league and labor being necessary to be sold to pay the debts and expenses of administration. It also recited the payment of the purchase money, and conveyed to J. D. Giddings all right, title, etc., of the estate in and to the said half league and labor of land, and to the headright certificate of the said Pendleton, etc. The plaintiffs objected to the introduction of this deed in evidence, because: (1) The order of sale only authorized the administrator to sell 600 acres of said land, or a sufficient amount thereof to pay the indebtedness, which order of sale was void, as being vague, indefinite, and uncertain. (2) Because the order of sale having only ordered the sale of 600 acres, the deed showed that the administrator had sold one-half league and labor, which was in excess of the order of the court. (3) Because the administrator sold more than the order of sale directed or than the report of sale declares that he did sell. (4) Because there was a variance between the petition for order of sale and the report of sale. (5) Because the deed does not show where the land is situated, and does not describe the certificate, or the land attempted to be conveyed by the deed. The court sustained the objections of plaintiffs to the introduction of the deed to Giddings on the ground that the order of sale authorized the administrator to sell 600 acres of said land, or a sufficient amount thereof to pay the remaining indebtedness; and said order of sale was void as being vague, indefinite, and uncertain, the deed showing that the administrator had sold one-half league and labor, which was in excess of the order of court. The defendants then offered in evidence deeds tending to show a regular chain of title from W. Y. McFarland and J. D. Giddings to themselves, some of said mesne conveyances being of the certificate only, duly acknowledged and recorded at and about their several dates, in order to show title in themselves to the lands in controversy; to the introduction of which chain of title plaintiffs objected, because the defendants had failed to connect themselves with the title from Creed T. Pendleton, or his administrator, of the two deeds from Shubal Marsh, administrator, to McFarland and Giddings, and by reason of defective probate proceedings, which objections were sustained by the court, and said chain of title was only permitted to be read to the jury for the purpose of showing title by limitation and improvements in good faith.

The defendants, after a peremptory instruction from the court to the jury to find for plaintiffs for an undivided three-fourths interest in the land in controversy, requested four special instructions, to wit, in substance: (1) That the children and heirs at law of Creed T. Pendleton were aliens at his death, and could not recover. (2) That the Texas wife was entitled to one-half of the land in controversy, and that plaintiffs were precluded from any interest in said one-half, and could only recover such portion of the remaining half as the jury might determine they were entitled to under the instructions of the court. (3) That, defendants having been admitted on trial to be the owners of a portion of the land in controversy, plaintiffs were not entitled to recover any rents until after the institution of the suit. (4) That two of the plaintiffs,—Benjamin A. Pendleton and Jacob H. Pendleton,—they and their descendants, who were parties to the suit, having been shown to have been of age before defendants took possession of the land, in 1883, were barred by limitation. All of these requested special instructions were refused.

The defendants also proved that the defendant the Santana Live-Stock & Land Company took possession of the land in controversy in October, 1883, and held possession till sales were made to its co-defendants, and that the land was of the reasonable value of \$2.50 per acre, and of the rental value of 5 cents per acre per annum; that the defendant Newman entered into possession of 640 acres of land on January 21, 1891; that D. S. McDaniel entered into possession of 140 acres of the land on April 10, 1893; that S. J. Pieratt entered into the possession of 60 acres of the land on June 2, 1891; that J. D. Smith entered into possession of 355 acres of the land on June 3, 1891; that W. D. Braun entered into possession of 340 acres of the land on June 2, 1891; that Henry Braun entered into possession of 120 acres of the land on June 2, 1891, and J. R. McMillin entered

into possession of 53 acres of the land on December 5, 1891. The verdict and judgment found that these defendants had made permanent and valuable improvements, and the judgment gave them a recovery against plaintiffs for the value of said improvements to the extent of three-fourths, but entered judgment against each of said defendants for rents for the amounts of lands held by them, respectively, at the rate of five cents per acre per annum from and after October, 1883, in accordance with the charge of the court, which charge was excepted to. The defendants, having failed to obtain relief on motions for a new trial and in arrest of judgment, sued out this writ of error.

Geo. Clark and D. C. Bolinger, for plaintiffs in error.

John W. Davis, for defendants in error.

Before PARDEE and McCORMICK, Circuit Judges, and NEWMAN, District Judge.

PARDEE, Circuit Judge, after stating the facts as above, delivered the opinion of the court.

Creed T. Pendleton, in his lifetime, having acquired a right to the grant under the colonization laws of Mexico by immigrating to the state of Coahuila and Texas, and residing there with his family, the original certificate issued to the heirs of said Pendleton on the application of Shubal Marsh, administrator, was assets of said Pendleton's estate, subject to administration by the proper probate court, and to be applied to the payment of said Pendleton's debts. *Soye v. Maverick*, 18 Tex. 101; *Allen v. Clark's Heirs*, 21 Tex. 404; *Marks v. Hill*, 46 Tex. 346; *Rogers v. Kennard*, 54 Tex. 34; *Hill v. Kerr*, 78 Tex. 218, 14 S. W. 566; *Lyne v. Sanford*, 82 Tex. 59, 19 S. W. 847. The patent issued to the heirs of Creed T. Pendleton by the state of Texas on the 9th day of January, 1874, by virtue of the certificate above referred to, vested the legal title to the lands conveyed by the patent in the heirs or assigns of Creed T. Pendleton according to interest in the certificate, by virtue of the act of the legislature of the state of Texas passed December 24, 1851. See Rev. St. Tex. 1879, art. 3961. As the location of the Creed T. Pendleton league and labor in Robertson county, Tex., at the time of the sales by the administrator was invalid by reason of partial conflict with a prior 11-league grant, and as said certificate was afterwards floated in accordance with the laws of Texas, and relocated in Coleman county, on the lands in controversy, any discrepancies in the description of the land as shown in the deed of the administrator to W. Y. McFarland, and in the report of sale by the administrator to the probate court of Washington county, are and were immaterial, as the administrator's deed at least conveyed the right to one-half of the certificate, and upon the relocation in Coleman county the legal title to one-half of the league as located vested in the purchaser of the one-half of the certificate. *Simpson v. Chapman*, 45 Tex. 560, 566; *Renick v. Dawson*, 55 Tex. 102, 107; *Hines v. Thorn*, 57 Tex. 98, 102; *Hearne v. Gillett*, 62 Tex. 23; *Robertson v. Du Bose*, 76 Tex. 1, 13 S. W. 300. It is to be noticed that in the administrator's deed to McFarland the certificate issued to the said Creed T. Pendleton was expressly conveyed. As to the title passed by an administrator's deed, see *Sypert v. McCowen's Ex'rs*, 28 Tex. 636, 640; *Bennett v. Kiber*, 76 Tex. 389, 13 S. W. 220; *Burkett v. Scarborough*, 59 Tex. 495; *Lumpkin v. Adams*, 74 Tex. 103, 11 S. W.

1070. The order of sale under which the administrator of Creed T. Pendleton sold the remaining half league to pay the outstanding debts of the estate authorized the sale of 600 acres, or so much (not of the 600 acres, but) of the remaining half league as was necessary to pay all the debts due by the estate of said Pendleton. The entire record in the case shows that in the case of each order of sale issued it was intended that the administrator should deal with the one-half of the entire league and labor, and, as the entire record may be looked to in determining what was sold by the administrator under the approval of the court, it is clear that under the two sales in question the entire right of Creed T. Pendleton to a league and labor of land was intended to be and was sold. *Farris v. Gilbert*, 50 Tex. 350, 355; *Collins v. Ball*, 82 Tex. 259, 266, 17 S. W. 614. After the lapse of over 50 years, every reasonable presumption should be indulged in to support titles acquired at administrators' sales made under orders of courts of competent jurisdiction; and where, as in this case, the record shows that the sales as made by the administrator were duly reported with accompanying accounts, showing the disposition of the proceeds, a confirmation of the sales should be presumed, if necessary, to show full title in the purchasers. It follows, from the application of the foregoing propositions to the case in hand, that the trial court erred in excluding the administrator's deeds to W. Y. McFarland and J. D. Giddings, and the various deeds and transfers of titles from W. Y. McFarland and J. D. Giddings to the plaintiffs in error, and in giving a peremptory instruction to the jury to find in favor of the defendants in error (plaintiffs below) for any portion of the land in controversy. Other questions raised by the assignments of error need not be considered. The judgment of the circuit court is reversed, and the cause is remanded, with instructions to grant a new trial, and thereafter proceed in accordance with the views expressed in this opinion, and as law and justice may require.

SOUTHERN RY. CO. v. ELDER.

(Circuit Court of Appeals, Sixth Circuit. July 6, 1897.)

No. 400.

1. RAILROADS—OMISSION OF SIGNALS AT CROSSING—FAILURE OF ROAD OVERSEER TO ERECT SIGN.

Under Mill. & V. Code Tenn. § 1298, requiring overseers of public roads to erect a sign at each railroad crossing, and providing that "no engine driver shall be compelled to blow the whistle or ring the bell at any crossing unless it is so designated," the servants in charge of a train are not required to give a warning of any kind of the approach of a train to a crossing not so designated.

2. SAME—PLEADING.

The plaintiff having alleged in her declaration that the road where the accident occurred was a "public road," she cannot, without amending her declaration, be heard to claim that the road was a private one, even if it should be conceded that that is material.

In Error to the Circuit Court of the United States for the Eastern District of Tennessee.

This was an action by the widow of Davis Elder to recover damages for the negligent killing of her husband while crossing the track of the Southern Railway Company at a point where the railroad was crossed at right angles by a public road upon which the deceased was traveling. The deceased at the time of the accident was driving in a one-horse vehicle, called a "buggy," upon a road which is described in the declaration as "a public road leading from the town of Cleveland, Tennessee, which crossed at grade the track of the railroad owned and operated by plaintiff in error." The only witnesses to the collision were the driver and fireman upon the engine of the company. They testified that the train was moving at about 40 miles per hour as it approached the crossing, and was within 30 or 40 yards of the crossing when deceased was observed to be driving on the track, and that he had not been sooner seen, though one of them had been on the lookout ahead. They further testified that everything was done to stop the train and warn the deceased which was possible after he was seen. There was a conflict in the evidence as to whether the bell was rung or whistle sounded while approaching this crossing. The deceased was instantly killed, and there was no direct evidence as to whether he had stopped or looked or listened before approaching the crossing. There was evidence, however, that the right of way on both sides of the track was so obstructed by weeds and undergrowth as that one undertaking to cross the road in a buggy could not observe the approach of a train on either side of the crossing until within a few feet of the track. There was a verdict and judgment for the plaintiff below, and this writ of error was sued out by the railroad company for the purpose of reversing that judgment.

Thos. H. Cooke, J. E. Mayfield, Leon Jourolmon, W. L. Welcker, and Henry Hudson, for plaintiff in error.

W. L. Humphrey, C. W. Lester, Wiley S. Gaston, N. Q. Adams, and E. B. Madison, for defendant in error.

Before TAFT and LURTON, Circuit Judges, and HAMMOND, J.

LURTON, Circuit Judge, after stating the facts as above, delivered the opinion of the court.

Section 1298, Mill. & V. Code Tenn., provides as follows:

"(1) The overseers of every public road, crossed by a railroad, shall place at each crossing a sign, marked: 'Look Out for the Cars When You Hear the Whistle or Bell;' and the county court shall appropriate money to defray the expenses of said signs; and no engine driver shall be compelled to blow the whistle or ring the bell at any crossing, unless it is so designated. (2) On approaching every crossing, so distinguished, the whistle or bell of the locomotive shall be sounded at the distance of one-fourth of a mile from the crossing, and at short intervals till the train has passed the crossing. * * * (4) Every railroad company shall keep the engineer, fireman, or some other person upon the locomotive, always upon the lookout ahead; and when any person, animal or other obstruction appears upon the road, the alarm-whistle shall be sounded, the brakes put down, and every possible means employed to stop the train and prevent an accident."

By sections 1299 and 1300 of the same revision it is provided that every railroad company which fails to observe these precautions shall be responsible for all damages to persons or property occasioned by or resulting from any accident or collision that may occur, and that no railroad company that observes or causes to be observed these precautions shall be responsible for any damages done to persons or property upon its road. It was admitted that the crossing in question was not designated in the manner prescribed by section 1298, and there was evidence tending to show that the railroad company did not ring a bell or blow a whistle, or give any other warning of approach to

this crossing. After charging the jury with respect to what was designated by the learned trial judge as "statutory negligence" at railroad crossings, he then instructed the jury as follows:

"Now, in this case it is conceded that at this crossing there was no signboard of the kind prescribed by the statute, and, that being so, the company and its engineer, in the express language of the statute, was under no obligation to sound the bell or blow the whistle as prescribed by the statute. * * * I say to you now, and before I leave this part of the case, that this statutory requirement of sounding the bell and blowing the whistle at one-fourth of a mile from the crossing, and at short intervals till the train has passed the crossing, has no application to this case."

He then instructed the jury further, as follows:

"Regardless of the statutory requirements, the court is of the opinion, and so instructs you, that it was the duty of the railroad company, if a road used as a public highway by the people in that neighborhood for traveling had been there for such length of time and so used as that the railroad company, through its officers and agents, knew that it was so used, the company was under the duty of giving reasonable notice and of exercising reasonable care at such crossing to prevent accident, irrespective of any statutory requirement. The distinction is that the common law, in the absence of any statute, requires no particular signal to be given, but requires such warning to be given as would be reasonable and prudent in notifying persons who might be crossing of the approach of the train. It might be seen by sounding the bell or blowing the whistle, or either. It might, if the train made a sufficient amount of noise, occur by the motion of the train. Any signal which was reasonable—the giving of which would be reasonable care and caution—would be sufficient to discharge that duty, and a failure to give any warning of any kind reasonably calculated to inform travelers of the approach of the train would render the defendant liable if an accident resulted from such failure."

The charge of the trial judge that, although this crossing was not designated as required by the statute, yet it was the duty of the railroad company to give "reasonable notice and to exercise reasonable care at such crossings to prevent accidents, irrespective of any statutory requirements," cannot be sustained if any effect is to be given to the positive words of the statute, that "no engine driver shall be compelled to blow the whistle or ring the bell at any crossing, unless it is so designated." The authority of the state to prescribe rules and regulations concerning the operation of railroads at such crossings is not disputed, and the only question which can arise is whether the legislation enacted was intended to cover the whole subject, and to relieve railroads from the exercise of common-law precautions at crossings where the statutory signboard had not been erected. If the statute had been silent as to the duties of railroads where crossings were not so designated, there would be room to infer that at undesignated crossings it would be the duty of such companies to exercise all the care and prudence required by common law. In the case supposed, it could be well presumed that the common law was not repealed or altered except in the case mentioned in the statute, and that at places so designated no signal or precaution other than those prescribed by the statute would absolve the railroad from responsibility. The peculiarity distinguishing this statute from all others to which attention has been called is that it expressly absolves railroads from blowing the whistle or ringing the bell unless the crossing be designated by the proper signboard. These signals are, beyond controversy, the most

effectual of all known means of giving warning; and to say that while absolved from using the best known and most efficient signals, or using them at the time and place named in the statute, the duty remains of using less known and less usual methods of warning, is to practically annul the statute without securing any adequate protection to the public. But the instruction went further than this. The whole question of what would be "such warning * * * as would be reasonable and prudent in notifying persons * * * of the approach of the train" was left to the jury. If, under the circumstances of the particular case, the jury should think that nothing less than the blowing of the whistle or the ringing of the bell, or both, at the distance of one-fourth of a mile from the crossing, and at intervals until crossed, was reasonable care and prudence, it was their perfect right to so find, and return a verdict accordingly. Thus, we would have the situation of the lawmaking power of the state saying that, unless the crossing is designated as required by law, the engine driver shall be under no duty to blow his whistle or ring his bell, while the jury, acting also by virtue of law, would be authorized to say on the same facts that it was negligence not to blow the whistle or ring the bell. Such an anomalous situation is not to be supposed, and the plain language of this statute leaves no room for such a construction. If any doubt could be suggested as to the import of the positive provision of the statute, it must be regarded as settled by the opinion of the Tennessee supreme court in the case of *Railroad Co. v. McDonough*, 97 Tenn. 255, 37 S. W. 15,—a case which has been decided since the allowance of the writ of error in this case. That was an action for damages sustained by the killing of a cow at a railroad crossing. A jury was waived, and the case submitted to the trial judge, who found generally for the plaintiff. There was no evidence as to whether the crossing was distinguished by a signboard such as required by section 1298, Mill. & V. Code Tenn. The railroad company insisted that it was not bound to ring the bell or sound the whistle on approaching this crossing unless it was first shown that the crossing was marked by the statutory signboard. In support of the judgment it was urged that, where it was shown that the road was a public and much-traveled road, the law would presume that the road overseer had discharged his duty, and maintained the sign which the law required him to erect. To this the court, speaking through Justice McAllister, said:

"We are unable to concur in this contention. The statute provides that the overseer of every public road crossed by a railroad shall place at such crossing a signal marked, 'Look Out for the Cars When You Hear the Whistle or Bell,' and the county court shall appropriate the money to defray the expenses of such signs, and no engine driver shall be compelled to blow the whistle or ring the bell at any crossing unless it is so designated. Mill. & V. Code, § 1298, subsec. 1. It will be observed that the duty of the company to ring its bell or sound its whistle at public crossings is not absolute, but is contingent upon the performance of a separate and distinct duty by an independent public agent. The company is in no default until it is made to appear that the crossing has been designated in the manner required by the statute."

It is true that the judgment in that case was affirmed, but the affirmation was placed upon another ground, there being a general finding in favor of the plaintiff below.

It has been suggested by counsel for defendant in error that the crossing where this collision occurred was not such a crossing as was required to be designated by section 1298, and that, therefore, the common-law duties of the railroad company at crossings other than such as are described in section 1298 have application. This is clearly an afterthought. The declaration described the road as a "public road." Whether it had been laid off by the county authorities as a public road does not appear, and, in view of the averment of the declaration, it was unnecessary. Dedication by the landowner and acceptance and use by the public are sufficient to make it a public road, without any formal action by the county authorities. The declaration having described the road upon which the deceased was traveling as a "public road" precluded the plaintiff from controverting that fact without amending his pleading. The question as to whether the statute has any application to a mere "private road," as distinguished from a "public road," was not involved on this record, and no charge was made or requested upon this aspect of the case. We do not, therefore, regard this question as involved upon this writ of error, or calling for any expression of opinion by this court. *Nashville & D. R. R. v. State*, 1 Baxt. 58; *Gilson v. State*, 5 Lea, 163, 164. The neglect of the proper authorities to appoint an overseer, or of the overseer to properly designate the crossing, would not alter its character as a public road. That railroads should be absolved from the common-law duty of giving some reasonable warning of the approach of its trains to undesignated public road crossings may be a public misfortune, but it is one which the public can obviate by causing the proper signs to be erected. The absence of such a sign is notice that extraordinary care should be exercised by a traveler desiring to cross. Altogether different provisions of the statute apply concerning the duty of railroads to persons, animals, or objects which appear on its tracks at crossings or elsewhere. The provisions of the third paragraph of section 1298 cover the latter class of cases, and impose very stringent duties, and an absolute liability for any failure to observe the duties prescribed by that paragraph. The first paragraph of the section deals only with the precautions to be observed on approaching a crossing, and before an object has appeared on the track. There was conflicting evidence as to whether the duties imposed by the third paragraph of the section had been observed, and an unobjectionable charge upon that phase of the evidence. But for the error in the instruction as to the duty of the railroad company upon approaching the crossing in question the judgment must be reversed and the cause remanded, with directions to award a new trial.

EQUITABLE LIFE ASSUR. SOC. OF UNITED STATES v. NIXON.

(Circuit Court of Appeals, Ninth Circuit. July 1, 1897.)

No. 340.

1. LIFE INSURANCE—PLACE OF CONTRACT.

Where an application for life insurance was made in the territory of Washington, and the advance premium paid there to the company's agent, to be forwarded to the company, under an agreement that the insurance should not take effect unless the premium was accepted and the risk approved by the company in New York, and, by the terms of the policy issued, all premiums and the policy itself were payable in New York, and proof of death was to be there made, the policy is a New York contract, and the rights of the parties thereunder are governed by the statutes of that state, there being no statute in the territory or state of Washington affecting the right of the parties to so contract.

2. SAME—FORFEITURE FOR NONPAYMENT OF PREMIUM—STATUTE.

The statute of New York providing that no life insurance company doing business in that state shall have power to declare a policy forfeited for nonpayment of premiums, anything to the contrary in the policy notwithstanding, until 30 days after it shall have mailed a notice to the assured or to his assignee, as therein prescribed, and stating that the policy will be forfeited unless payment is made within 30 days, unless a similar notice shall have been mailed not less than 30 nor more than 60 days previous to the maturity of the premium, which shall state the date of such maturity, applies to and governs a policy issued and to be performed in New York, though the assured resides in another state.

3. SAME—ACTION ON POLICY—EVIDENCE.

Under the provision of the New York statute making the affidavit of any officer, clerk, or agent of a life insurance company, that the notice required by the statute to be given to a policy holder before a forfeiture of the policy for nonpayment of premiums can be declared has been duly addressed and mailed, presumptive evidence of such fact, evidence to rebut such presumption may be given by the adverse party, and may consist in part of evidence of the nonreceipt of such notice by the assured.

4. SAME—WAIVER OF STATUTORY REQUIREMENT.

The statute of New York declaring that no life insurance company shall have power to declare a policy forfeited for nonpayment of premiums until 30 days after the notice therein prescribed shall have been given is mandatory, and its requirements cannot be waived by the parties.

In Error to the Circuit Court of the United States for the Northern Division of the District of Washington.

Thomas R. Shepard, for plaintiff in error.

Stanton Warburton, for defendant in error.

Before GILBERT and ROSS, Circuit Judges, and HAWLEY, District Judge.

ROSS, Circuit Judge. This action was brought by Cora E. Nixon, a citizen of the state of Washington, and widow of Thomas L. Nixon, upon a policy issued by the Equitable Life Assurance Society of the United States, a corporation of the state of New York, and doing business in the then territory of Washington, upon the life of Thomas L. Nixon; the complainant being the beneficiary of the policy. The application for the policy was made July 14, 1888, at Tacoma, in the then territory of Washington. Among the questions and answers contained in the application were the following:

"(12) What cash premium has been paid, to make the assurance under this application binding from this date, provided the risk is assumed by the society? A. $\frac{1}{4}$ annual premium of \$80.00 has been paid, upon condition that, if the risk is not assumed by the society, this sum is to be returned, in accordance with the provisions of the society's official binding receipt No. 20,860, given as voucher for said payment. It is hereby agreed that all the foregoing statements and answers, as well as those made or to be made to the society's medical examiner, are warranted to be true, and are offered to the society as a consideration of the contract, which shall not take effect until the first premium shall have been paid during the life and good health of the person herein proposed for assurance."

The application papers, including the medical examiner's report, upon being completed and signed, were delivered by the applicant to one Delprat, at Tacoma, and by him delivered to one May, a subagent at Portland, Or., under North & Snow, the managers and general agents at San Francisco, Cal., of the defendant corporation. At the time of so delivering the application, the applicant, Thomas L. Nixon, paid to Delprat \$80, as the first quarterly premium on the desired policy, receiving therefor from Delprat the defendant corporation's "binding receipt," conditioned that, if the risk proposed should not be assumed by the society, the money should be refunded; and the money so paid was forwarded by Delprat, through May, to North & Snow, who remitted it to the home office of the society, in the city of New York. The application being there accepted, the policy in suit was executed on the part of the defendant corporation in the city of New York on or about August 1, 1888, and was, through its agents, sent to the assured, at Tacoma, Wash. By the terms of the policy all premiums were due and payable in the city of New York; the proofs of death were to be delivered to the company at its home office, in that city; and the policy, when it matured, was payable to the beneficiary in the state of New York. It was "issued and accepted upon the condition that the provisions and requirements printed or written by the society upon the back of this policy are accepted by the assured as part of this contract, as fully as if they were recited at length over the signatures hereto affixed." Among the provisions and requirements thus referred to and made a part of the policy were the following:

"(4) All premiums are due in the city of New York, at the date named in the policy; but, at the pleasure of the society, suitable persons may be authorized to receive such payments at other places, but only on the production of the society's receipt therefor, signed by the president, first, second, or third vice president, actuary, assistant actuary, secretary, assistant secretary, second assistant secretary, comptroller, cashier, or registrar, and countersigned by the person to whom the payment is made. No payment made to any person except in exchange for such receipt will be recognized by the society. All premiums are considered payable annually in advance. When the premium is made in semi-annual or quarterly installments, that part of the year's premium, if any, which remains unpaid at the maturity of this contract, shall be regarded as an indebtedness to the society on account of this contract, and shall be deducted from the amount of the claim; and, if any premium or installment of a premium on this policy shall not be paid when due, this policy shall be void. Nevertheless, nothing herein shall be construed to deprive the holder of this policy of the privilege to demand and receive paid-up insurance in accordance with the agreement contained in this policy. (5) The contract between the parties hereto is completely set forth in this policy and the application therefor, taken together; and none of its terms can be modified, nor any forfeiture under it waived, except by an agreement in writing signed by the president, first, second, or third vice president, actuary, assistant actuary, secretary, assistant secretary, second

assistant secretary, comptroller, cashier, or registrar of the society, whose authority for this purpose will not be delegated."

The assured paid all premiums that accrued prior to July 14, 1890. The quarterly premium that accrued on that day was not paid, and it is insisted by the defendant corporation that by that failure the policy was rendered void. That depends upon whether the contract is to be regarded as a Washington or a New York contract; for there is no statute of Washington affecting that provision of the policy which declares that, "if any premium or installment of a premium on this policy shall not be paid when due, this policy shall be void." In the state of New York there is such a statute, and hence the principal question in the case is whether the policy in suit was a New York contract, and to be ruled in accordance with the statute of that state, or to be governed by the principles of the common law, which are in force in Washington in respect to such contracts of insurance. We think it clear that the policy in question was a New York contract. It was applied for in the territory of Washington, through one of the defendant corporation's agents, to whom the defendant corporation had intrusted its "binding receipt" for the first premium upon the policy, and to whom the applicant paid the first premium, in consideration of which the soliciting agent delivered him the company's receipt. The only condition attached to the payment was that, in the event the application should be rejected by the defendant corporation, the money should be refunded to the applicant; and by the express terms of the application, which was made a part of the policy, the payment of the cash premium at the time of the making of the application made the assurance under the application binding from the time of payment, provided the risk should be assumed by the society. When the application and the applicant's money were accepted by the society, the contract between the parties became complete. That was done in the state of New York. Not only so, but, as has been seen, all of the conditions of the policy were to be performed in the state of New York; the premiums were to be paid in that state; proof of loss, if any, was to be there made; and the payment agreed to be made by the defendant corporation in the event of the death of the assured was to be made in the state of New York. It would seem to be very clear, therefore, that the rights and obligations of the respective parties are to be measured and controlled by the laws of that state, subject, perhaps, to any additional limitations or conditions imposed by the statutes of the state (then territory) into which the defendant corporation went to solicit the business in question; for it may be true that every foreign corporation that enters a state other than that of its creation, and there transacts business, does so in subordination to the statutes of the state permitting its entry therein, and that no business transacted by virtue of the privilege thus conferred can, by any sort of contract, be removed from the operation of the statutes of the state permitting the business to be transacted. But in the present case, as has been said, there is no Washington statute affecting that portion of the policy here in question.

The conclusion reached by the court below—which we think cor-

rect—that the contract in question was a New York contract is well supported by authority. *Wayman v. Southard*, 10 Wheat. 48; *Pritchard v. Norton*, 106 U. S. 124, 136, 141, 1 Sup. Ct. 102; *Bank v. Hume*, 128 U. S. 195, 206, 9 Sup. Ct. 41; *Coghlan v. Railroad Co.*, 142 U. S. 101, 109, 12 Sup. Ct. 150; *Hall v. Cordell*, 142 U. S. 116, 120, 12 Sup. Ct. 154. There is nothing to the contrary in the case of *Society v. Clements*, 140 U. S. 226, 11 Sup. Ct. 822, so much relied on by the plaintiff in error. In that case it appeared that the first premium was not paid by the assured until the delivery of the policy to him in the state of Missouri, and no other acceptance of his application for insurance by the company was made to appear. The court said:

“The application declares that the contract ‘shall not take effect until the first premium shall have been actually paid during the life of the person herein proposed for assurance.’ The petition alleges that that premium and two annual premiums were paid in Missouri. The answer expressly admits the payment of the three premiums, and, by not controverting that they were paid in Missouri, admits that fact also, if material. Rev. St. Mo. 1879, § 3545. The petition further alleges that the policy was delivered in Missouri, and the answer admits that the policy was, ‘at the request of the said Wall, transmitted to the state of Missouri, and was delivered to said Wall in said state.’ If this form of admission does not imply that the policy was, at the request of Wall, transmitted to another person, perhaps the company’s agent, in Missouri, and by him there delivered to Wall, it is quite consistent with such a state of facts; and there is no evidence whatever, or even averment, that the policy was transmitted by mail directly to Wall, or that the company signified to Wall its acceptance of his application in any other way than by the delivery of the policy to him in Missouri. Upon this record, the conclusion is inevitable that the policy never became a completed contract, binding either party to it, until the delivery of the policy and the payment of the first premium in Missouri, and, consequently, that the policy is a Missouri contract, and governed by the laws of Missouri.”

The contract involved in the present case was made when the application and the applicant’s money were accepted by the insurance company, not before nor after. It then became a completed contract, binding both parties to it. The place of its making, as well as the place of its performance, being the state of New York, there is no room for doubt that it is governed by the laws of that state. The statute of New York declares:

“No life insurance company doing business in the state of New York shall have power to declare forfeited or lapsed any policy hereafter issued or renewed by reason of non-payment of any annual premium or interest, or any part thereof, except as hereinafter provided. When any premium or interest due upon such policy shall remain unpaid, when due, a written or printed notice stating the amount of such premium or interest due on such policy, the place where said premium or interest should be paid, and the person to whom the same is payable, shall be duly addressed and mailed to the person whose life is insured, or the assignees of the policy, if notice of the assignment has been given to the company, at his or her last known post office address, postage paid by the company, or by an agent of such company, or person appointed by it to collect such premium. Such notice shall further state that unless the said premium or interest then due shall be paid to the company, or to a duly appointed agent or other person authorized to collect such premium, within thirty days after the mailing of such notice, the said policy and all payments thereon will become forfeited and void. In case the payment demanded by such notice shall be made within the thirty days limited therefor, the same shall be taken to be in full compliance with the requirements of the policy in respect to the payment of said premium or interest, anything contained to the contrary notwithstanding; but

no such policy shall in any case be forfeited or lapsed until the expiration of thirty days after the mailing of such notice, provided, however, that a notice stating when the premium will fall due, and if not paid, the policy and all payments thereon will become forfeited, at least thirty and not more than sixty days prior to the time when the premium is payable, shall have the same effect as the notice hereinbefore provided for." Sess. Laws 1876, c. 341, § 1, as amended by Laws 1877, c. 321.

Section 2 of the act is as follows:

"The affidavit of any officer, clerk, or agent of the company that the notice to the assured provided for in section one has been duly addressed and mailed by the company issuing such policy to the assured shall be presumptive evidence of such notice having been duly given."

It has been several times decided by the court of appeals of New York that the provisions of this statute respecting forfeitures should be strictly interpreted in favor of the assured, and that the defense of a forfeiture through nonpayment of premium is not available to an insurance company if there has been any departure on its part from the provisions of the statute in regard to notice. *De Frece v. Insurance Co.*, 136 N. Y. 144, 32 N. E. 556; *Baxter v. Insurance Co.*, 119 N. Y. 450, 23 N. E. 1048; *McDougall v. Society*, 135 N. Y. 551, 32 N. E. 251; *Phelan v. Insurance Co.*, 113 N. Y. 147, 20 N. E. 827; *Carter v. Insurance Co.*, 110 N. Y. 15, 17 N. E. 396.

It is contended on the part of the plaintiff in error that its proof to the effect that the notice required by the statute of the premium falling due July 14, 1890, was properly given through the mail to the assured was conclusive, and that the court below erred in permitting the defendant in error to give any evidence to the effect that such notice was never received by the assured. In *Association v. Hamlin*, 139 U. S. 298, 11 Sup. Ct. 614, by the terms of the contract the certificate of insurance issued to Hamlin became null and void if he failed to pay, when due, at the office of the defendant association in the city of New York, or to its agents furnished with the proper receipt, any assessment upon him. An assessment became due and payable "within thirty days from the date of each notice"; that is, from the date of the notice of such assessment. Upon the subject of notices by the association to members the certificate provided:

"A notice addressed to a member at his post-office address, as appearing upon the books of the association, according to its usual course of business, shall be deemed a sufficient notice; and proof of mailing same according to the usual course of business of said association shall constitute and be deemed and held sufficient proof of compliance herewith on the part of said association."

The same provision as to notice was in the constitution of the association. The controlling question in the case was whether the insurance company gave notice to the assured of a certain assessment falling due June 2, 1884. The trial court instructed the jury that it was not incumbent upon the defendant to prove anything more than that it mailed a notice of the assessment to the insured according to his address and its usual course of business, and that, that fact being proved, it was entitled to a verdict, whether the insured received the notice or not; thus giving to the insurance company the most favorable construction of the contract to which it was

entitled, under any view. It was contended by the company that the proof of such mailing was so overwhelming that the court erred in refusing to instruct the jury to find a verdict in its favor. The supreme court said:

"We do not concur in this view. Without referring to the evidence in detail, we content ourselves in saying that upon the issue as to whether notice was in fact mailed as claimed by the defendant there was evidence both ways. The case upon this point was peculiarly one for the jury."

The supreme court further said:

"Whether the clause in the certificate of insurance relating to the notice means anything more than that proof of mailing a notice, according to the defendant's usual course of business, directed to the insured at his post-office address, as appearing upon its books, made a prima facie case of compliance upon its part with the terms of the contract, leaving the insured to prove, in order to prevent a forfeiture of his membership, that the notice was not in fact received by or for him, we need not determine."

In the present case the statute itself makes proof by the insurance company of the mailing of the required notice prima facie evidence only of the giving of the notice; for the provision is that:

"The affidavit of any officer, clerk, or agent of the company that the notice to the assured provided for in section one has been duly addressed and mailed by the company issuing such policy to the assured shall be presumptive evidence of such notice having been duly given."

Certainly, in view of that statutory provision, the beneficiary of the policy is entitled to give rebutting testimony. That this may consist in part of the fact that the notice was never received by the assured is clear. *Jackson v. Association* (Wis.) 47 N. W. 733, 735; *Hastings v. Insurance Co.*, 138 N. Y. 473, 476, 34 N. E. 289; *Insurance Co. v. Fields* (Tex. Civ. App.) 26 S. W. 280, 281; *Huntley v. Whittier*, 105 Mass. 391, 392.

It is further contended on the part of the plaintiff in error that the court below erred in refusing to give to the jury this instruction:

"The jury are further instructed that, under the provisions of the policy in suit, and particularly the provisions of paragraph 7 of 'Provisions and Requirements,' printed on the back of the policy, and constituting a part thereof, after the insured in said policy had elected not to use, in reduction of his quarterly premium payments falling due during the year next preceding July 14, 1890, two of the quarterly shares of the dividend or surplus distributed to his policy for that year, the defendant company was not obliged or entitled to credit any sum to him on account of said two quarterly shares not used in reduction of the amount of the premium payable on said policy on July 14, 1890, except upon request of the person holding the absolute legal title to the policy, and was not obliged to make any mention, in giving the insured notice of the premium to become payable on July 14, 1890, or in the dividend notice accompanying the same, of the right of the insured to use said two quarterly shares of the next preceding year's dividend in reduction of the amount of that premium, or to make any reference in either of said notices to the above-mentioned provision of the policy in that regard."

The substance of the request thus made was covered by that portion of the charge of the court below in which the jury was told that if they found from the evidence that the notice requiring the assured to pay the premium of \$80 on July 14, 1890, was mailed as claimed on the part of the plaintiff in error, then and in that event the plaintiff in the suit could not recover upon the policy "without having proved payment of the quarterly premium of \$80, which became due

and payable on said policy by the terms thereof on July 14, 1890, or the payment of said premium less the amount of any dividend which the insured was entitled to apply toward payment of said premium."

Complaint is also made of the refusal of the court below to give to the jury this instruction requested by the plaintiff in error:

"If the jury believe from the evidence that on July 14, 1890, George G. Matthews was the agent of the insured, Thomas L. Nixon, in charge of the policy in suit, and with authority to act for him in respect to it, and was then also the agent of the plaintiff, Cora E. Nixon, with authority to act for her in respect to that policy, and that on said July 14, 1890, the witness Ball, being an agent of the defendant company in charge of the company's receipt for the premium payable on said day upon said policy, and being authorized to collect said premium and thereupon to countersign the [and] deliver said receipt, called on said Matthews for that purpose, and requested payment of said premium; and if the jury believe that thereupon said Matthews declined to pay said premium, and stated that the insurance provided for in said policy would no longer be kept in force,—in such case the jury are instructed that such response of said Matthews to said request for payment of said premium amounted in law to a waiver on the part of both the insured and the plaintiff of the previous notice in respect to said premium required by the statute of the state of New York, and in such case the plaintiff is not entitled to recover upon the policy in suit without having proved payment of said premium which became due, according to the terms of the policy, on June (July) 14, 1890."

There are several reasons why the court below was right in refusing to give this instruction. It will be sufficient to state one, and that is that the statute of New York prescribes the condition upon which a policy may be forfeited for the nonpayment of a premium. The statute is mandatory, and controls the contract. Its provisions are not subject to be set aside or waived either by the company, or the assured, or by both together. *Society v. Clements*, 140 U. S. 226, 233, 11 Sup. Ct. 822; *Hicks v. Insurance Co.*, 9 C. C. A. 215, 60 Fed. 690; *Griffith v. Insurance Co. (Cal.)* 36 Pac. 117; *Warner v. Association*, 100 Mich. 157, 58 N. W. 667. The judgment is affirmed.

KINNAVEY v. TERMINAL R. ASS'N OF ST. LOUIS.

(Circuit Court, E. D. Missouri, E. D. June 14, 1897.)

No. 3,970.

1. CARRIERS—INTERSTATE COMMERCE ACT—UNREASONABLE CHARGES—PLEADING.

The schedule of rates required to be established, published, and filed with the commissioners by a common carrier, by the interstate commerce act, is, *prima facie*, the criterion in determining whether or not a given charge is unreasonable; and a petition to recover, under section 1 of such act, which fails to allege either that the defendant had no published schedule of rates, or that it charged plaintiff in excess of rates thereby fixed, is insufficient.

2. SAME—DISCRIMINATION—PETITION—AVERMENT.

A petition to recover under section 2 of the interstate commerce act is sufficient if it states facts which show the circumstances and conditions under which the defendant had charged plaintiff a given rate for transportation of freight, and alleges, in the language of the act, that for like services, under substantially similar circumstances and conditions, the defendant had charged another a less given rate, without alleging facts which show that the services

were alike, or rendered under substantially similar circumstances and conditions, or that plaintiff was charged more than the schedule rate.

F. A. Wind and C. G. B. Drummond, for plaintiff.
M. F. Watts, for defendant.

ADAMS, District Judge. The plaintiff sues the defendant as a common carrier engaged in interstate commerce, and predicates his right of recovery upon alleged violations of sections 1 and 2 of the act to regulate commerce, commonly known as the "Interstate Commerce Act." The petition charges, in effect, that the defendant, at certain periods stated, exacted from the plaintiff an unreasonable and unjust charge for carrying certain shipments of coal from East St. Louis, Ill., to St. Louis, Mo., and further charges that during the same period the defendant performed like service for the Consolidated Coal Company, a competitor of the plaintiff in the same business, in the transportation of coal under substantially similar circumstances and conditions, and charged to and collected from the said Consolidated Coal Company a less sum therefor than it exacted from the plaintiff, and thereby, as it is claimed, unjustly discriminated against the plaintiff, in violation of section 2 of said act. To this petition the defendant demurs on the ground that the same fails to state a cause of action.

It is argued for defendant that the object sought to be accomplished by the interstate commerce act was to establish and maintain uniform and reasonable freight charges, and to prevent unjust discrimination between shippers similarly situated. This seems to be a fair statement of the purpose of the act. Section 6 requires the carrier to print, and keep open to the public inspection at its stations, and file with the interstate commerce commission, schedules of its established rates and charges for transportation of freight, and prohibits any advance or reduction in such rates or charges without prior public notice, and further provides that it shall be unlawful for any carrier of interstate commerce to charge or receive from any shipper a greater or less compensation than that specified in the schedules. The rates so published and on file are the only legal rates the carrier can charge, and any variation from them subjects the carrier to the penalties of the act. *Railway Co. v. Hefley*, 158 U. S. 98, 15 Sup. Ct. 802. These rates, as published and filed, must therefore be, *prima facie*, the criterion in determining whether a given charge is reasonable or not. If the charge conforms to the schedule of rates, it is therefore, *prima facie*, reasonable. Under such circumstances, therefore, to state a cause of action based on section 1 of the act, there must be an averment either that the carrier failed to publish its schedule of rates, or that it charged in excess of the rates as published and then in force, and in either case that the charge as made was unreasonable, or an averment of other facts sufficient to do away with the *prima facie* effect of the schedule rate. *Swift v. Railroad Co.*, 64 Fed. 59; *Winsor Coal Co. v. Chicago & A. R. Co.*, 52 Fed. 716; *McGrew v. Railway Co.*, 114 Mo. 211, 21 S. W. 463. I do not intend, by citing the *Swift Case*, *supra*, to express my approval of the proposition there elaborately discussed and maintained, that the citizens of the United

States who may voluntarily resort to federal courts for the redress of wrong, or who are forced involuntarily into federal courts to defend their rights, are thereby deprived of the benefits of the common law, in so far as the same may be applicable to their case, or that they must sift their common-law rights through enactments of their states adopting the same. On the contrary, I believe, with Judge Shiras, as expressed in the case of *Murray v. Railway Co.*, 62 Fed. 24, that the general principles of the common law, as they existed at the adoption of our constitution, must, so far as applicable, be enforced in all appropriate cases pending in the federal courts, without any act of congress specially providing therefor. In other words, there is a common law of the United States, applicable within the scope of the jurisdiction conferred upon its courts, necessarily arising from the provisions of the constitution and judiciary act conferring jurisdiction upon the courts of the United States; and this need not be hunted for or found by the indirect process of inquiring whether the legislatures of the states whose citizens are litigants have, by special act, adopted the common law as a part of their judicial system. The foregoing views will also show to counsel that I cannot adopt their theory of this case, in so far as they build it upon the assertion that the United States, as such, has no common law. The Case of *Swift* is cited solely in support of the proposition that the test of reasonableness in charges for interstate commerce is the schedule rates of the carrier at the time in force. So far, therefore, as plaintiff claims redress on the ground that the charges complained of were unjust and unreasonable, within the meaning of section 1 of the act, his petition is defective, in not stating either that the defendant at the time had no published schedule of rates, or, if it did have any, that it charged plaintiff in excess of rates thereby fixed.

The question next arises whether the plaintiff has stated facts sufficient to bring himself within the provisions of section 2 of the act. As already seen, he states that at certain times the defendant performed service for him by carrying coal from East St. Louis, Ill., to St. Louis, Mo., and charged therefor at the rate of 30 cents per ton. He further states that during the same periods defendant performed like service in the transportation of coal, under substantially similar circumstances and conditions, for the Consolidated Coal Company, a corporation then engaged in the same business with plaintiff, and charged therefor a less compensation than was charged the plaintiff, as hereinbefore stated, to wit, 25 cents per ton, thereby discriminating unjustly against this plaintiff, in violation of section 2 of said interstate commerce act. In my opinion, this part of the petition contains facts sufficient to constitute a cause of action. The reasonableness or justice of the charge which is the subject of section 1 of the act is not necessarily involved in determining the unjust discrimination which is the subject-matter of section 2. The charge made for transporting freight may be entirely reasonable, and the plaintiff may have no occasion to complain of the intrinsic value of the services rendered, but may be injuriously affected by advantages given his competitors in rates of freight. A shipper of interstate commerce is generally a dealer in such commerce; and it is as important for him, in the race of com-

petition, that his competitors get no advantage in freight rates, as it is that he himself pay only reasonable charges for his own shipments. The second section of the act aims to secure equality in rates of all shippers similarly situated, and any favoritism in this particular is declared to be unlawful; and, by the eighth section of the act, any carrier who does such unlawful act is made liable to the person injured for the full amount of damages sustained in consequence of such unlawful act, together with reasonable counsel or attorney's fee, to be fixed by the court in every case of recovery. It is said that the plaintiff has failed to allege the facts from which it may appear that defendant performed like service under substantially similar circumstances and conditions for the Consolidated Coal Company; that the statement, as made, involves conclusions only. I do not think this criticism is well made. The pleader alleges the ultimate facts which constitute the right of recovery, and has alleged them in the language of the act which confers the right of action. He has declared that the defendant rendered to the Consolidated Coal Company, for 25 cents a ton, services like those rendered to him, for which it charged 30 cents per ton, and that these services so rendered to the Consolidated Coal Company were performed under circumstances and conditions substantially similar to those attending the services rendered to the plaintiff. Plaintiff is not required to set forth details of facts which show that the services were alike, or rendered under substantially similar circumstances and conditions. This is a matter of proof. Again, it is said that, inasmuch as it does not appear from the petition that plaintiff was charged any more than the schedule rates prevailing at the time, he shows no damages. This view overlooks the main purpose of the enactment of section 2, namely, to prevent unjust discrimination. Plaintiff is entitled to such damages as he sustained by reason of the discrimination. Whether this is the difference between the discriminating charges or otherwise need not now, for the purposes of this demurrer, be determined. The demurrer must be overruled.

HETTINGER v. MEYERS.

(Circuit Court, D. Kansas, Second Division. June 21, 1897.)

PROMISSORY NOTE—FAILURE OF CONSIDERATION.

The maker of a promissory note given in payment for stock in a national bank, and immediately transferred by indorsement to said bank by the payee, cannot resist payment of the note, in the hands of a receiver of the bank, on a plea of failure of consideration because of the insolvency of the bank, where the payee has fully indemnified him against loss.

McKinstry & Fairchild, for plaintiff.

D. H. Martin and Z. L. Wise, for defendant.

WILLIAMS, District Judge. It appears from the testimony in this case: That the plaintiff is the receiver of the Hutchinson National Bank, of Hutchinson, Kan. That on or before the 17th day of August, 1893, James Meyers, the defendant, purchased of one W. L. Little, of said Hutchinson, Kan., 10 shares of the stock of said bank,

of the par value of \$100 per share, agreeing to pay therefor the sum of \$1,000. That he executed his note to the said Little for the sum of \$1,000 in payment for the said stock, and that the said Little on the same day, after business hours, transferred, assigned, and delivered the said note to the said Hutchinson National Bank, and received credit on the books of said bank for the sum of \$1,000 on account of his indebtedness to the same. That on October 18th the said Hutchinson National Bank closed its doors, being insolvent, and was taken in charge by the comptroller of the currency, and the plaintiff in this action was appointed receiver. Finding the note mentioned herein among the assets of said bank, he has brought suit upon the same, which is the subject-matter of this action. At the time of the execution of said note the following agreement in writing was entered into between the parties, which writing is in words and figures as follows:

"This writing witnesseth that W. L. Little, of Hutchinson, state of Kansas, has this 17th day of August, 1893, sold to James Meyers, of the said city and state, ten shares of stock of the Hutchinson National Bank, of said city, of the par value of \$100.00 per share, for the sum of \$1,000.00, upon the following conditions, to wit: That said W. L. Little herein agrees and binds himself, his heirs and assigns, to purchase the aforesaid ten shares of stock at the expiration of six months from this date at the price above stated, together with any interest or losses paid by the said Meyers on the said stock during the said term of six months, if said Meyers shall so elect. In witness whereof, we have hereunto set our hands and seals this year and date above mentioned.

"[Signed]

W. L. Little.
"James Meyers."

Afterwards said James Meyers, believing that said stock, after the failure of said bank on the 18th of October, had become of but little or no value, and that he might be liable upon the same for an assessment of 100 per cent., took from the said W. L. Little two notes of \$1,000 each, the payment of which notes was secured by mortgage upon real estate in the said city of Hutchinson, one of which notes was transferred by said Meyers to other parties for the sum of \$750, which sum was paid him by the purchaser thereof. That the property covered by the mortgage is reasonably sufficient in value to secure the payment of the other note for \$1,000. The defendant, Meyers, pleads failure of consideration for said note, and denies his liability as a stockholder under the transactions herein referred to.

One of the main troubles about the case is want of simplicity in the pleadings, and, though drawn by very learned counsel, it is perhaps for this reason that they might be termed too artistic. The court sees nothing in the case to sustain the contention of the defendant. The note was transferred to the bank in his presence, with his knowledge, and with the understanding before the note was executed that it was to be so transferred. He made no objection at the time to its being transferred and becoming the property of the bank. The transaction was completed when the note was transferred, and the bank acquired the right to consider it a part of its assets, and there is no reason why it should not be so considered. So he has no defense at law to the note. The agreement that was made at the time of the execution of the note seems to have been fully com-

plied with. It seems from the testimony that his liability as a stockholder cannot exceed the sum of \$750. He has already received that. There can be no failure of consideration, because he is secured against loss by the other note of \$1,000, executed to him by Little, which is secured by mortgage upon real estate. If this suit should fail, then the bank equitably should have the proceeds that he has received from Little, to wit, the \$750 in money, and the note secured by the mortgage upon real estate. While this could not be done in this action, yet in equity it ought to be done. Then why should he be allowed to defend against this note? As the court has already stated, there is no valid defense that can be made. The findings of law and fact asked for by the plaintiff in this action will be given, and those asked for by the defendant will be refused, and the verdict and judgment in this case will be for the plaintiff.

BALTIMORE & O. R. CO. v. CAMP.

(Circuit Court of Appeals, Sixth Circuit. July 6, 1897.)

No. 449.

1. DAMAGES FOR PERSONAL INJURY—EVIDENCE—PLAINTIFF'S FAMILY.

In an action against a railroad company to recover damages for personal injuries caused by negligence, evidence that the plaintiff has a wife and child is inadmissible.

2. RAILROAD—INCOMPETENT EMPLOYEE—EVIDENCE OF REPUTATION.

In an action against a railroad company for injuries received in a collision caused by the gross negligence of a telegraph operator, after the plaintiff has introduced evidence tending to show that the operator was not a fit man for the place, evidence offered by the defendant that the general reputation of the operator as a telegraph operator was good is admissible.

3. PLEADING—AMENDMENT—NEW DEFENSE.

When a defendant is granted leave to withdraw the answer and file a demurrer, upon the overruling of the demurrer it is not error for the court to refuse to permit him to file an answer setting up a new defense, where no excuse is given for not pleading it in the first answer.

In Error to the Circuit Court of the United States for the Western Division of the Southern District of Ohio.

This was an action for personal injuries by John P. Camp against the Baltimore & Ohio Railroad Company. There was judgment for plaintiff, and defendant brings error.

J. H. Collins, for plaintiff.

S. M. Hunter and R. A. Harrison, for defendant.

Before TAFT and LURTON, Circuit Judges, and CLARK, District Judge.

TAFT, Circuit Judge. This is the second time this case has been before this court. It is reported in 31 U. S. App. 213, 13 C. C. A. 233, and 65 Fed. 952. The plaintiff was a locomotive engineer of the Baltimore & Ohio Railroad Company, and was seriously injured in a collision between two of the freight trains of the company at a point about six miles east of Black Hand, a station of the Central Ohio Division.

In the first trial he recovered a verdict and judgment against the company for \$10,000. Because of error in the instructions of the court below, this court reversed the judgment, and directed a new trial. The present proceeding is brought to review a judgment for \$12,000 entered upon the verdict rendered at the second trial. We regret exceedingly that we are obliged to reverse the judgment again. We do so for two reasons. The court permitted evidence to go to the jury that the plaintiff had a wife and one child. The evidence was objected to, the objection overruled, and an exception taken. In *Pennsylvania Co. v. Roy*, 102 U. S. 451, in a suit for personal injuries against a railroad company, the plaintiff was permitted, against the objection of the defendant, to give the number and ages of his children. The court said upon this point:

"This evidence does not appear to have been withdrawn from the consideration of the jury. It certainly had no legitimate bearing upon any issue in the case. The manifest object of its introduction was to inform the jury that the plaintiff had infant children dependent upon him for support, and, consequently, that his injuries involved the comfort of his family. This proof, in connection with the impairment of his ability to earn money, was well calculated to arouse the sympathies of the jury, and to enhance the damages beyond the amount which the law permitted; that is, beyond what was, under all the circumstances, a fair and just compensation to the person suing for the injuries received by him. How far the assessment of damages was controlled by this evidence as to the plaintiff's family it is impossible to determine with absolute certainty, but the reasonable presumption is that it had some influence upon the verdict."

In the face of this controlling authority, we are unable to escape the conclusion that the action of the court below in permitting the plaintiff to show that he had a wife and one minor child was erroneous, and prejudicial to the defendant.

There was a second error in the rulings of the trial court. One of the main charges of negligence against the company was in the employment of the telegraph operator whose gross negligence caused the collision and the plaintiff's injuries. The plaintiff had offered evidence tending to show that the operator was not a fit man for his place. The defendant, to meet this evidence, offered evidence to show that the general reputation of the operator as a telegraph operator was good. This offer was rejected, and an exception noted by the defendant. We are at a loss to see why this evidence was not competent. It is well settled that it would be competent to show such a general reputation of the servant as would lead a reasonable man to believe that he was incompetent. *Railroad Co. v. Henthorne*, 19 C. C. A. 623, 73 Fed. 634; *Stone Co. v. Whalen*, 151 Ill. 472, 38 N. E. 241; *Grube v. Railroad Co.*, 98 Mo. 330, 11 S. W. 736; *Monahan v. City of Worcester*, 150 Mass. 439, 23 N. E. 228; *Railroad Co. v. Scott*, 71 Tex. 703, 10 S. W. 298. It is impossible to see why, if such evidence is competent to show negligence on the part of a servant, it is not also competent to introduce evidence of good reputation to rebut the charge of negligence.

We find no other errors in the record. Complaint is made by the railroad company of the refusal of the court to permit it to file an answer setting up a new defense. When the case was remanded by this court for a new trial, the company was permitted to with-

draw its answer, and file a demurrer. The demurrer was overruled, and then the company tendered an answer setting up as an additional defense a release founded on the receipt by the plaintiff of a small sum as a member of a relief association. No adequate excuse was given for not pleading the defense in the first answer. We are clearly of opinion that under the circumstances the court had the discretion to refuse to allow new defenses to be filed, and that the discretion was rightly exercised. The leave to withdraw the answer and to file a demurrer did not give the defendant any greater right to file a different answer than if the application had been directly for leave to amend the answer. The judgment of the court below is reversed, with directions to order a new trial.

CLIFFE v. PACIFIC MAIL S. S. CO.

(Circuit Court, N. D. California. June 28, 1897.)

No. 12,279.

NEGLECT—OWNER OF VESSEL—LIABILITY TO STEVEDORE.

An employé of a company of stevedores unloading a vessel may maintain an action for damages against the owners of the vessel for injuries received by reason of stepping on the cover of a manhole on the deck which the owners had carelessly and negligently permitted to become defective, out of repair, and unsafe.

Action at law, to recover damages for injuries alleged to have been sustained by plaintiff through the negligence of the defendant. Demurrer to the amended complaint. Demurrer overruled.

Jas. L. Nagle, for plaintiff.

Ward McAllister, for defendant.

MORROW, Circuit Judge. This is an action to recover damages for injuries alleged to have been sustained by plaintiff through the negligence of the defendant. A demurrer has been interposed to the amended complaint on the ground that neither of the two causes of action set out in the complaint states facts sufficient to constitute a cause of action. The first cause of action states, substantially, that the plaintiff was employed by a firm of stevedores to unload rock ballast from the steamship City of Sydney, owned and operated by the defendant; that while so engaged in said work it was necessary that the plaintiff should go on board, and should pass along and walk on deck, of said vessel; that on the 12th day of December, 1894, while walking on the deck of said vessel, and while in the performance of his duties, he stepped on an iron plate or cover, which, by reason of the carelessness and negligence of the defendant, and because of the unsafeness, imperfectness, and defectiveness of said iron plate or cover, tipped, slipped, and turned in a vertical position, thereby causing the plaintiff to slip and fall straddle of said iron plate or cover, and against the edge thereof, fracturing his right leg and otherwise severely injuring him, to his

damage in the sum of \$20,000. It is further particularly averred, in the sixth allegation of the first cause of action:

"That at the time aforesaid the said defendant negligently and carelessly permitted the iron plate or cover of one of the manholes on the deck of said steamship to become out of repair and defective, and the iron ring which supported said iron plate or cover to become unsafe, imperfect, and defective, by the want of the exercise of care and diligence, and was at the time aforesaid known to the defendant."

The same facts, substantially, are alleged as a second cause of action, except that the negligence of the defendant is alleged to have consisted in permitting the iron plate or cover to become loose, and not properly placed, and in such a position that it could be easily moved, upset, and displaced; and also the nature of the injuries sustained is somewhat differently averred. If the facts set out in the complaint be true,—and upon this demurrer they must be assumed in law to be true,—they certainly state a cause of action. The general rule is that the owner of premises owes a duty towards those whom he invites there that the premises are reasonably safe, and in a fit state of repair. See Clerk & L. Torts, pp. 370-376; *Abbott v. Macfie*, 2 Hurl. & C. 744; *Clark v. Chambers*, 3 Q. B. Div. 327. This duty applies equally to the deck of a vessel. It is a well-settled rule that the owner of a vessel owes a general duty to all employed on board that the vessel shall be reasonably safe against accidents or dangers to life or limb. The fact that the plaintiff was employed by a firm of stevedores, and not directly by the owner of the vessel, makes no difference in the measure of duty and responsibility which the law imposes on the owners of vessels with reference to those who, by reason of their work in relation to the vessel, must be on board more or less. Owners owe it, as a positive duty to stevedores employed on board of their vessels, to provide reasonable security against danger to life or limb. The following cases, and others that might be cited, abundantly establish this general doctrine: *Gerrity v. The Kate Cann*, 2 Fed. 241, 245; *The Helios*, 12 Fed. 732; *The Max Morris*, 24 Fed. 860, affirmed in 137 U. S. 1, 11 Sup. Ct. 29; *The Guillermo*, 26 Fed. 921; *The Phoenix*, 34 Fed. 760; *Crawford v. The Wells City*, 38 Fed. 47; *Keliher v. The Nebo*, 40 Fed. 31; *The Terrier*, 73 Fed. 265; *The Pioneer*, 78 Fed. 600, 608. See, further, on the general proposition, *Indemaur v. Dames*, 2 L. R. C. P. 311; *Smith v. Docks Co.*, 3 L. R. C. P. 326; *Schmidt v. Bauer*, 80 Cal. 565, 22 Pac. 256.

The demurrer will therefore be overruled, and it is so ordered.

SUTHON v. UNITED STATES.

(Circuit Court of Appeals, Fifth Circuit. June 11, 1897.)

Nos. 591 and 592.

SUGAR BOUNTY—CONSTRUCTION OF STATUTE—PRODUCER OF SUGAR.

One who advanced money to sugar planters to enable them to produce a crop of sugar cane and manufacture sugar therefrom, taking as security a mortgage on the crop to be raised, and by contract having the sugar manufactured and sold in his name, with the agreement that the license under

the act of October 1, 1890, should be taken out in his name, and that he should receive the bounty provided by said act to be paid by the United States, is a producer of sugar, within the purview of the law, and entitled to recover the bounty on such sugar in an action against the government.

In Error to the Circuit Court of the United States for the Eastern District of Louisiana.

Edgar H. Farrer, for plaintiff in error.

J. Ward Gurley, Jr., for defendant in error.

Before PARDEE and McCORMICK, Circuit Judges, and NEWMAN, District Judge.

McCORMICK, Circuit Judge. Walter J. Suthon, plaintiff, is a sugar factor and commission merchant. John Scannell and James D. Capron were sugar planters and owners of plantations in St. Mary's parish, La., in the beginning of the year 1894. They were without funds to operate their plantations in that year, and they each induced the plaintiff to enter into a contract with each of them, respectively, to advance them money for the purpose of growing and manufacturing a crop of sugar on their respective plantations; and in order to secure the plaintiff, Suthon, for these advances, each granted a mortgage on his plantation, and the statutory pledge, under Act 66 of Louisiana (Acts 1874), on the crop to be produced during that year, and consented that the license for the bounty on the sugar to be produced that year on their respective plantations should be taken in the name of Suthon, and obligating themselves to keep, or cause to be kept, all proper books, certificates, etc., required to be kept by the bounty laws in the name of Suthon, and to make all reports required under the bounty law and internal revenue regulations. At the time these contracts were made the act of congress approved October 1, 1890, was in force, and the form of the several contracts was one well known to the business community; and it was the custom of established merchants making such advances to take out licenses on the plantations of their constituents, and this custom had been followed for several years under the operation of the bounty act, and was well known to the government officials, who had always paid the bounty to such merchants under such licenses. Suthon acted, in making his contracts, on the faith of these precedents established by the government in the interpretation of the bounty law. There was no concealment of the facts as to the ownership of the plantations described in Suthon's applications for licenses. The applications were made prior to July 1, 1894, in due form, to produce sugar at the sugar factory owned by John Scannell and James D. Capron, at the place, with the machinery, and by the methods described in the application, and the required bonds were given. The license was not granted, because the law was repealed on August 28, 1894, before the sugar-making season began. Suthon complied with his contracts with Scannell and Capron, and advanced the money which he engaged to advance, and the crop was made by means thereof. The sugar factories were conducted in the name of W. J. Suthon. Scannell and Capron made sworn re-

turns of the product of the factories, as managers thereof, as required by the internal revenue regulations. The sugar there produced was marketed and shipped as the sugar of W. J. Suthon, and was sold as such in the New Orleans market. At the end of the season, Scannell and Capron remained indebted to Suthon in sums exceeding the amount that would have been due for bounty if it had been collected, and when collected this bounty is to be credited on the debt thus due to Suthon. When the act of March 2, 1895, was passed, Suthon presented to the internal revenue collector for Louisiana his claim for bounty allowed in that act, and the same was approved and forwarded to the commissioner of internal revenue at Washington for allowance and payment. His claim was rejected by the internal revenue department on the ground that he was not a producer of sugar, within the purview of the law. An appeal was taken from this decision to the secretary of the treasury, who affirmed the decision of the commissioner of internal revenue. Thereupon he filed these suits, seeking to recover against the United States amounts that he claimed would be due him under the act of March 2, 1895, as a sugar producer. The government met the plaintiff's petition with a peremptory plea that his petition set forth no cause of action, because it appeared from the allegations thereof that he was not a sugar producer, within the purview of the statutes of the United States. There is no question in the case as to the amount of sugar produced on the respective plantations, nor as to the amount of bounty to which the producer of it is entitled under the act of March 2, 1895. The only question raised is, within the meaning of these acts, was the plaintiff a producer of sugar?

The provisions of the act of October 1, 1890, granting a bounty to the producers of sugar, inaugurated a new policy in this country; and the questions arising in connection with its practical application were novel, and excited doubt in the minds of the most eminent lawyers as to their correct practical solution. To escape the embarrassment resulting from the provisions of law in reference to making transfers of claims against the government of the United States, the contracts in this case, and in numerous other like cases, provided that the plaintiff should make application for a license as a sugar producer on the plantations and at the factories of the other contracting parties, and that the operation of manufacturing and disposing of the sugar should be in his name, and under the management of persons representing him as his agents in relation thereto. The law of October 1, 1890, having been repealed before the licenses were in fact issued to plaintiff, no such licenses were issued to any one as a producer of sugar on the respective plantations for that year. It is not questioned that the owners of the respective plantations, or the plaintiff, under his contract with them, respectively, is the producer of the sugar produced on the plantations, and entitled to the benefit of the act of March 2, 1895. In the first case that came before us growing out of the provisions of the sugar bounty law, it was strenuously urged that the bounty was a matter of pure grace, and that before it was received it was not, and could not be, the subject of contract or lien, as not being in any

proper sense property. We held, however, that it was property, and that, in case of the insolvency of a licensed producer of sugar, upon his being adjudged an insolvent his claim for bounty would pass by the insolvency proceeding to his syndic. *Calder v. Henderson*, 2 U. S. App. 627, 4 C. C. A. 584, 54 Fed. 802. In another case, where a lien upon a right to collect the bounty was claimed by reason of a previous contract for advances and hypothecation of the crop, and an express pledge of the bounty as security for the advances, we held that the party making the advances was entitled to retain the draft for the bounty which by direction of the parties had been sent to him by the department, and the licensed producer, or his syndic, required to indorse the check so that the holder or pledgee and mortgagee could and did collect the same. *Barrow v. Milliken*, 20 C. C. A. 559, 74 Fed. 612. In the third case that came before us, where a lien upon the bounty after it had been paid by the government and was in the hands of one of the parties to the suit was claimed by pledgee and mortgagee under a contract made previous to the production of the sugar, we certified certain questions to the supreme court, and asked their instructions in reference thereto; and their decision, rendered May 10, 1897, is to the effect that it was within the power of the contracting parties to create an equitable lien upon the bounty collected; that "the bounty was given, by the terms of the act of 1890, not to the manufacturer of sugar manufactured within the United States, but to the producer of such sugar from beets, sorghum, and sugar cane grown within the United States. In this way the law, in conferring a bounty, created a link between the manufacturer of the sugar and the grower of the beets, sorghum, or cane from which it was manufactured. And this connection between the manufacturer and the grower being created by the act of congress in conferring a bounty only for sugar manufactured from cane grown within the United States, the relation between the grower and the manufacturer was one arising from the laws of the United States. * * * The parties to the contract had in view, in making it, the necessary relation between them accorded by the act of congress; for the contract stipulated that the parties of the first part should keep all such books and records as are required by the United States government in relation to the bounty, and to furnish to the party of the second part all the details which may be necessary to enable them to effectuate their bounty rights. The right to collect the bounty having arisen from a law of the United States, the provisions of that law create the necessary relation between the grower and the manufacturer, making them, in effect, joint producers of the sugar. The right to the equitable lien stipulated by the contract was not controlled by the provisions of the local law of Louisiana." *Refining Co. v. Payne*, 17 Sup. Ct. 754. And the questions were answered to the effect that the parties had an equitable lien on the bounty money collected, and that the lien could be enforced in the equity proceeding in the circuit court. It seems clear to us, from the allegations of the bills in these cases, and the conceded facts, that Walter J. Suthon is the equitable owner of the bounty in question; that his relations with the owners of

the plantations and the factories thereon, established by contract made in good faith, and not opposed to the policy of the bounty acts, but with the evident and efficient purpose of promoting that policy, fix his character as one of the joint producers of the sugar. It is clear that the term "producer" is not used in any technical sense in these statutes, and the elaborate regulations providing for notice in the application for license seek only to definitely point out who is the beneficial owner of the claim to the government's bounty for the production of the sugar. The act of March 2, 1895, reposes for its validity, in part, at least, on the equities arising out of the situation of the parties, precipitated by the repeal of the act of October 1, 1890 (*U. S. v. Realty Co.*, 163 U. S. 427, 16 Sup. Ct. 1120); and all of the equitable considerations that induced, constrained, and authorized congress to make the appropriation made by that act point to the plaintiff in these suits as the producer, within the purview of those acts, of the sugar that was in fact produced on the plantations in question. We conclude, therefore, that the circuit court erred in sustaining the peremptory plea to the plaintiff's cause of action, and in dismissing the bills in these cases, for which error the decrees must be reversed and the causes remanded to that court, with directions to overrule the pleas, and thereafter to proceed in accordance with law.

TENNESSEE COAL, IRON & RAILROAD CO. v. PIERCE.

(Circuit Court of Appeals, Fifth Circuit. June 11, 1897.)

No. 590.

MASTER AND SERVANT—CONTRACT OF EMPLOYMENT—CONSTRUCTION.

A contract between a corporation and a workman who has received injuries while in its service, that he shall be paid a given rate of wages per month, and shall render such services as he can, without any stipulation as to duration, is not an undertaking to pay such workman an annuity during the remainder of his life, but a contract of employment by the month, which may be terminated by either party at the end of any month.

Pardee, Circuit Judge, dissenting.

In Error to the Circuit Court of the United States for the Southern Division of the Northern District of Alabama.

Walker Percy and W. I. Grubb, for plaintiff in error.

W. A. Guntor and Robert C. Redus, for defendant in error.

Before PARDEE and McCORMICK, Circuit Judges, and NEWMAN, District Judge.

McCORMICK, Circuit Judge. Frank H. Pierce, the defendant in error, brought his action in the state court of Alabama against the Tennessee Coal, Iron & Railroad Company, plaintiff in error, on January 22, 1892. His declaration, filed on the same day, is as follows:

"The plaintiff claims of the defendant, a body corporate, incorporated under the laws of the state of Tennessee, and resident and doing business in said state of Alabama, county of Jefferson, the sum of fifty thousand dollars, as damages for the breach of a certain contract in writing entered into between the plaintiff and the defendant by its agent, in substantially the words and figures following,

to wit: '4th of June, 1890. Whereas, I, F. H. Pierce, while in the employ of the Tennessee Coal, Iron & Railway Company, Pratt Mines division, as a machinist, was seriously hurt by a trip of tram cars on the main slope of the mine known as "Slope No. 2," and operated by the Tennessee Coal, Iron & Railroad Company, under circumstances which I claim render the said company liable to me for damages; but whereas, they disclaim any liability for said accident or injuries to me resulting from same, and both parties being desirous of settling and compromising said matter; and whereas, the said Tennessee Coal, Iron & Railroad Company did make me a proposition on the — day of November, 1888, said accident having occurred on the 21st day of May, 1888, that they would furnish me such supplies from the commissary at No. 2 prison as I might choose to take, pay me regular wages while I was disabled, and give me my coal and wood for fuel at my dwelling, and the benefit of the convict garden at No. 2; and whereas, said proposition was accepted by me, and carried out by the said company; and whereas, in May, 1889, after I had resumed work, a further proposition was made to give me work, such as I could do, paying me therefor the wages paid me before said accident,—that is, \$60 a month,—and, in addition, free house rent; and whereas, said agreement has been faithfully kept by both parties; and whereas, on the 4th day of June, 1890, it is mutually agreed between myself and the said company that it will be better to give me the house rent than the supplies of about equal amount from the commissary: Now, therefore, it is agreed that, in view of the above propositions, which have been faithfully carried out, that my wages from this date are to be \$65 per month, and, in addition, I am to have, free of charge, my coal and wood necessary for my household use at my dwelling, and the same benefit from the garden as is had by others who are allowed the garden privilege, and I, on my part, agree and bind myself to release the said company from any and all liability for said accident, or from injuries resulting to me from it, or the effects of it, and agree that this is to be a full and satisfactory settlement of any and all claims which I might have against said company.' And plaintiff avers that in and by said agreement the said defendant, for the consideration therein mentioned, became liable to pay to the plaintiff monthly during his life the wages stipulated therein to be paid to him monthly, to wit, the sum of sixty-five dollars, and to furnish him at his dwelling, free of charge, the coal and wood necessary for his household use, and to allow him the same benefit from the garden of the said defendant as is had by others who are allowed the garden privilege; and plaintiff avers that others then had, and since have had, the free use of the garden of said defendant for vegetables for domestic use, and that this privilege is worth the sum of five dollars per month; and plaintiff avers that he has at all times been ready and willing and offered to do for said defendant such work given to him to do as he was able to do, and that he has labored at the same for such reasonable time as he was able to work and bound to work under said contract. And plaintiff avers that by the injuries received by him from said accident mentioned in said contract, he was permanently disabled in the use of his legs and hands; and that he was so otherwise injured thereby that his strength and health is such that he is incapacitated to reasonably do more work for the said defendant than he has done and offered to do since the said contract was entered into; and that he has, at all times since the said contract was entered into, fully carried out and performed the stipulations on his part to be done and performed. But the plaintiff avers that the said defendant has, without any reasonable ground for so doing, abandoned said contract, and refused to carry the same out, claiming that there is no obligation upon it to pay plaintiff the wages therein stipulated to be paid longer than it suits its pleasure to do so, and accordingly said defendant has wholly neglected and refused to be governed by the terms of said contract, and has failed and refused to pay plaintiff the sum of sixty-five dollars for six months last past before the commencement of this suit, and has failed and refused to furnish the defendant at his dwelling the coal and wood necessary for his household use for the same period, and plaintiff avers that the value of the coal and wood necessary for his household use is worth the sum of five dollars per month, and that said defendant has wholly and purposely disregarded and refused to abide by the obligations of said contract for the said period of six months last past before the commencement of this suit, and has wholly and entirely abandoned said contract, and discharged the plaintiff from its service. Wherefore the

said defendant became liable to pay to the plaintiff his reasonable damages, which plaintiff avers was and is the sum of fifty thousand dollars, for its breach and abandonment of the stipulations of the said contract above set out; and, being so liable, and in consideration thereof, the said defendant promised to plaintiff on, to wit, the 1st day of February, 1891, to pay plaintiff the sum of fifty thousand dollars, but, though often requested so to do, has hitherto neglected and refused, and still neglects and refuses, to pay the same, to the damage of the plaintiff fifty thousand dollars, for which he sues."

On January 29, 1894, the plaintiff in error, defendant in the state court, was allowed to withdraw its plea, and file demurrers to the complaint. The demurrer was sustained by the court, and, the plaintiff declining to amend, the court rendered judgment in favor of the defendant. From this judgment of the state circuit court the plaintiff in that action appealed to the supreme court of the state of Alabama. The record before us does not show any further action in the state court. It does show that upon application of plaintiff in error, presented March 23, 1896, to the circuit court of the United States, that court granted an order for the removal of the cause from the state court to the circuit court. It appears that the defendant demurred to plaintiff's complaint in the circuit court, and that the demurrer was overruled January 4, 1897. On the same day, the defendant filed the following pleas:

"(1) The defendant, for answer to the complaint, says that it denies each and every allegation therein contained. (2) The defendant, for further answer to the complaint, says that the plaintiff, under and by the terms of the contract set out in the complaint, contracted to perform for the defendant during the term thereof such service as he was able to perform, in consideration for the promises made by defendant therein, and the defendant avers that the plaintiff thereafter became able to perform service for the defendant, and did in fact perform such service for some time thereafter; and that, while engaged in the performance of such service, the plaintiff voluntarily, and without excuse therefor, refused to further perform such service as he was able to perform, and was in fact performing, for the defendant, as required by said contract, and the defendant thereupon discharged the plaintiff from its service; and the defendant avers that the plaintiff failed to comply with the conditions imposed upon him by said contract. (3) The defendant, for further answer to the complaint, says that the contract upon which this action is founded is not executed by it, or any one authorized by it to bind it in the premises, and defendant makes oath that this plea is true."

Plaintiff joined issue on the first and third pleas, and demurred to the second plea, on the ground that said plea does not go to the whole consideration of the contract, and is no answer to the entire action. Plaintiff's demurrer to the second plea was sustained. On the trial there was a substantial conflict in the testimony admitted, but there was credible positive testimony tending to establish the defendant's second plea. The plaintiff testified on his own behalf, and, being cross-examined by the defendant's counsel, was asked to state the conversation and agreement made and had between him and Mr. McCormack with reference to what the company would do for him when the first agreement was made, in November, 1888. To this question plaintiff, by counsel, objected, on the ground that this agreement was contained or merged in the original agreement, which was in writing. The court sustained the objection, and the defendant excepted. The defendant's counsel also asked plaintiff to state what the agreement between him and Mr. McCormack was which was

made in May, 1889. The plaintiff, by counsel, made the same objection to this question, which was sustained by the court, and the defendant excepted.

The court gave to the jury the following written instruction, and no other, either oral or written:

"Under the evidence in this case, I charge you that the plaintiff is entitled to recover in this action, and the measure of his damages is the aggregate amount of all the installments of seventy dollars for each month in default and unpaid from the time of the commencement of the employment under the contract sued on until the time of the trial, with interest on each installment from the time it fell due up to the time of the trial, which amounts, under the evidence, to the sum of \$5,893."

In obedience to this instruction, the jury returned a verdict in favor of the plaintiff for \$5,893, on which judgment was duly rendered, and the defendant sued out this writ of error.

We cannot affirm this judgment, and we find it very difficult to discuss the propositions which the case presents, because they appear to us to be anomalous. On no view of the pleadings and proof which we can take was the trial court justified in directing a verdict in this case. The charge given to the jury plainly withdrew the case from their consideration, and their action, as far as they acted, was purely clerical. After hearing the able oral arguments submitted by counsel for the respective parties, and carefully considering the elaborate briefs filed by each, and thoroughly examining the record, we remain at a loss to know exactly what view of the case induced the action of the circuit court. As has been already said, the record in this case does not bring up before us any judgment of the state court except the action of that court sustaining the demurrer to the plaintiff's declaration, and dismissing the plaintiff's cause of action. We infer, from the case remaining in the state court and being removed to the circuit court, that the action of the state circuit court was reversed by the supreme court. Both counsel have referred to an opinion of the supreme court of Alabama reversing that judgment, and construing the contract declared on in this case. There are suggestions in the brief in reference to the suppression of a part of the opinion, and some action, not very intelligible, on an application for rehearing. The only thing that does satisfactorily appear is that the supreme court of Alabama decided that the demurrer to plaintiff's action was improperly sustained, and the plaintiff's cause improperly dismissed, and that the judgment of the state circuit court was reversed, and the cause remanded (19 South. 22); but the action thereon is not presented in a way to enlighten or embarrass us in the consideration of the contract as it appeared in the proceedings of the circuit court, and we are not able to construe that contract in the manner that the judge of the circuit court must have construed it in order to have ruled as he did on the admission of evidence, and to give the instruction embraced in his charge to the jury. It appears on the face of the paper declared on that plaintiff was injured on May 21, 1888; that the defendant verbally agreed to furnish him such supplies from the commissary as he might choose to take, to pay him regular wages while he was disabled, and to give him coal and wood for fuel at his

dwelling, and the benefit of the convict garden,—all of which the defendant did, or, in the language of the contract, carried out. It appears further on the face of the contract that after the plaintiff had resumed work there was a verbal agreement made in May, 1889, between the parties to the effect that he should do such work as he could do, and that the defendant would pay him therefor \$60 a month, and, in addition, free house rent, and that this agreement was faithfully kept by both parties until June 4, 1890, when the writing declared on passed between the parties, which, after reciting the facts just stated, continues in these words, viz.:

"It is mutually agreed between myself and the said company that it will be better to give me the house rent than the supplies of about equal amount from the commissary. Now, therefore, it is agreed that, in view of the above propositions, which have been faithfully carried out, that my wages from this date are to be \$65 per month, and, in addition, I am to have, free of charge, my coal and wood necessary for my household use at my dwelling, and the same benefit from the garden as is had by others who are allowed the garden privilege; and I, on my part, agree and bind myself to release the said company from any and all liability for said accident, or from injuries resulting to me from it, or the effects of it, and agree that this is to be a full and satisfactory settlement of any and all claims which I might have against said company."

It will be observed that the date of this writing is more than three years removed from the date of the injury suffered by the plaintiff. By the law of Alabama, such a cause of action is subject to the plea of limitation of one year. Besides what fully appears on the face of this writing, the proof abundantly shows that the plaintiff resumed work within the first year after receiving his injury, and that he had received wages and allowances from the time of his injury up to April 1, 1891. The plaintiff contends that the last paragraph of the writing declared on shows the yielding of a consideration, which the defendant cannot restore, and that this requires that the contract shall be construed as a contract for the permanent hiring of plaintiff by the defendant. The counsel suggests that the defendant fraudulently set a trap for the plaintiff, and induced him to enter into this contract, in order to escape liability for the personal injuries that plaintiff had sustained. It does not clearly appear to us that this consideration, if it was a consideration, has passed beyond the power of the defendant to restore, or of the plaintiff to claim, to the extent that he was in a condition to claim it at the date of the execution of the writing. The practical effect of the construction claimed by the plaintiff, and shown by the verdict in this case, shocks the common judgment and conscience, and to support it would require express terms in the writing. Such express terms do not appear. On the contrary, to us it appears that the defendant had been dealing tenderly with the plaintiff, on account of the very severe injuries which the plaintiff had received in the defendant's service; that, while all along denying its liability for those injuries, it had done what it could to alleviate them, and this condition of friendly accord had progressed for more than three years. Plaintiff probably reiterating his claim against the defendant for the injuries, or dwelling upon it, and the defendant desiring to have the relations between the parties put upon a business basis, it was certainly not a matter of

small consequence to the plaintiff to secure the employment which in this written agreement the defendant expressed itself willing to continue. The proof shows that the service the plaintiff could render, and was rendering, and had been rendering for two years after his wounds had healed, was reasonably worth about the wages and the allowances which the defendant consented to give. It shows also that he was not quite as efficient as a man with two good hands and two sound legs would have been with like skill and experience, but, to our minds, there is nothing on the face of this paper that indicates that the defendant, for a disputed claim that was thrice barred, was willing to give, or was giving, a binding contract to pay an annuity to a man 55 years old at the rate of \$840 a year as long as he should live. His disability was fixed more than two years before the date of this writing. Exactly how much he was disabled was known, not only to him, but to the defendant. It is easier to say what the contract does not mean than to declare authoritatively and clearly what is the proper construction of the contract. The defendant contends that it is an employment by the month, and, like every other such employment, subject to be discontinued, at the will of either, at the expiration of any month, or at any time, for adequate cause. This construction comports more with the terms of the writing itself, and we conclude it is the only intelligible construction to be put upon the writing.

It appears to us that the plaintiff has been led into this contract, and into the loss of valuable employment, by his own misconstruction of the contract. His own testimony on the trial of this case showed clearly that in his dealings with the agent of the defendant he relied upon the unfounded belief that he had the defendant bound to pay him an annuity of \$70 a month for the rest of his life, and that he could work or not, as he pleased,—a kind of servant that would not be very valuable to any employer. We conclude that the demurrer to the declaration should have been sustained, and for the error of the court in overruling the demurrer—without further comment on other errors indicated—the judgment of the circuit court is reversed, and the cause is remanded to be proceeded with in that court in accordance with the views we have expressed.

PARDEE, Circuit Judge, dissents.

NORTON et al. v. UNITED STATES.

(Circuit Court of Appeals, Fifth Circuit. June 7, 1897.)

No. 564.

SUIT ON POSTMASTER'S BOND—EVIDENCE.

Rev. St. § 952, providing that "no claim for a credit shall be allowed upon the trial of any suit for delinquency against a postmaster * * * unless the same has been presented to the sixth auditor, and by him disallowed," etc., does not affect the admissibility of evidence offered to show that the defendant never received the amounts with which he is charged.

In Error to the District Court of the United States for the Northern District of Texas.

George Clark and D. C. Bolinger, for plaintiffs in error.

J. Ward Gurley, for defendant in error.

Before PARDEE and McCORMICK, Circuit Judges, and NEWMAN, District Judge.

NEWMAN, District Judge. The record presents the following case for determination: Suit was brought in 1895 against Charles M. Norton and his sureties on his three official bonds as postmaster at Calvert, Tex. The suit came on for trial at the November term, 1896. Exceptions were reserved, and error is alleged as to the rulings of the court in rejecting certain pieces of evidence offered. A general view of the case, which we have, will dispose of it without going into detail as to all the evidence offered and rejected. The suit, as it finally went to trial, although not so originally, was for certain balances claimed to be due by Norton, as postmaster, in connection with the money-order business of the post office at Calvert. The United States introduced in evidence the three bonds sued on, executed by the defendant and his sureties; three certified transcripts from the auditor of the treasury for the post-office department, showing balance due by Norton as postmaster at Calvert for the period covered by the three bonds, respectively, of \$33.10, \$1,108.50, and \$1,454.98; also evidence of demand for the said several sums of Norton and his sureties. The government having closed, the defendant offered, among other things, to show that the several balances claimed to be due by him as postmaster on the money-order business of the Calvert office had never come into his hands; that he had never received any of the money with which he was charged by the post-office department, and which was embraced in the transcript offered in evidence for the government. This evidence was objected to by the United States attorney, and rejected by the court, on the ground that it was not admissible under section 952 of the Revised Statutes. The court, having rejected defendant's evidence, directed a verdict in favor of the government for the amount sued for. The section (952) of the Revised Statutes referred to reads as follows:

"No claim for a credit shall be allowed upon the trial of any suit for delinquency against a postmaster, contractor, or other officer, agent or employé of the postoffice department, unless the same has been presented to the sixth auditor and by him disallowed, in whole or in part, or unless it is proved to the satisfaction of the court that the defendant is, at the time of the trial, in possession of vouchers not before in his power to procure, and that he was prevented from exhibiting to the said auditor a claim for such a credit by some unavoidable accident."

Was this section applicable to the testimony offered in the district court? That is the question for determination here. It will be seen that the language of this statute is that "no claim for a credit shall be allowed upon the trial of any suit against a postmaster * * * unless the same has been presented to the sixth auditor, and by him disallowed, in whole or in part." When there is a claim by the postmaster that money charged against him did not actually

come into his hands at all, is that a claim "for a credit"? A claim for a credit, in the ordinary sense in which that expression is used, is against an opposing debit. Where one is charged with certain funds as having come into his hands, and he denies that he ever received such funds, that is not a claim for a credit in any reasonable or just sense. Where funds have come into the hands of a person by reason of some fiduciary relation, and he claims to have paid the same over either to the owner, or to some third person by his direction or authority, that is a claim for a credit. Assuming, therefore, that the language used in this statute was used in its ordinary and usual sense, it does not embrace or apply to the case of a claim that funds with which a postmaster is charged never came into his hands at all. The use of the term "vouchers" in a subsequent part of this section emphasizes the fact that its meaning is that above indicated. The defendant is allowed to introduce vouchers "not before in his power to procure, and that he was prevented from exhibiting to said auditor a claim for such credit by some unavoidable accident." The "claim of credit," therefore, is to be evidenced by "vouchers." We think this is clear, construing the meaning of the first expression in the section cited above, in connection with the language of the latter part of the section just referred to. The claim of credit to be made is to be evidenced by "vouchers," and certainly no voucher could be presented by a postmaster for the disbursement of that which never came into his hands. So we have no difficulty in holding that a postmaster, against whom suit is brought for default on his official bond, may defend by showing that the money, or a part thereof, as claimed by the government, never actually came into his hands, without presenting the same to the auditor for the post-office department, and having the same by him disallowed. Any other conclusion would not only do violence to the language of the statute referred to, but do manifest injustice and wrong to defendant against whom such suit is brought. Cited for the defendant on this question: *Myer's v. U. S.*, 1 McLean, 493, Fed. Cas. No. 9,996; *U. S. v. Hutcheson*, 39 Fed. 540; *Ware v. U. S.*, 4 Wall. 629; *U. S. v. Dumas*, 149 U. S. 286, 13 Sup. Ct. 872. For the reasons given, we think the verdict directed in favor of the government was wrong; therefore the judgment of the court below is reversed, with directions to award a new trial.

MERCHANTS' & PLANTERS' OIL CO. v. KENTUCKY REFINING CO.

(Circuit Court of Appeals, Fifth Circuit. May 11, 1897.)

No. 515.

PLEADING AND PROOF—VARIANCE—DECEIT—BREACH OF CONTRACT.

Plaintiff brought an action according to the Texas practice to recover possession of certain oil cars, with actual and exemplary damages for the wrongful detention thereof, alleging that defendant obtained possession of the cars by fraudulently pretending to have for sale, and to sell to plaintiff, cotton-seed oil of a certain grade, to be transported in said cars, but that in fact it had no oil of that grade. Judgment for possession and for the rental value of the cars having been rendered for plaintiff, *held*, that

there was no merit in defendant's contention that there could be no recovery of rental value because the action was one for deceit, whereas the evidence showed that the cause of action, if any, was for a breach of contract, and hence that there was a fatal variance between the allegations and the proofs.

In Error to the Circuit Court of the United States for the Eastern District of Texas.

This was an action by the Kentucky Refining Company against the Merchants' & Planters' Oil Company to recover possession of certain oil cars, with damages for their detention. In the court below the jury found for plaintiff as to the title and possession of the cars, and also found he was entitled to \$640 as the reasonable rental of the cars for the period of detention. Judgment having been entered on the verdict, the defendant sued out this writ of error.

The plaintiff in its second amended original petition alleged, in substance, that about March 12, 1893, plaintiff owned and was in possession of the eight cars in question; that on that day the defendant unlawfully took said cars from plaintiff's possession, and has since wrongfully detained them; that the reasonable value of the use of each of said cars was \$5 per day, which defendant well knew. The plaintiff further alleged that defendant fraudulently induced plaintiff to send its cars from its place of business at Louisville, Ky., to defendant, at Houston, Tex., by fraudulently representing, through its agents, that it had 1,000 barrels strictly prime yellow summer cotton-seed oil, which it would sell to plaintiff if the latter would send sufficient oil cars to transport the same; that plaintiff, believing these representations, accepted the offer, and requested defendant to send it a sample of the oil; that, on defendant's insistence, it forwarded the cars before receiving the sample; that the sample, when received, showed that the oil was not strictly prime summer yellow, but was of an inferior grade, and plaintiff at once notified defendant that it would not accept any but strictly prime summer yellow cotton-seed oil, to which defendant replied that it had no such oil; that plaintiff, having in this manner wrongfully obtained possession of the cars, failed and refused to deliver them up on demand by plaintiff, but unlawfully and wrongfully held them until plaintiff obtained possession by the writ of sequestration issued in this suit. The plaintiff prayed judgment for actual damages in the sum of \$8,000, alleged to consist of the reasonable rental value of the cars, the expenses incident to sending them to defendant, and to obtaining possession by means of the writ of sequestration, and to sending agents from Louisville and Chicago to Galveston, Tex., to represent plaintiff in the suit, and to testify therein. Plaintiff further asked exemplary and vindictive damages in the sum of \$50,000 for the fraudulent and malicious acts of defendant in inducing plaintiff to send it the cars, etc.

To this pleading the defendant set up a counterclaim and plea in reconvention, in which it was alleged, in substance, that about February 28, 1893, the plaintiff, in the usual course of business, purchased from defendant, through Benjamin McLean & Co., acting as brokers, 1,000 barrels of yellow prime cotton-seed oil, to be delivered by defendant at its mills in Houston, Tex., in tank cars to be furnished by plaintiff, at the price of 50 cents per gallon, amounting to \$25,000. Defendant alleged that it stood ready at all times to comply with its part of the contract, and that plaintiff neglected to forward the cars promptly as agreed, and did not forward them until three weeks after the sale. Defendant further charged that plaintiff violated its contract of sale, refused to pay for the oil, and notified defendant not to ship it; that the price of oil declined after the sale, and for this reason, and no other, plaintiff refused to accept the oil tendered. Defendant further alleged that thereafter it tried to sell the oil elsewhere, but that 40 cents per gallon was the highest price it could obtain for it, by reason whereof it was damaged in the sum of \$6,000, for which it prayed judgment.

The first trial of the case resulted in a verdict and judgment for plaintiff; but the judgment was reversed on error, by this court. See 69 Fed. 218. On

the second trial the court charged the jury to find for plaintiff as to title and ownership of the cars, and for defendant on the question of exemplary damages, but submitted to the jury the question of the rental value of the cars during their detention; refusing defendant's request to instruct the jury that defendant could recover nothing on this head because the action was for deceit, and the allegations and proofs did not correspond. A verdict was rendered accordingly, fixing the damages at \$640, and, to review the judgment entered thereon, defendant sued out this writ of error.

Jas. A. Baker, Jas. A. Baker, Jr., R. S. Lovett, and Frank Andrews, for plaintiff in error.

The plaintiff's petition in this case states an action for tort and deceit, alleging the details of the transaction between plaintiff and defendant by way of inducement. The evidence discloses a contract between the parties, and that, if the plaintiff had any cause of action, it was for a breach of the same. There is a fatal variance between the allegata and the probata, and the declaration in the petition of an action of tort is not supported by the evidence, because the evidence discloses a contract, and the plaintiff cannot sue for tort and recover for breach of contract, and the verdict and judgment are wholly without any legal evidence to support them. Cooley, Torts, p. 106; 1 Walt, Act. & Def. p. 132; 5 Am. & Eng. Enc. Law, p. 30; Benj. Sales (2d Ed.) p. 1075; 23 Am. & Eng. Enc. Law, p. 60; Johnson v. Moss, 45 Cal. 515; Boardman v. Griffin, 52 Ind. 101; Long v. Doxey, 50 Ind. 385; Waldhler v. Railway Co., 71 Mo. 514; Buffington v. Railway Co., 64 Mo. 246; Hackett v. Bank, 57 Cal. 335; Rothe v. Rothe, 31 Wis. 570; De Graw v. Elmore, 50 N. Y. 1; Ross v. Mather, 51 N. Y. 108; People v. Dennison, 84 N. Y. 272; Watts v. McAllister, 33 Ind. 264; Johannesson v. Borschenius, 35 Wis. 131; Beck v. Ferrara, 19 Mo. 30; Dean v. Yates, 22 Ohio St. 388; People v. Cushman, 1 Hun. 73; Masten v. Griffing, 33 Cal. 111; Cowles v. Warner, 22 Minn. 449; Cummings v. Long, 25 Minn. 337; 28 Am. & Eng. Enc. Law, 61; Sanches v. Railway Co., 88 Tex. 117, 30 S. W. 431.

Samuel R. Perryman, for defendant in error.

Under the statutory laws of Texas the pleader is required to set forth a full and clear statement of the cause of action, and such other allegations pertinent to the cause as the plaintiff may deem necessary to sustain his suit, and state the nature of the relief which he requests of the court. The pleading shall consist of a statement, in logical and legal form, of the facts constituting the plaintiff's cause of action or the defendant's ground of defense. This proposition virtually copies articles 1195 and 1197 of the Revised Statutes of Texas of 1879. Construing these statutes in *Estes v. Browning*, 11 Tex. 237, it is said: "We have no forms of action, and if, upon the facts stated, the plaintiff be entitled to recover, he may have his judgment; also, a trespass may be waived, and suit brought for the value of the use and occupation." In *Shirley v. Railway Co.*, 78 Tex. 131, 10 S. W. 543, it is said, "A tort is generally described as a wrong independent of a contract, though it is conceded that a tort may grow out of, make a part of, or be coincident with, a contract." See, also, Cooley, Torts, p. 3, note 1; *Railway Co. v. Levy*, 59 Tex. 548; *Pridgin v. Strickland*, 8 Tex. 427.

Before PARDEE and McCORMICK, Circuit Judges, and NEWMAN, District Judge.

PER CURIAM. This was an action to recover the title and possession of certain cars, with actual and exemplary damages for their unlawful detention. The plaintiff, in the circuit court, claimed that the defendant had fraudulently obtained possession of the said cars and unlawfully detained the same. There was evidence tending to establish the plaintiff's claim of ownership, and for actual damages. The trial judge charged the jury to find for the plaintiff

as to the title and ownership, and for the defendant on the question of exemplary damages, to all of which there was no objection. He submitted to the jury, on the evidence, the question as to whether the plaintiff was entitled to recover the rental value of the cars during their detention, as actual damages; refusing the request of the defendant to instruct the jury that in no event was the plaintiff entitled to recover anything for, or as the value of, the use and hire of the cars in question, because the action was one for deceit, and that the allegata and probata did not correspond, and because there was no legally sufficient evidence upon which to base a verdict for the plaintiff. The jury found for the plaintiff as to the title and possession, and further in the sum of \$640, as the amount shown by the evidence to be the reasonable rental value of the cars for the time of their detention. The defendant below sued out this writ of error. We have carefully considered the errors assigned, in the light of the very able briefs of counsel, but are unable to find merit in them. Judgment affirmed.

COLEMAN v. UNITED STATES.

(District Court, D. Kentucky. June 1, 1897.)

No. 5,298.

LEGAL DAY'S WORK—RIGHT OF ACTION FOR ADDITIONAL HOURS.

One employed as a laborer in the service of the United States, at a given monthly salary, who, without objection, works at such employment more than eight hours each day, and who, without protest, accepts the agreed monthly pay, has no right of action against the government for additional compensation for such extra hours of labor, in the absence of an express contract therefor.

C. G. Hulsewede and L. A. Douglass, for plaintiff.
W. M. Smith, for the United States.

BARR, District Judge. In this case the plaintiff alleges that:

"On the ——— day of February, 1888, he was employed as a laborer on a dredge boat on the Louisville & Portland Canal, in the state of Kentucky, for the United States, at a salary of \$40 per month, and continued to discharge the duties of such position as laborer on said dredge boat at said place and at said salary until the 3d day of September, 1890, when he was relieved from duty on said canal, and he has not done any work for the United States since that time. That, during the time above referred to, he discharged the duties of laborer on said dredge boat, and was so employed and performed the duties of said laborer, and that he was compelled to, and did, work and labor as such laborer during each and every day of said time, Sundays excepted, and was on duty and worked each day for ten hours, and not less. That he never had any special agreement or contract with the United States, or with any of its officers, department officials, or representatives, that he was to work or be on duty for ten hours per day for the same sum per month as specified above, nor did he ever agree to work ten hours a day for the same amount of salary and pay as for eight hours a day. That, contrary to law, he was compelled to, and did, work, and was on duty, each day of said time, Sundays excepted, for two hours longer than a legal day's work, to wit, eight hours per day; and the United States then and there received the benefit and accepted his said two hours of labor during each day of his said time, Sundays excepted. The United States

then and there became indebted to the petitioner upon an implied contract for the value of said two hours additional work and labor during said time. That said additional labor so received during said time was and is of the value of \$1,000. Said sum is still due and unpaid."

To this petition the United States have filed a general demurrer. Section 3738, Rev. St., declares: "Eight hours shall constitute a day's work for all laborers, workmen and mechanics who may be employed by or on behalf of the government of the United States;" and the question under this demurrer is whether or not this provision of the law gives the petitioner, Coleman, a right of action for the extra time over the eight hours per day for which he was employed.

The supreme court, in *U. S. v. Martin*, in considering this statute, say:

"We regard the statute chiefly as in the nature of a direction from the principal to his agent that eight hours is deemed to be a proper length of time for a day's labor, and that his contract shall be based upon that theory. It is a matter between the principal and his agent, in which a third party has no interest." 94 U. S. 404.

Subsequent to this employment, to wit, by an act approved August 1, 1892, congress declared that "the service and employment of all laborers and mechanics * * * upon any of the public works of the United States * * * is hereby limited and restricted to eight hours in any one calendar day, and it shall be unlawful for any officer of the United States * * * or any such contractor or subcontractor whose duty it shall be to employ, direct, or control the services of such laborers or mechanics, to require or permit any such laborer or mechanic to work more than eight hours a day, except in case of extraordinary emergency," and prescribes that the person who violates this provision of the law shall be guilty of a misdemeanor, and punished upon conviction. The provisions of this act, however, do not have any application to the case at bar, as all contracts made prior to its passage are expressly excluded, but it (the act) is material in considering how congress construed the act of 1868 (which is now section 3738), and shows, we think, quite clearly that that act was never intended to give the laborer or workman or mechanic a right of action, or to raise an implied contract, if they should work more than the time.

The fact, as alleged, that this party was paid a salary of \$40 a month, and there being no allegation that the money was not received regularly, and no allegation that he protested either at the time of receiving the money or during the time when the work was performed, precludes, we think, any right of action now. The mere allegation of the petition that he never made any special agreement or contract with the United States, or with any of its officers, that he was to work or to be on duty for ten hours per day for the sum specified, nor that he ever agreed to work for ten hours per day for the same amount of salary and pay as for eight hours, is not sufficient to raise an implied contract, and give him a right of action for the extra two hours per day. Even if the construction of the statute herein indicated is too broad, and the petitioner is entitled to its benefit, he would have no right of action now, since the government or its agents should have had notice, by protest or objection, that the petitioner, who had

agreed to labor at the salary of \$40 a month, claimed that the agreement required that he should only work eight hours a day of each day for the month. *Gordon v. U. S.* (a recent case in the court of claims, decided April 6, 1896) 31 Ct. Cl. 254. We conclude as the statute did not make a contract between the United States and the petitioner that a day's work should be eight hours, and that the receipt of the money, the \$40 a month, as compensation for his month's labor, precludes any recovery now.

The statute under consideration is quite different in its terms from the act of May 24, 1888, as to mail carriers. The provision of that act is that:

"Hereafter eight hours shall constitute a day's work for letter carriers in cities and postal districts connected therewith, for which they shall receive the same sum as is now paid for a greater number of hours. If any carrier is employed a greater number of hours than eight he shall be paid for the same in proportion to the salary now fixed by law."

This statute clearly gives the right of compensation to the carrier for the extra time, and directs its payment; and it was so decided in *U. S. v. Post*, 148 U. S. 125, 13 Sup. Ct. 567. The act of 1868 had no such provision, and was not a contract between the government and its laborer that eight hours shall constitute a day's work. It did not prevent the government from making agreements, either express or implied, by which a day's labor could be more or less than eight hours a day; nor does it prescribe the amount of compensation for that or any other number of hours' labor. This is clearly decided in *U. S. v. Martin*, *supra*. We conclude, therefore, that the demurrer should be sustained.

In re CHU POY.

(District Court, N. D. Ohio, E. D. June 26, 1897.)

DEPORTATION OF CHINESE—LABORER—MERCHANT.

A Chinaman, who is a member of a firm of Chinese merchants engaged in buying and selling merchandise at a fixed place of business, and who is sent out by such firm, as an employé, to take charge of another mercantile establishment in which said firm owns a one-half interest, is a merchant, and not a laborer, within the meaning of the act of November 3, 1893, and is not liable to deportation while thus employed.

Samuel D. Dodge, U. S. Atty., and George R. McKay, Asst. U. S. Atty.

Foran & Dawley, for defendant.

HAMMOND, J. The proof in this case is entirely clear that this defendant is neither a skilled nor an unskilled manual laborer, as commonly understood, nor does he come within the enlarged definition of the second section of the amended act of November 3, 1893 (2 Supp. Rev. St. U. S. p. 154), "including Chinese employed in mining, fishing, huckstering, peddling, laundrymen, or those engaged in taking, drying, or otherwise preserving shell or other fish for home consumption or exportation." The only scrap of proof in any way connecting him with employment as a laborer is that on the day he was arrested he

was in attendance at the laundry of a registered Chinaman of this city, called Ah Sam. That is fully explained by the fact that he had the business connections hereinafter mentioned with Ah Sam, in his business of keeping a Chinese merchandise store in the city of Cleveland, at No. 90 Prospect street. On this day, Ah Sam being absent or sick, this defendant was temporarily taking care of the laundry at that moment. The proof of his landlord, and those who know him here in this city, is that he has been, since he came here, employed in the store at No. 90 Prospect street. About that fact there can be not the least doubt; and unless these Chinamen are to be treated differently from ordinary human beings in their helpful relations to each other, or in the associations of business and social life, this temporary help to his business associate is not to be taken as proof of the fact that he is a laborer, in the sense of this statute. When arrested, he had no certificate of registration to produce to the inspector, and it is conceded now that he has none, and never had any. That is undoubtedly a formidable circumstance against him, and would be conclusive under the rule of the statute that he shall affirmatively show his right to be in this country, if the proof showed at all that he was a laborer seeking to evade the provisions of the act. But this circumstance is explained by the proof that at the time of the registration he claimed to be within the exceptions of the statute, and not subject to registration. Perhaps, if he had been wise, or wisely advised, he would have registered, and set at rest all question of his right to be here. But if, at that time, he was within the exceptions of the statute, he cannot now be deported because he did not register. It seems fairly to be established by the proof that as a youth he was employed in the store of Kwong, Chin, Chong & Co., No. 2 Mott street, New York, of which firm his father was a member; and that subsequently, by succession of contract, he came into possession of his father's interest, the father returning to China. This was the situation while he resided in New York, and affords a reason for his not registering at that time. The proof also establishes quite satisfactorily that recently his firm in New York entered into a business connection with Ah Sam, of Cleveland, Ohio, the afore-mentioned registered Chinaman, who conducts at Cleveland both a laundry and a Chinese merchandise store. This arrangement was, in effect, that Ah Sam was to own one-half of the merchandise establishment, and the New York firm the other half. The young fellow who is the defendant in this case was sent out to Cleveland to take care of the interests of the New York firm, to engage in buying and selling as an employé in the Cleveland establishment, and he was to receive a compensation of \$30 per month, and, impliedly, his share of the profits accruing to the firm in New York. This seems to the court to bring him very distinctly within the definition given by the statute of "a merchant engaged in buying and selling merchandise at a fixed place of business, which business is conducted in his name, and who, during the time he claims to be engaged as a merchant, does not engage in the performance of any manual labor except such as is necessary in the conduct of his business as such merchant." Act Nov. 3, 1893 (2 Supp. Rev. St. U. S. p. 154). It is not necessary now to decide the

point, but it is not an unreasonable interpretation of this statute that a Chinaman who is engaged only as a clerk in an established mercantile business, and in no other manual labor than that which is necessary to conduct the business of buying and selling merchandise at a fixed place of business, is in every proper sense "a merchant," and not a laborer, and would be conducting such branch of the business of merchandising as is done by the clerks of a mercantile establishment; and, if he were honestly using his own name in making employments and engagements and in the buying and selling, he would be "conducting the business in his own name," in the sense of this statute. It may be that it was not the intention of congress to limit this exception of "merchants" to the owners of the merchandise which is bought and sold, but also that it comprehends those engaged in and about the business of buying and selling as assistants to the owner, where it is all done openly and honestly, and without any purpose to evade the statute.

Clearly, the purpose of the statute is to protect American against cheap Chinese labor; and it has no intention, apparently, of protecting American merchants, or American merchants' assistants, against cheap Chinese merchants and merchants' assistants. And while the statute, as to a laborer, is very strong and imperative in demanding that he shall be deported if he has not registered, or if he has come into the country in hostility to the statute, or evasion of it, when we get beyond that class of Chinese, and find a man who is clearly not a laborer, and not within the reason and prohibitions of the statute, but is engaged in mercantile life, we are authorized to be more liberal in the interpretation of the statute in favor of the defendant. The statute is harsh enough as to outlawed laborers in its deprivation of the right of trial by jury, the reversal by statutory command of the ordinary laws of evidence, and those familiar provisions for the protection of all persons against whom penalties are decreed, such as the presumption of innocence, the reasonable doubt, and the like, and the statutory rule for the conclusiveness of the want of the certificate, and all that; but it is not within the purview of the statute, nor within the objects to be accomplished, to apply the harshest interpretation of definition as against those who are actually engaged in mercantile life while here, because, as before remarked, it has not been deemed necessary to protect our merchants against Chinese merchants, nor our merchants' clerks against Chinese merchants' clerks, for the reason, probably, that the Chinese could not procure and would not give employment to our own people as clerks in their stores, and it would be depriving them of the privileges of the statute to carry on mercantile business in this country to deprive them of the right to employ Chinamen in the ordinary vocations that are necessary to conduct a mercantile business. But, on the proof we have here, this defendant answers every element of the statutory definition of "a merchant" which we have already quoted, and there can be no doubt as to any of these statutory elements except that of "conducting the business in his own name." He certainly was conducting the business of a merchant's clerk in his own name, but it is argued that because he had in his own name no partnership with Ah

Sam, and because his own name did not appear in the firm style in the New York concern, he was not conducting the business in his own name. But this is merely sticking in the bark of the words that are used. It appears by the proof that this New York firm is composed of a numerous list of what they call, in their testimony, "partners," and in the list of this New York firm, produced by the government Chinese inspector, who comes from New York as a witness on behalf of the government, there are some 30 or more names of these partners, from which it is said the name of this young man is absent. It shows that that firm, at least, has too many names to go upon the signs and letter heads, and it would be impracticable for each man's name to thus appear; and I should say that, like all merchants, it is open to the Chinese to conduct their mercantile enterprises by corporations and partnership firms, under the designation of the word "company," and that every man who honestly and fairly had an interest as a member of the corporation or the firm would be, in the language of the statute, "conducting the business in his own name." This young man produces a book, and other evidence, from which it appears that he became the successor to his father's interest, and was, at the time of his arrest, one of the members of the firm in New York, and was the member of the firm sent out to Cleveland to watch its interests in the business arrangement with Ah Sam. This makes him a merchant doing business in his own name, in any fair and reasonable sense of the statute. Now, all this may be fabricated testimony, and it may be a trick to protect this man; but it does not appear to be so by any proof here that is at all worthy of judicial consideration. The testimony of the New York inspector, admitted by consent, is the purest and most suspicious of hearsay evidence, not worthy of the least attention, much less belief, coming from any witness; and certainly not when coming from one who is an overzealous prosecutor, bent on sustaining his own prejudiced opinion that the other witnesses are lying. Apart from all the testimony of the Chinese witnesses, the white men who testify show facts and circumstances which imply that he was in fact engaged in mercantile business. He has been doing that kind of business ever since he came to Cleveland, and nothing else, so far as it appears from this proof, except on the one day when he was caught watching his co-partner's laundry, as already stated. There is every indication in all the proof of the citizens of Cleveland who have known and seen him that he has been in good faith engaged in the business which he says he has been engaged in. There are also corroborating facts by the white testimony at New York. The fact that he was there as a boy with his father, and has grown up, so to speak, in the New York store, to the knowledge of the white witness who was the drayman or truckman for the Chinese firm, is a strong corroborating fact of the claim that he has been engaged in mercantile life. The story which he and his Chinese witnesses tell about his mercantile employments is wholly consistent with what we know about him from the white witnesses. Under such circumstances as these, it is my judgment that he should not be deported, and the application is refused.

UNITED STATES v. BELL

(Circuit Court, W. D. Tennessee, W. D. June 10, 1897.)

1. CONSTITUTIONAL LAW—SELF-INCRIMINATING TESTIMONY—COMPULSORY ATTENDANCE—PENSION EXAMINERS.

In determining whether false testimony, given before a special pension examiner, and on which a charge of perjury is based, was extracted from the accused in violation of his constitutional right to remain silent in regard to matters incriminating himself, the fact that he appeared and submitted to examination without service of subpoena is not conclusive. If, being an ignorant man, he appeared reluctantly, upon the importunity and at the direction of the examiner, who had the power to compel his attendance, he will be regarded as having appeared upon compulsion, as much as if he had come in obedience to a subpoena.

2. SAME—WAIVER OF RIGHT OF SILENCE.

If one, fully cognizant of his constitutional right to remain silent in respect to matters tending to incriminate himself, abandons it, whether under compulsion or otherwise, and essays to speak under oath, he must speak the truth, and may be prosecuted for perjury if he does not; but, before this principle can be invoked, it must appear that the witness' abandonment of his rights was knowingly and understandingly made, and that no undue advantage has been taken of an ignorant witness in the course of an inquisitorial examination.

3. SAME—PROTECTION OF WITNESS.

No statute, rule, regulation, or act of administration can be constitutional which does not in some way protect the right of the citizen under the fifth amendment to be silent in respect to matters tending to incriminate himself, if he chooses to be silent. Whether any given citizen has exercised his privilege of waiving this right, and essayed to speak voluntarily, subject to the pains and penalties of perjury, depends upon the circumstances of each particular case.

4. SAME—EXEMPTION OF WITNESS—PROSECUTION FOR PERJURY.

To secure the full constitutional immunity, so as to allow any inquisitorial, self-incriminating examination to take place, the witness must not only be exempted absolutely from all prosecution for offenses aliunde the testimony he is then giving, but that testimony cannot be made the basis of a prosecution against him.

5. SAME—REV. ST. § 860.

Quære: Whether an investigation by a special pension examiner, under Rev. St. § 4744, as amended by the act of July 25, 1882, is a "judicial proceeding," within the meaning of Rev. St. § 860, which provides that evidence obtained from a party or witness shall not be used against him in any criminal proceeding, etc.

6. SAME.

The immunity offered by Rev. St. § 860, from the use of self-incriminating testimony against the person giving it, is not as broad as the constitutional protection afforded by the fifth amendment, and therefore the witness is not compelled to answer. *Counselman v. Hitchcock*, 12 Sup. Ct. 195, 142 U. S. 547, followed.

7. SAME—PROSECUTION FOR PERJURY.

Quære: Whether the proviso in Rev. St. § 860, declaring that the immunity thereby afforded shall not exempt the witness from prosecution for perjury committed in giving testimony thereunder, is not inconsistent with the constitutional guaranty.

8. SAME—EXAMINATIONS BEFORE SPECIAL PENSION EXAMINERS.

The examinations conducted before special pension examiners, under Rev. St. § 4744, as amended by the act of July 25, 1882, are almost purely inquisitorial, and no sufficient safeguards are thrown around the witness in respect to the extortion of self-incriminating testimony.

9. SAME—IGNORANT WITNESS—WARNING OF HIS RIGHTS.

Unless a witness, manifestly ignorant of his constitutional right to remain silent in respect to self-incriminating testimony, is informed of that right by a special pension examiner, before whom he is subjected to an inquisitorial examination, so that he may protect himself, or consult counsel if he desires, the examination cannot be used in evidence against him, even on an indictment for false swearing in the progress of the examination itself.

The defendant stands indicted for perjury, as defined by Rev. St. U. S. § 5392, upon an examination before Pension Examiner W. M. Ragsdale, had on the 14th day of November, 1895, at his office, in the city of Memphis.

On the trial the defendant excepted to the introduction of the written examination, as taken down by the examiner, upon the ground, among others, that the said examination was a violation of his privilege to remain silent upon the matters inquired about, as secured by the fifth amendment to the constitution of the United States, which objection was reserved by the court, and, subject to the exceptions, the document was read to the jury. The defendant also asked the court, among others, to give the following instruction to the jury: "(3) If, from the evidence, the jury find that the defendant appeared before the pension examiner under such circumstances as would induce a man of ordinary information to believe that he was compelled to appear and answer interrogatories touching his conduct with reference to the postdating of a pension voucher, and of the execution of a pension voucher certified by him; and if, from the evidence, you believe that he did not understand that he could not lawfully be compelled to answer interrogatories so propounded by the pension examiner, and that the pension examiner did not warn him of his rights in the premises; and if he did appear and answer questions under such circumstances,—the court charges you that this would, in law, be compelling the defendant to give evidence against himself. And, if you believe from the evidence that the foregoing propositions have been established, you should acquit." He also asked the court generally to direct a verdict upon all the proof in the case.

The examination of the defendant and other persons subjected to examination was undertaken under authority of the following letters:

"(1) Department of the Interior, Bureau of Pensions.

"Washington, D. C., Aug. 12, 1895.

"Mr. W. M. Ragsdale, Special Examiner, Memphis, Tenn.—Sir: Herewith find papers in claim for pension certificate No. 372,580, Hattie, widow of Samuel Woods, Company K, 57 U. S. C. T., for compliance with instructions contained in the accompanying letter from the chief of the law division, dated August 10th, 1895. In making your report, let letters herewith appear as exhibits.

"Very respectfully, Wm. Lochren, Commissioner."

"(2) Department of the Interior, Bureau of Pensions, Law Division.

"Washington, D. C., Aug. 10, 1895.

"Chief of Special Examination Division—Sir: Transmitted with this letter you will find papers in the case of Hattie, widow of Samuel Woods, Company K, U. S. C. Vol. Inf., certificate No. 372,580, together with a report from Special Examiner V. M. Johnson, containing some testimony tending to show that Mr. A. W. Dorsey, of Memphis, Tenn., has been guilty of illegal and fraudulent conduct in connection with a certain check and voucher belonging to this pensioner. Accompanying the papers is one paid and canceled check, and two original vouchers, the execution, indorsing, and cashing of which should be the subject of a scrutinizing investigation on the part of a special examiner, preferably Mr. Johnson. Should criminal conduct be developed, all the evidence should be considered by the United States attorney who is now investigating Mr. Dorsey's conduct relative to pension claims. This letter should appear as an exhibit in any report which the examiner may make.

"Very respectfully, Frank E. Anderson, Chief of Law Division."

At the date of these instructions, two indictments found May 31, 1895, for alleged pension frauds, were pending against Dorsey. These, however, were not connected with this pension of Hattie Woods. The first of these indictments contained five counts, charging Dorsey with the forgery of indorsements upon five several pension checks, belonging to five different pensioners. As to some of the counts a nolle prosequi was entered, and, upon a trial subsequently had, he was acquitted upon the others. The other indictment against him was for the forgery, outright, of the name of another pensioner to an affidavit as to his identity, upon which he was subsequently tried and acquitted. These are probably the frauds referred to in the letter of the pension bureau to Examiner Ragsdale, directing the investigation during which the examination of the defendant in this case was had. After the examination of the defendant in this case, and other persons shown to have been connected with Dorsey in his frauds upon the pension law, and probably as a result of these examinations, on the 23d of November, 1895, another indictment was found against Dorsey, charging him in four different counts with the forgery of the indorsement of still another pensioner, upon as many of his pension checks, upon which a nolle prosequi was subsequently entered. And on the 29th day of November, 1895, as the result of these examinations, and particularly that of the defendant involved here in this proceeding, still another indictment was found against Dorsey and this defendant, Bell, jointly. In the first count they were charged with postdating a pension voucher of one Hattie Woods, of date August 4, 1894, by which her identity was established, and the fact that she was still a widow. By the second count of the indictment, this defendant alone was indicted for having made, as a notary public, a false certificate of the jurat to this same voucher of August 4, 1894. They were put upon their trial, which resulted in the conviction of Dorsey, and the imposition of a fine by the judge then presiding, but the defendant Bell was acquitted upon both counts of the indictment, which trial was in December, 1895. On the 23d of November, 1896, another indictment was found against Dorsey, the first count of which charged him with the offense of withholding considerable sums of pension moneys belonging to one Brown, heretofore mentioned, the second count of which charged him with the offense of withholding considerable sums of pension money belonging to another pensioner, Coleman, alias Driver, being one of the same pensioners also mentioned in the other indictments. Upon that indictment Dorsey had just been tried, and convicted upon the first count, but acquitted upon the second, and is now awaiting sentence. On the 26th of November, 1896, an indictment was found against the defendant, Bell, charging him with perjury in his examination before Commissioner Ragsdale, upon which he is now on trial, being the same indictment we are now considering.

It will be observed from this recital that, at the time Ragsdale was directed to undertake this investigation against Dorsey, there were indictments then pending, but not connected with the pensioner Hattie Woods; and at the time of the examination of this defendant by Ragsdale, on the 14th of November, 1895, there was no indictment pending either against the defendant or Dorsey about any matter relating to their operations with regard to the pension papers of Hattie Woods; but it is evident that the previously enlarged investigation against Dorsey and others connected with him had developed the manipulations which had taken place in respect of this Hattie Woods pension, and therefore Examiner Ragsdale was directed to investigate it. No mention is made in his letters of instruction of the defendant, Bell, but only Dorsey, whose name appears as a witness upon the certificate and voucher of the 4th of August, 1894, involved in this case. The examiner was not specifically instructed to investigate the connection of the defendant Bell with that voucher, or the Hattie Woods pension papers, but only that, as there was testimony tending to show that Dorsey had been guilty of illegal and fraudulent conduct in connection with a certain check and voucher of the pensioner Hattie Woods, he was told that "the execution, indorsing, and cashing of this check and voucher should be the subject of a scrutinizing investigation on the part of a special examiner," etc., and this was his authority for undertaking the examination of Bell, involved in this indictment for perjury.

The proof here develops the fact that the defendant Bell, who is a negro, was for many years a porter about the mercantile houses of this city, and afterwards a Pullman-car porter. By the easy-going methods customary with us,

he obtained a license to practice law, and, by like methods, was appointed a notary public. Thus armed and equipped, he took an office or desk room with the Dorsey above mentioned, who is also a negro with license to practice law. Dorsey was engaged in the business of a pension agent, or, as he styled himself, the "subagent" of certain pension practitioners of Washington City. His business was to help his negro clients who were pensioners or claimants for pensions in and about their pension business, the favorite part of it to him being the handling of their pension money, and the safe-keeping of it for them; but it may be assumed, for the purposes of this case, that he kept large parts of it for himself. This office association with the defendant was evidently useful to him if it had no criminal conspiracy to commit frauds upon the pension funds. The defendant testified in this case that on pension days, when vouchers were to be signed, the office was crowded, and it was customary to sign such papers as Dorsey and those aiding and helping him would present to him in his capacity as notary public, and without very much scrutiny on his part as to the details of the business; and it can hardly be doubted but that such is the fact, and perhaps this want of scrutiny was a part of the scheme to perpetrate these frauds. On the 4th day of August, 1894, the pension voucher of Hattie Woods, of that date, was executed before the defendant as a notary public. She signed with her mark, and this Dorsey and one Allen and another negro were her attesting witnesses. By the printed depositions, they swore that they were acquainted with Hattie Woods, and that she was the identical person represented, and she had never remarried since the death of her husband, and that, if she had, they would have known it, and that she was without means of support except her labor, and that her minor children were still living, and had not been abandoned. It appears by the same printed form that Hattie Woods herself, on the 4th of August, swore before the defendant, as a notary public, that she was the identical person named in the pension certificate of the 24th of April, 1893; that she was the widow of the deceased soldier Hattie Woods; that she had never remarried since his death; that she had no other support except her labor; that she had two children dependent upon her, that had not been abandoned; and named her residence. The defendant attached on the printed form his signature and seal as a notary public to the jurat to the foregoing affidavit and depositions of the two witnesses. The jurat also was a certificate that the pensioner had exhibited to the defendant, as a notary public, her pension certificate as described, and had signed in his presence duplicate receipts for the sum of \$36, payable by check of the pension agent, of date August 11, 1894, which duplicate receipts were also signed with her mark, and witnessed by the same two witnesses above mentioned. The defendant's jurat is in the following words, to wit:

"(The Pension Certificate Must be Exhibited to the Magistrate when this Voucher is Executed.)

"State of Tennessee, County of Shelby—ss: Personally appeared before me, this 4th day of August, 1894, the above witnesses, A. W. Dorsey, of Shelby county, Tennessee, and Daniel Allen, of Shelby county, Tennessee, whom I believe to be credible persons, and the pensioner, above named, and made oath in due form of law to the truth of the foregoing statements subscribed by them; and I certify that the aforesaid pensioner has this day exhibited to me her pension certificate, above described, and signed the following duplicate receipts in my presence.

"[Magistrate's signature]

"[Official character]

E. R. Bell,

Notary Public.

"[E. R. Bell, Notary Public, Shelby County, Tenn.]"

On the 4th of August, 1894, when this certificate was made and notarial seal affixed, the pensioner Hattie Woods was in fact in Missouri, a servant in a Memphis family, having a temporary home at that place. This was so conclusively proved, and it is not denied, and the defendant's counsel, before the jury, admits it to be a fact. But it is in proof that she received the blank form of the voucher before she left Memphis, in June, 1894, to go to Missouri. The form of the voucher itself has a printed warning and instruction that "the voucher may be executed on or after 4 August, 1894, but not before." Before she left the city, she carried the voucher to Dorsey, and left it with him.

with instructions to collect the money, and pay it to a creditor of hers in this city, whom she named. When the 4th of August, 1894, arrived, the voucher was executed in Dorsey's office, attested by the witnesses as aforesaid, and certified by the defendant, precisely as if the pensioner were then present before them, as the law required she should be, with her pension certificate. By the way, it may be further said that she also left her pension certificate with Dorsey along with the voucher. Duplicate receipts were executed in her absence in the same way, and the money was collected, and it is not denied, but admitted, that Dorsey paid it to the pensioner's creditor, according to her instructions. Her signature was made by mark, which, of course, she never herself made, although it was certified and witnessed as such.

Upon this state of facts, as already stated, the defendant and Dorsey were acquitted upon the indictment for postdating the voucher, and the defendant of making a false certificate, probably because, no harm being done to anybody so far as the direct loss of money was concerned, it was not considered that the intent to defraud the United States was sufficiently proved. Whatever the reason may have been, they were acquitted in December, 1895. Nevertheless, a year afterwards, in November, 1896, the grand jury found this indictment for perjury against the defendant, in his examination before Ragsdale. That examination took place on the 14th of November, 1895. The testimony about the circumstances attending it are somewhat conflicting. The examiner himself testifies that he personally notified the defendant that he wished him to appear before him for examination, to which the defendant assented; but, not appearing, the examiner again went to his office, and told him that he must appear, and be examined, which the defendant again promised to do. Possibly there was more than one visit to the defendant's office, asking him to appear. No subpoena was ever issued or applied for. The deputy marshal testifies that he was told by the examiner that the defendant was wanted for examination, and requested to notify him, and that, meeting him on the street, he told Bell that Ragsdale wanted to see him for examination. There is a misrecollection on the part of the deputy marshal, and some confusion as to the date of this occurrence. The marshal had a *capias* for Bell issued the next day after the examination, and executed about the same time. He does not remember whether he had that *capias* at the time he met Bell or not, but is inclined to think he had. At all events, Bell did appear on the 14th of November, 1895, and was examined by Ragsdale. The defendant himself testifies that he did not wish to go before Ragsdale for examination, although he had promised to do so; that Ragsdale had told him several times he must come, and that, if he did not, he would take steps to compel him to come; that he came to his office several times afterwards, and either told him or left word for him to come; and, meeting the deputy marshal on the street upon the morning of the examination, the marshal told him he had a subpoena for him to appear before Ragsdale, as he understood it, and he went to his office supposing that he had been subpoenaed to do so. It is quite clear that the marshal did not get his *capias* until after the examination, and it is somewhat difficult to determine whether the defendant has confused the statement of the marshal that he had a *capias* for him with the statement that he had a subpoena to appear before Ragsdale. The defendant insists that the notification made by the marshal was on the day of the examination, and that the notification by the *capias* came afterwards. The marshal not being quite clear about it, it remains uncertain.

When Bell did appear before the examiner, according to the testimony of the latter, he was interrogated with questions which do not appear in the written document, to which questions Bell gave his answers, and they were reduced in narrative form to writing by the examiner, as follows:

"My age is 51. Am a notary public and lawyer. Post office, 13 Gholson street. I have been well and personally acquainted with this pensioner, Hattie Woods, for a number of years, and have executed several vouchers for her. The vouchers herewith shown me, purporting execution August 4, 1894, and November 5, 1894, bear my genuine signatures and jurats, and she was personally present, and properly identified and sworn, on each occasion. I remember the execution of these vouchers better than those of others whom I did not personally know. Yes, sir; I personally know A. W. Dorsey, Daniel Allen, William H. Mills, and T. W. Bradford; and they were properly sworn to said vouchers as to the continued widowhood of the pensioner Hattie Woods, and

said vouchers were executed on the date that they bear, to wit, August 4, 1894, and November 5, 1894. No, sir; there is no possibility of my being mistaken about this. I knew all the parties personally, and it was an invariable rule that the pensioner or claimant and witnesses must always be present when I executed a voucher. I have heard this read, and it is correct.

"[Signed]

E. R. Bell. [And sworn to.]"

Two vouchers are named in this examination, but only one has been introduced in evidence, and is involved in the inquiry relating to the occurrences of August 4, 1894. The examiner testifies that, in the taking of this examination, no compulsion was used; that he had no scheme or intention of entrapping Bell into false swearing, for the purposes of this prosecution; that he was engaged about his business of carrying out his instructions to learn from all the parties to the voucher and the checks, by sworn examinations, all that they knew about them, for the purpose of making his report to the bureau at Washington; that he asked such questions as would develop the facts he wanted to know; and that, while he did not undertake to reproduce the precise language or words of the defendant, he put them down in substance as they appear. He issued no subpoena, and made no threats of issuing one, and he used no language or tone of command or authority to induce or force Bell to submit to the examination. Bell always expressed a willingness to be examined, and made no objection to it. He did not, however, notify Bell that he had the right to remain silent, and refuse to answer any of these questions. That matter was not suggested by either himself or Bell, and nothing was said about it. The defendant, as a witness in his own behalf, testifies that, when he came to the office under what he supposed was a subpoena by the marshal, he started to leave the office with the intention of consulting a lawyer, but the examiner told him that he must remain, and that he could not leave again until the examination was had. Supposing that he was under compulsion to stay as a witness, the defendant remained, and reluctantly testified. He says that he did not then know of any right that he had to remain silent. He did not know anything about his constitutional rights, and, if it had occurred to him, he would have asserted them. He had an idea that he ought to consult a lawyer, but understood that he was not allowed to go away for that purpose. He does not say that he told Ragsdale that he wanted to consult a lawyer, and was refused, but only that he had in his own mind a desire to that end, which was not carried out, because of the arbitrary and commanding authority of the examiner. He supposed that the examiner had all the official authority to detain him, and compel him to submit to an examination, and in that belief he yielded to his importunities. He further says that Ragsdale did not use his language, nor put down all or just what he did say, but that he put it in a form to suit himself. He says that he did not say to Ragsdale that he remembered the fact that Hattie Woods was present at the time he certified she was, but told him precisely the facts that he has detailed here in his testimony now as to the occurrences of the 4th of August, 1894, in Dorsey's office; that he told Ragsdale there was a large crowd present, signing papers on that day; and that Dorsey came in, and laid the pension certificate and the vouchers before him, with the marks already made, and the signatures already written, and he assumed, without looking around to see, that she was present, and so certified and swore the witnesses to the deposition. He further says he told Ragsdale that it was customary to satisfy himself that the witness was present; that he believed on this occasion she was present, because of that custom. He did not tell him what appears in the examination, that he knew her so well personally and exceptionally that he had a positive recollection that she was present from his exceptional acquaintance with her, and that that appears in the examination without his having said it. He says he signed it without scrutinizing it to see that all he had said or just what he had said went down, supposing the examiner had a right to put down so much of it as he wanted; that he did not know the effect of that which was done, and did not understand the purport and meaning of the document. Since these investigations took place, the defendant testifies that he has abandoned the practice of the law, and gone back to the business of porter on a Pullman car. He states that he found that he did not have sufficient knowledge to practice law; that he did not understand pleading and practice, and found himself at a disadvantage, so that he always had to apply to other lawyers to show him how; and, while he had plenty of

clients, he felt incompetent to attend to the business, and concluded to quit it. He says that he did not, through his knowledge of the law or otherwise, know anything about his right to be silent, nor how to claim the right at the time of this examination.

The defendant appears to be a negro above the average intelligence of the men of his race. He uses good language, and answers questions intelligently and comprehensively, but he does not appear to be very quick or alert in his mental operations. He does not have the appearance or demeanor of a self-assertive and aggressive man, and is not a person who would be likely to protect himself by assertiveness and aggressiveness without being sustained by the advice of others. The defendant proved a good character, his former employers stating that he was an efficient and faithful porter, truthful and honest, and that they would believe him on oath. The indictment predicates perjury of the statement that the pensioner Hattie Woods appeared before the defendant on the 4th day of August, 1894, and that she made oath in due form of law to the truth of the statement contained in her affidavit, whereas in fact she did not personally appear before him, and did not make oath to the statements made in her affidavit. The plea of the defendant is, "Not guilty."

C. B. Simonton, Dist. Atty., and Thos. M. Scruggs, Asst. Dist. Atty., for the United States.

Cassells & Cassells, for defendant.

HAMMOND, J. (after stating the foregoing facts). In support of the direction which has just been given for the acquittal of the defendant, the court feels that it is incumbent upon it to express the considerations which have led it to that conclusion, being fully impressed with the importance of the rulings that are now made in relation to the administration of the pension bureau for the protection against speculation of the vast sums annually appropriated for pensions.

The conclusion has been reached that the objection is well taken to the document containing the result of the examination of the defendant had before the examiner of the pension bureau, and that it lawfully cannot be used in evidence against him upon this prosecution for perjury in the making of the oath by which that examination was verified by him; wherefore the exception taken by the defendant, and reserved by the court, is now sustained, and the document is excluded from the consideration of the jury. The necessary result is the acquittal of the defendant.

Possibly, the court would also, under other conditions, submit the question of the defendant's compulsion to the jury in the terms of the special instruction asked by the defendant in that behalf, and fully set forth in the foregoing statement of facts accompanying this opinion; but it is unnecessary to submit that question to the jury, for the reason that the court is of the opinion that the compulsion is thoroughly established by the testimony of the examiner himself, and without reference to the conflicting testimony as to the circumstances attending the appearance of the defendant before him for that examination.

In *Boyd v. U. S.*, 116 U. S. 616, 6 Sup. Ct. 524, it was distinctly held that it is sufficient compulsion to bring a case within the prohibition of the fifth amendment to the constitution of the United States that a rule of evidence prescribed by statute would operate disadvantageously to him in the event the citizen refused to obey an unlawful order to produce evidence against himself, it being held that

it is equivalent to the compulsory production of papers to make the nonproduction of them a confession of the allegations which it is pretended they will prove; and in the concurring opinion Mr. Justice Miller says:

"Though the penalty for the witness' failure to appear in court with the incriminating papers is not fine and imprisonment, it is one which may be more severe, namely, to have charges against him of a criminal nature taken for confessed, and made the foundation of a judgment of the court. That this is within the protection which the constitution intended against compelling a person to be a witness against himself is, I think, quite clear."

And he placed the decision in that case upon the ground that it was a violation of the fifth amendment to the constitution of the United States, that no person shall be compelled in any criminal case to be a witness against himself, and that it was not a case of the unlawful seizure and search of private papers, in violation of the fourth amendment. The chief justice agreed in this view, while the other members of the court thought it was a violation of both of these amendments. Whatever may be thought of this difference of opinion, the case establishes beyond doubt that the compulsion prohibited by the fifth amendment is not alone physical or mental duress, such as comes from unlawful commands and authoritative orders by those engaged in extorting testimony, but comprehends also that lesser degree of compulsion which subjects the citizen to some important disadvantage by the use of means to procure the evidence which it is desired should be extracted from him.

Here the compulsion resides in the state of mind which existed in the defendant at the time he was subjected to the inquisitorial examination that took place. It is true that he was technically not under the compulsion of a subpoena, for none had been issued; and if we take alone the examiner's testimony, and leave out of view all that the defendant says, the most that can be affirmed in that regard is that the defendant waived the issuance of a subpoena, and came at the solicitation and upon the importunity of the examiner; and he occupies precisely the same attitude as he would have occupied if a subpoena had been issued and served upon him. The fact that he did not by his conduct insist upon the issuance of a subpoena, and that he did not force measures to the extent of requiring the examiner to resort to the powers which he had of compelling him to appear for examination, does not make his examination any the less compulsory, if it shall appear that it was not entirely voluntary. He was directed and importuned by the examiner to come, and, that official having the power to compel him to come, if he should be recalcitrant about it, his coming in compliance with the demand that was made upon him may be taken to be tantamount to a subpoena.

Mr. Justice Bradley said in that great opinion from which we have just quoted that:

"It is the duty of the courts to be watchful for the constitutional rights of the citizen, and against any stealthy encroachments thereon. Their motto should be, 'Obsta principiis.' We have no doubt that the legislative body is actuated by the same motives, but the vast accumulation of public business brought before it sometimes prevents it, on a first presentation, from noticing objections which become developed by time and the practical operation of the objectionable law."

It would be a stealthy encroachment upon the rights of this citizen, closely viewing the relative situation between him and the pension examiner, to hold that he voluntarily appeared on this occasion for examination. He was a negro, accustomed to obedience to white men, and particularly obedience to those having or assuming authority over him to command; and I have no doubt, upon the examiner's own statement, that this citizen was before him upon compulsion. This being so, it is unnecessary to submit the question to the jury whether the defendant voluntarily submitted himself to this examination, as asked for in the special instruction.

Neither is it necessary to submit to the jury the other question of fact submitted by that instruction, relating to the defendant's state of mind in regard to his knowledge of his rights in the premises to stand mute, and refuse to be examined upon any subject involving his own incrimination.

The district attorney has pressed with great earnestness upon the court and jury the fact that this defendant is not a common, ignorant negro, but that he was above the average intelligence of his race, so far that he was ambitiously inclined, a lawyer and a notary public, and presumably as well acquainted with his civil and constitutional rights in this behalf as other lawyers and notaries public might be presumed to be. But having again in view what Mr. Justice Bradley has said, and what all English-speaking judges have said from almost time immemorial of the duty of the courts to see that the citizen is protected against stealthy encroachments upon his immunity from the exercise of an unconstitutional power, the fact cannot be overlooked, after all, that this negro lawyer and notary public was only a negro porter, having no fair claims to be considered an educated and well-advised lawyer, capable of taking care of himself. He was not. Probably he never heard of this constitutional provision, and his long-established right to stand silent, and refuse to answer, when his answers might not only involve him in criminal prosecution, but submit him to the pains and penalties of yielding to the human temptation to sustain his wrongdoing by false swearing, or lose his office by removal at the hands of the state authorities, or his license as a lawyer at the hands of some court, or to be in many ways subjected to material losses and penalties by reason of his false official certificate. He was just in the situation where a man should and would, if properly advised, keep his mouth shut, and defy those who would compel him to speak concerning his conduct in the matter which had been challenged. Now, it is conceded that this examiner did not warn him of his right to be silent, as it is the duty of all officers to do when about to examine one who may be incriminated by his testimony. It may be conceded that there is no imperative obligation on the judge or other magistrate or officer who commences the examination of one who is involved by danger of criminal pursuit to warn the citizen of that danger, in the sense that, if he neglects or refuses to do so, the citizen can complain against the magistrate; and it may be conceded that it is a personal privilege to stand silent, that may be waived, and, further, that it is the duty of the citizen himself to

claim his privilege whenever it is in danger. But this is all beside the question. It is the common practice and the recognized course of procedure that the judge or magistrate or other official does warn the proposed witness of his danger and his privilege to avoid it by silence, and it was not done in this case. That is one of the facts. If it further appear that the given witness was especially ignorant of his privilege, by reason of his conditions, the duty to warn is increased; and, where it has not been done, the claim of the citizen for protection against encroachment by judicial counteraction, when confronted with his oath in any way, is enlarged.

Look at the situation here for one moment. An ignorant negro man, brought before an official for whom naturally he must have great regard in respect of his authority, is taken into the office of the official, which, while it is a public office, is not an open court, but more like a private corner; and, separate and apart from all the world, with only those two, he is subjected to a close, presumably artful, and necessarily an inquisitorial, examination, intended to develop whatever criminality may have existed in the transaction with which the witness has been concerned, whether it relates to him or other persons; and this without any attendance of counsel, without any previous consultation with counsel, and without any warning by the official of his right to be silent—absolutely silent—so far as every question that was put to this witness was concerned, as we may infer from the nature and character of the document itself, and in total ignorance of his privilege in the premises. It is idle to say, in view of such circumstances, that this citizen had voluntarily appeared for his examination; that he had knowingly waived his privilege of being silent, and answered with a full responsibility of one who was aware of that which he was doing, and of the magnitude of its importance to him in many and divers directions. There is nothing to be considered by the jury or settled in relation to the conflicting testimony on this point. Upon the examiner's own statement of the case, this citizen was testifying in ignorance of his rights, and without any knowledge of his privilege, and under sufficient compulsion by him.

We have, then, the simple question whether an ignorant citizen, subjected to such an inquisitorial examination as these facts show, may be prosecuted for false swearing in his answers to any questions asked, without an infringement of the Anglo-American and Anglo-Saxon prohibition against compelling any man to be a witness against himself. Every moralist would answer this question in the affirmative, upon the ground that, no matter how or when or where one speaks, one should speak the truth, and be punished for speaking falsely. But every lawyer knows that the law of perjury or false swearing never has proceeded upon that high moral ground; that of many oaths it is impossible to predicate criminal perjury or false swearing; and that we must therefore lay aside the high moral sentiment, and look to the kind of false oaths which are indictable. It may, for our general purpose, be affirmed that every indictable oath is made under compulsion, and that that circumstance is never a defense in perjury. Indeed, it need never be voluntary to be indictable, and the fact that it is voluntary never is an essential ele-

ment of the crime of false swearing. The voluntary quality of this proceeding before the pension examiner does not so much hinge about any compulsion in its relation to the crime of false swearing that was undoubtedly committed on this occasion as about the right not to swear at all, which was disregarded and violated by the examiner. Can the government take advantage of its own wrong, inveigle or drive or permit the citizen, too ignorant to protect himself, to make an oath which he need not take under any compulsion, and then insist upon the pains and penalties of perjury that he shall tell the truth? Truth-telling may be the highest virtue, but may the fifth amendment be violated to enforce it? We answer no.

We now come to the consideration whether or not the fifth amendment has been violated by the statutes authorizing these proceedings, as they have been interpreted and acted upon by the examiner on this particular occasion. To avoid all misapprehension, it may be stated once for all that if a citizen fully cognizant of his privilege abandons it under compulsion or otherwise, and essays to speak under oath before an authorized officer, he must speak the truth, and may be prosecuted for perjury if he does not. At least, this will be conceded for the present; but the ruling we make here is that, before that principle can be invoked, it must appear, as it must appear in all cases of abandonment and waiver of rights, that the abandonment was knowingly and understandingly made, and that no undue advantage was taken of the ignorance of the victim of inquisitorial investigation in the process of his examination. To be more specific, in its application to this case, the pension examiner ought to have given the defendant warning of his danger, advised him of his right to stand absolutely silent as to any inquiry that might involve him in a criminal prosecution, and given him an opportunity, if necessary and if desired, to engage and consult counsel before he proceeded to answer the inquisition. We do not say that this is necessary in all cases, nor that there is any statutory or other obligation upon the examiner to do it in any case, but only that, in the existing state of congressional legislation upon this subject, the examination cannot be given in evidence upon a prosecution for perjury in answering the questions unless it shall appear that the citizen, having the right to stand mute, understandingly waived that right, and gave answer to the questions. No statute, rule, or regulation or act of administration in the given case can be constitutional which does not in some way protect the right to be silent if the citizen chooses to be silent. Whether any given citizen has exercised his right to waive his privilege, and speak voluntarily, subject to the pains and penalties of the statutes against perjury, depends upon the circumstances of each particular case, and upon those alone. In this case the defendant did not waive his privilege under the fifth amendment, under the facts above stated.

Of course, such a ruling as this cannot be passed without sufficient reference to the adjudicated principles and cases relating to the subject of this constitutional privilege in its application to a case like this. I have already mentioned that it could hardly have been expected that this defendant, when confronted with an inves-

tigation concerning the making of his notarial certificate, should admit that it was false. He might be expected to swear that it was true until at least, as on this trial, its falsity was put beyond all question, for that would be the human tendency of one capable of making a false certificate in the beginning. The examiners probably already knew that it was false, though it does not appear in the evidence here, except by inference, that they had then found out that Hattie Woods was in Missouri, and not in Dorsey's office, when the certificate was made. Why were they not then contented to prosecute on that conclusive evidence, as they must have been under Rev. St. § 860, if that applies, since they knew that nothing the defendant would say upon this examination could be used against him for any offense previously committed in respect of his false certificate? Of what value was this examination in view of that section, and to what pending issue did it appertain, or to what was it pertinent? Bell might be used as a witness against Dorsey, no doubt; but he was asked nothing about Dorsey's wrongdoing in the premises, and the examination was confined to Bell's own conduct. His counsel has argued that this shows that the only purpose of this inquisitorial proceeding was to lay the foundation for this indictment for perjury. The examiner denies this, and it is altogether probable that his only purpose was to carry out his instructions, and fully develop the facts for the information of the authorities and prosecutions of offenses. This may relieve the examiner of the imputation of inveigling or leading Bell into the temptation of false swearing, in order to entrap him; but, in its relation to Bell himself, the proceeding was none the less dangerous to him, and its effect on him and his constitutional rights was none the less disastrous because the examiner did not intend to entrap him. He was entrapped as a fact by his own yielding to the temptation to take the bait, and sustain his false certificate, by standing by it with his oath.

As long ago as A. D. 1700 a motion was made for an information against Dummer for perjury in a trial between the king and Fitch. In answer to this question, "whether he had received eight hundred pounds for passing his accounts," Holt, C. J., said:

"If the question had been fair, we would have granted an information; but this question was in effect whether he was guilty of bribery, which it could not be expected he would own. You may indict him, but we will not grant an information." *Rex v. Dummer*, 1 Salk. 374.

Here the witness has been indicted, but the questions put to him were none the less unfair, as Lord Holt conceived them to be; and if they were not only unfair, but unauthorized, without a warning to the defendant of his right to be silent, can they be admitted in evidence to sustain an indictment for perjury, without impinging upon the protection afforded by the fifth amendment to the citizen? If the witness in the case before Lord Holt had been as secure as this witness in a privilege to remain silent as to the question asked, would he not have warned him that he need not answer a question which might subject him to the pains and penalties of perjury, if he yielded to the temptation he suggested? He certainly would have done so. Whatever may be said of the necessity of allowing the executive department

of the government to protect the funds committed to its hands for distribution among the pensioners against speculation, that consideration cannot override the obnoxious element that inheres in this method of inquisitorial examination by the pension examiners. The statutes which have been framed, and under which they are proceeding, do not sufficiently guard the citizen against an invasion of his privileges in this behalf. We are not now prepared to say that they are unconstitutional in their entirety, and it is not intended to so decide, but only that, without a resort in practice to the habit of safeguarding the citizen against any invasion of his privilege not to be compelled to testify against himself, they may result in a very disastrous overthrow of his privilege by an unconstitutional interpretation in the administration of their powers by the pension examiners. It will not do to rely upon the theory that every citizen can take care of himself in such a purely inquisitorial examination. It is not like the examination that takes place in open court, in the presence of counsel and the bar, and before judges, who are in the habit of exercising the power, if not following the duty, of warning every witness against the danger which confronts him when he is called upon to testify about incriminating matters. And, owing to this peculiar nature and character of the examination itself, it needs more watching to prevent an encroachment upon the citizen's constitutional privileges, which Mr. Justice Bradley has said the courts must guard; and, if the courts must guard them, so must the pension examiners, in the administration of their powers, which are quasi judicial in themselves.

In the very latest emanation from the supreme court of the United States upon this subject, we have Mr. Justice Brown saying:

"The maxim, 'Nemo tenetur seipsum accusare,' had its origin in a protest against the inquisitorial and manifestly unjust method of interrogating accused persons which has long obtained in the continental system [and Mr. Justice Brown might have added "suspected persons"], and until the expulsion of the Stewarts from the British throne, in 1688, and the erection of additional barriers for the protection of the people against the exercise of arbitrary power, was not uncommon even in England. While the admissions or confessions of the prisoner [or suspected person], when voluntarily and freely made, have always ranked high in the scale of incriminating evidence, if an accused person be asked to explain his apparent connection with a crime under investigation, the ease with which the questions put to him may assume an inquisitorial character, the temptation to press the witness unduly, to browbeat him if he be timid or reluctant, to push him into a corner, and to entrap him into fatal contradictions, which is so painfully evident in many of the earlier state trials, notably those of Sir Nicholas Throckmorton and Udal, the Puritan minister, made the system so odious as to give rise to its total abolition. The change in the English criminal procedure in that particular seems to be founded upon no statute and no judicial opinion, but upon a general and silent acquiescence of the courts in a popular demand. But, however adopted, it has become firmly imbedded in English as well as American jurisprudence. So deeply did the iniquities of the ancient system impress themselves upon the minds of the American colonists that the States, with one accord, made a denial of the right to question an accused person a part of their fundamental law; so that a maxim which in England was a mere rule of evidence became clothed in this country with the impregnability of a constitutional amendment." *Brown v. Walker*, 161 U. S. 591-596, 16 Sup. Ct. 644.

This protection applies just as much for suspected persons as for accused persons, the language of the constitution being, "No person shall be compelled in any criminal case to be a witness against him-

self;" and in the very case that Mr. Justice Brown was deciding for the supreme court of the United States the witness had not been accused in any formal and ceremonious indictment, and was only a witness before the grand jury to give evidence against another. And this point was also decided in the case of *Counselman v. Hitchcock*, 142 U. S. 547, 12 Sup. Ct. 195. In *Brown v. Walker*, just cited, it was held that that case was an exception to this principle of protection only because the interstate commerce statutes had taken the witness entirely outside the domain of criminal prosecutions by a statutory pardon, with which feature of this case we shall presently deal. Similar expressions of indignation against the inquisitorial system are to be found in the cases of *Boyd v. U. S.*, supra; in the case of *Interstate Commerce Commission v. Brimson*, 154 U. S. 447-478, 14 Sup. Ct. 1125; in *Counselman v. Hitchcock*, 142 U. S. 547, 12 Sup. Ct. 195; in *Re Pacific Railway Commission*, 32 Fed. 241-250, by Mr. Justice Field; by Mr. District Judge Grosscup in *U. S. v. James*, 60 Fed. 257; and in many other cases, and by juridical writers and publicists everywhere.

I wish again to call attention to the case of *Brown v. Walker*, to remark that Mr. Justice Brown in that case very carefully states the limitations that exist upon this prohibition against inquisitorial examinations, for the purposes of self-incrimination, and refers to the classes of cases that constitute an apparent exception to the general prohibition as follows:

"Stringent as the general rule is, however, certain classes of cases have always been treated as not falling within the reason of the rule, and therefore constituting apparent exceptions. When examined, these cases will all be found to be based upon the idea that, if the testimony sought cannot possibly be used as a basis for or in aid of a criminal prosecution against the witness, the rule ceases to apply, its object being to protect the witness himself, and no one else; much less that it should be made use of as a pretext for securing immunity to others."

Mark his language: "If the testimony sought cannot possibly be used as a basis for or in aid of a criminal prosecution against the witness, the rule ceases to apply." And mark particularly that he includes testimony sought to be used as a basis for a prosecution, as this testimony is now sought to be used in this prosecution for perjury. In other words, to allow such an inquisitorial, self-incriminating examination to take place, the witness must be exempted absolutely from all prosecution, not only for offenses aliunde the testimony he is then giving, but that testimony cannot be made the basis of a prosecution against him, and it is manifest that the immunity of the constitution cannot comprehend full protection unless this be so.

Here I may as well remark, also, that from the time the interstate commerce law was passed, until now, those who were affected by it and put under restraint by it have been active and diligent in every direction to escape its restraints, and they have taken shelter within this constitutional provision for that purpose; and the decisions that have been made in recent times by the supreme court of the United States refer to controversies that have been instigated or instituted with the purpose to secure the protection of this amendment against the operations of the interstate commerce law. But it is to be especially noted that the analogy between the interstate commerce law

and the proceedings before these pension examiners is almost perfect, and while the powers of the pension examiners in making their examinations have not been challenged as the powers of the interstate commerce commission have been, and the citizens who have been subjected to inquisitorial examinations by the pension examiners have not been of a character of wealth and capability to defend and protect themselves against the operation of laws designed for the efficient detection of frauds against the pension funds, as the others have been, the underlying principles, so far as they relate to the question in hand, are precisely the same; and therefore we may safely appeal to these interstate commerce decisions and statutes for a safe guide out of the difficulties and perplexities that surround us in this case.

Before the amendment to the interstate commerce act of February 11, 1893 (27 Stat. 443; 2 Supp. Rev. St. p. 80), the statutory immunity offered to citizens about to be examined was found only in Rev. St. § 860, relied upon in this case. That statute reads as follows:

"No pleading of a party, nor any discovery or evidence obtained from a party or witness by means of a judicial proceeding in this or any foreign country, shall be given in evidence, or in any manner used against him, or his property or estate, in any court of the United States, in any criminal proceeding, or for the enforcement of any penalty or forfeiture: provided that this section shall not exempt any party or witness from prosecution and punishment for perjury committed in discovering or testifying as aforesaid."

It is not intended to base this judgment upon the peculiar phraseology of this statute, but to assume that it offers the immunity it contains to witnesses examined before the pension examiners. Nevertheless, it is important to call attention to the fact that the language is: "No pleading of a party, nor any discovery or evidence obtained from a party or witness by means of a judicial proceeding in this or any foreign country, shall be given in evidence," etc. Now, are the proceedings before a pension examiner upon one of these investigations judicial proceedings? Or can it be claimed that they are within the language of the statute? If they are not, then there is no act of congress offering any immunity to those witnesses who are subjected to these inquisitions of the pension examiners, and we have, to its fullest extent, the odium that exists against such proceedings; and it may well be suggested that, unless they can be construed to fall within this statute as judicial proceedings, there can be no pretense of any statute that will protect them from the imputation of being wholly and entirely unconstitutional, for want of such immunity to the witnesses who are proposed to be examined. As before remarked, it is not desired here to decide that question, and it is passed with the assumption that these proceedings before the examiners are within the language of section 860 of the Revised Statutes, and that, therefore, that immunity is offered to the witnesses. But it was precisely that immunity which was held to be insufficient in the case of *Counselman v. Hitchcock*, supra, and, because of its insufficiency, the witness in that case was held not to be subject to the compulsory process of compelling him to answer. Therefore he had an absolute right to stand silent, and there was no power anywhere to compel him to speak.

By the act of February 11, 1893, above referred to, this infirmity

in the interstate commerce law has been cured by an amendment which reads as follows:

"But no person shall be prosecuted or subjected to any penalty or forfeiture for or on account of any transaction, matter or thing concerning which he may testify or produce evidence, documentary or otherwise before the said commission or in obedience to its subpoena or the subpoena of either of them, or in any such case or proceeding, provided that no person so testifying shall be exempt from prosecution and punishment for perjury committed in so testifying."

It is to be observed that this immunity goes far beyond Rev. St. § 860, and exempts the witness from all manner of prosecution except that of perjury in his testimony before the commission; but it is also to be observed that congress confines this enlarged immunity to witnesses testifying before the interstate commerce commission, and has not extended it to other witnesses who may be called to testify before the houses of congress, pension examiners, or what not, and has left the narrower immunity as it stands in sections 859 and 860 of the Revised Statutes.

When this amendment to the interstate commerce act appeared, it was, like the original act, resisted; and in the case of *U. S. v. James*, 60 Fed. 257, it was held to be unconstitutional in toto, the fifth amendment being held to have a broader scope than the protection of the citizen against mere criminal prosecutions. In the case of *Brown v. Walker*, 70 Fed. 46, the contrary was held, upon the ground that the immunity was as broad as the constitution, and this view was affirmed by the supreme court of the United States in the case already cited, though there were four of the nine judges dissenting, and taking the view of Judge Grosscup in the *James Case*. This formidable array of dissenting judges might pronounce all these immunity statutes unconstitutional in their entirety, but the result of the decisions of a majority of the judges establishes that, if the immunity offered to the witness is as broad as the constitutional provision, he may be compelled to answer, and, of course, if he may be compelled to answer, he can be indicted for perjury if he swears falsely. But *Counselman's Case* settles it that the immunity offered under section 860 of the Revised Statutes is not as broad as the constitutional protection, and therefore the witness is not compelled to answer, and may, as before remarked, exercise the privilege, under the constitution, of standing absolutely mute, which was the right that this defendant had as to every question propounded to him by Examiner Ragsdale. I do not find that it has been determined by any court whether the proviso to Rev. St. § 860, that the immunity shall not operate to protect the witness against prosecutions for perjury committed in the examination itself, is consistent with the constitutional guaranty. The same proviso is to be found in the act of February 11, 1893, amending the interstate commerce act, and none of the decisions under that act have considered that point, unless it may be covered by that which has already been quoted from the opinion in the case of *Brown v. Walker*, *supra*. Broadly, that question is presented by this case; but inasmuch as the examination which was taken here is held to have been taken under a compulsion, coupled with the absence of the needed warn-

ing to the witness, that makes it inadmissible, the point need not be decided, and perhaps should not be until it is divested of complication with other questions. It is too important a provision for the protection of such examinations to be decided until the courts are compelled to do so. Courts do not annul statutes for unconstitutionality except in the last resort.

There is another consideration relating to this statute which strengthens the ruling we have made, and, if it stood alone, it would be sufficient to condemn the use of this examination as evidence against the defendant on such a charge as this. The special examiners of the pension bureau exercise their authority under the provisions of Rev. St. § 4744, as amended by the act of July 25, 1882 (22 Stat. 174; 1 Supp. Rev. St. p. 360). It reads as follows:

"Sec. 2. The commissioner of pensions is authorized to detail from time to time clerks or persons employed in his office to make special examination into the merits of such pension or bounty land claims, whether pending or adjudicated, as he may deem proper, and to aid in the prosecution of any party appearing on such examinations to be guilty of fraud either in the presentation or in procuring the allowance of such claims, and any person so detailed shall have the power to administer oaths and take affidavits and depositions in the course of such examinations, to orally examine witnesses and to employ a stenographer when deemed necessary by the commissioner of pensions in important cases, such stenographer to be paid by such clerk or person and the amount so paid to be allowed in his accounts.

"Sec. 3. That in addition to the authority conferred by section 184 of the Revised Statutes any judge or clerk of any court of the United States, in any state, district or territory, shall have power, upon the application of the commissioner of pensions, to issue a subpoena for a witness being within the jurisdiction of such court, to appear at a time and place in the subpoena stated, before any officer authorized to take depositions to be used in the courts of the United States, or before any officer, clerk or person from the pension bureau designated or detailed to investigate or examine into the merits of any pension claim, and authorized by law to administer oaths and take affidavits in such investigation or examination, there to give full and true answers to such written interrogatories and cross-interrogatories as may be propounded to him, or to be orally examined and cross-examined upon the subject of such claims; and witnesses subpoenaed pursuant to this and the preceding section shall be allowed the same compensation as is allowed witnesses in the courts of the United States, and paid in the same manner."

Section 184 of the Revised Statutes, referred to in this amendment, enacts as follows:

"Any head of a department or bureau in which a claim against the United States is properly pending, may apply to any judge or clerk of any court of the United States in any state, district or territory, to issue a subpoena for a witness being within the jurisdiction of such court, to appear at a time and place in the subpoena stated, before any officer authorized to take depositions to be used in the courts of the United States there to give full and true answers to such written interrogatories and cross-interrogatories as may be submitted with the application or to be orally examined and cross-examined upon the subject of such claims."

Rev. St. § 186, enacts:

"If any witness after being duly served with such subpoena neglects or refuses to appear, or appearing refuses to testify the judge of the district in which the subpoena issued may proceed upon proper process to enforce obedience to the subpoena or to punish the disobedience in like manner as any court of the United States may do in the case of process of subpoena ad testificandum issued by such court."

In the case of *In re McLean*, 37 Fed. 648, Mr. District Judge Benedict, upon an application made by a commissioner of pensions for a subpoena under these acts, refused the subpoena, upon the ground that congress did not have the power to invoke the aid of the courts in a purely executive examination pending in an executive department of the government. For this, he stated as authority the judgment of Mr. Justice Field in *Re Pacific Railway Commission*, 32 Fed. 241, in which substantially the same ruling was made. Subsequently, the same ruling was made by Mr. Circuit Judge Gresham in *Re Interstate Commerce Commission*, 53 Fed. 476.

It is contended by the district attorney that these decisions have been overruled by the case of *Interstate Commerce Commission v. Brimson*, 154 U. S. 447, 14 Sup. Ct. 1125. Possibly, in some respects, these decisions are inconsistent with each other, and it may be said that the power of congress to authorize an administrative commission to invoke the aid of the courts in compelling the production of witnesses and documentary evidence before the commission for the purposes of their examinations, and the punishment of such witnesses for false swearing and perjury, has been established by the *Brimson Case*; but the difference between the procedure authorized by congress for the aid of the interstate commerce commission and that in aid of these examinations by the pension bureau, as provided for in the last-quoted statute, is very wide, and the underlying power is much more carefully directed in the one than in the other, for the very purpose of protecting the rights of witnesses under the fifth amendment to the constitution of the United States.

The twelfth section of the original interstate commerce act authorized the circuit courts of the United States, in case of contumacy or refusal to obey a subpoena issued by the commission, to issue its order requiring the witness or party to give evidence touching the matter in question, and to punish by contempt a refusal to obey its order, and it especially forbade that the witness should refuse to testify because the evidence would tend to incriminate him, and enacted broadly that the testimony should not be used against the prisoner on the trial in any criminal proceeding. 24 Stat. 379; 1 Supp. Rev. St. p. 529. Amended by the act of February 10, 1891 (26 Stat. 743; 1 Supp. Rev. St. p. 891), this twelfth section now provides that the commission, in case of the disobedience to a subpoena of the commission, may invoke the aid of any court of the United States in requiring the attendance and testimony of witnesses, and the production of books and papers, and, further, that:

"Any circuit court of the United States within the jurisdiction of which such inquiry is carried on may in case of contumacy or refusal to obey a subpoena issued to any common carrier subject to the provisions of this act, or other person, issue an order requiring such common carrier or other person to appear before the said commission and produce books and papers if so ordered, and give evidence touching the matter in question, and any failure to obey such order of the court may be punished by such court as a contempt thereof. The claim that any such testimony or evidence may tend to incriminate the person giving such evidence, shall not excuse any such witness from testifying, but such evidence or testimony shall not be used against such person on the trial of any criminal proceeding."

This was the condition of the legislation at the time the *Brimson* Case occurred; and, as has been before stated, subsequent to that time, by the act of February 11, 1893, the constitutional objections to the inadequacy of the immunity offered have been removed so far as examinations before the interstate commerce commission are concerned, but, as before stated, have not been removed so far as they relate to examinations under the pension laws. Mr. Justice Harlan, in the opinion in the *Brimson* Case, considers the constitutional objections that were made in the cases just cited to these statutes, invoking the aid of the courts for the production of testimony, and sustains the procedure directed by the interstate commerce acts just referred to, upon the distinct ground that the commission was required, as the supreme court interprets the acts, by a petition to the circuit court, to distinctly set forth the particular questions to be answered, and the certain books and papers mentioned and named, and that it was then open to each witness to contend before that court that he was protected by the constitution from making answer to the questions propounded to him, or that he was not legally bound to produce the books, papers, etc., ordered to be produced, or that neither the questions propounded, nor the books, papers, etc., called for, related to the particular matter under investigation, nor to any matter which the commission is entitled under the constitution or laws to investigate; and, these issues being determined in favor of the witness by the court, the petition of the commission could have been dismissed upon its merits. *Interstate Commerce Commission v. Brimson*, 154 U. S. 479, 14 Sup. Ct. 1125.

Again, in another place, he says:

"The inquiry whether a witness before the commission is bound to answer a particular question propounded to him, or to produce books, papers, etc., in his possession, and called for by that body, is one that cannot be committed to a subordinate administrative or executive tribunal for final determination. Such a body could not, under our system of government, and consistent with due process of law, be invested with authority to compel obedience to its orders by a judgment of fine or imprisonment." 154 U. S. 485, 14 Sup. Ct. 1136.

The objection that the duties imposed upon the courts were non-judicial was also disallowed, and the case was remanded for a determination by the circuit court of the question whether or not the witness was compelled to answer the particular questions which the petition of the interstate commerce commission asked that he should be compelled to answer. Again four of the judges dissented, and held the procedure unconstitutional. *Interstate Commerce Commission v. Brimson*, 155 U. S. 3, 15 Sup. Ct. 19.

Now, it is apparent from this statement of the procedure sustained in the *Brimson* Case, in aid of the interstate commerce commission, that it was justified in its relation to the fifth amendment to the constitution solely upon the ground that the witness must have an opportunity to invoke the judicial determination by a court of competent jurisdiction of the question whether he is compelled or not to answer the particular interrogatories propounded to him. In a case of contumacy and refusal of a witness before a pension examiner to answer a particular question propounded to him, and of his assertion of his right to protection under the constitutional

amendment, it is possible that "the judge of the district" in which the subpoena issued, under Rev. St. § 186, before exercising the power to punish the disobedience in like manner as any court of the United States may do in the case of process of subpoena ad testificandum issued by such court, would inquire whether the particular inquiries propounded were within the protection of the fifth amendment; but the section evidently does not contemplate that he is acting in any such judicial capacity as that. The provisions of the Revised Statutes are intended only for the purpose of furnishing the pension examiner with a subpoena, and to compel obedience to it. The interstate commerce commission issues its own subpoena, and applies to the court in case of contumacy; but this provision of the Revised Statutes (section 4744) does not confer any jurisdiction for protecting the rights of witnesses under the fifth amendment, nor does the amended provision of the act of July 25, 1882 (1 Supp. Rev. St. p. 360), make any such provision for the determination of the question of the right of the witness to stand silent as that provided in the amended interstate commerce act. Like Rev. St. §§ 184, 186, this amended act confers the power that was there conferred upon "the judge of the district" upon any judge of any court of the United States to issue the subpoena; and the amendment is strictly confined to the simple function of issuing the subpoena, and the power to punish for contempt for its disobedience is not given under the amended act, as it is under section 186 of the Revised Statutes. The truth is, these provisions for aiding the pension examiner are almost purely administrative, and, so far as issuing the subpoena is concerned, may, by the words of the act, as well be performed by the clerk of the court as by the judge, but the power to punish for contempt is confined to "the judge of the district"; and we find in the legislation no such provision as that contained in the interstate commerce act, as amended, conferring upon the circuit courts of the United States or any other courts of the United States the jurisdiction relied upon by Mr. Justice Harlan in the *Brimson Case*, to support the constitutionality of that act.

The result of all this is that this examination provided for the pension examiners is almost purely and entirely inquisitorial, and no safeguards are thrown around the witness for his protection, such as the litigation with the interstate commerce commission upon this subject has forced congress to throw around the witnesses appearing before that body; and, until congress does for the other tribunals appointed to make these administrative examinations what it has done for the interstate commerce commission in this regard, the courts cannot be expected to neglect the duty which Mr. Justice Bradley says, in the *Boyd Case*, *supra*, belongs to them, of watching against any stealthy encroachment upon the constitutional rights of the citizen. And the least that they can require of these examiners, so armed with such dangerous power, and invested with such tempting opportunities to invade the constitutional guaranty, is that they shall conduct their examinations in such a manner that the citizen shall be fully warned of his constitutional right, and offered an opportunity to assert it by a refusal to answer; and where the witness

is ignorant and helpless, and such warning is neglected, protection can be afforded to him by the courts in no other way than by refusing to give any effect to the examination by way of any criminal prosecution to support it and its objects. If one asserts his privilege, and refuses to answer, then will arise the important question whether, under existing legislation above noted, there be any jurisdiction anywhere to compel him or to protect him by limiting the examination within constitutional bounds. Until congress shall set about improving the system of inquisition, it is not to be expected that the courts shall aid its usefulness at the expense of the constitutional protection of every citizen.

I have no doubt from the proof in this case that the defendant was guilty of making a false certificate, nor that he was guilty afterwards of falsely standing by his false certificate, by the oath that he took before this examiner; and although, in this particular case, the United States lost no money, and the pensioner lost no money, and no particular harm was done in that regard, I should say for myself that it was a fraudulent proceeding against the United States, by false certificates, to deny to the pension bureau that security which is provided for by requiring a magisterial officer to identify the pensioner at the time of the payment, and otherwise protecting the pension funds against a fraudulent misuse of them; but, having been formerly acquitted by a jury of the offense of making a false certificate, it does not now lie with us to hold the defendant responsible for any offense he committed in that respect, and he now and here stands not only under the ordinary presumption of innocence, but under the sanction of that acquittal, as having committed no such offense. And yet it is sought by this prosecution for perjury substantially to punish him for the same thing, because he subsequently to the making of the false certificate, before the examiner, in one of these inquisitorial examinations, in ignorance of his right to protect himself by silence, has yielded to the temptation to sustain his certificate by swearing that it was true. Heinous as the crime of false swearing is under our law, it is entitled to no other relaxation of the constitutional guaranty of the citizen in order to punish it than any other offense.

It must be conceded to the district attorney that it has been repeatedly and quite uniformly decided everywhere, under many varying conditions of fact, that where one who is incompetent as a witness, or for any reason is not subject to examination, is nevertheless compelled to testify, or does in fact testify, he must tell the truth, and perjury may be prosecuted against him if he does not. Here, in Tennessee, a witness not competent to swear for himself, under the book-debt law, erroneously was allowed to testify, and, being accused of false swearing by his adversary, brought an action of slander, and the defense that it was not a legal oath was overruled. *Sharp v. Wilhite*, 2 Humph. 434; *Haley v. McPherson*, 3 Humph. 104. And an extreme case in Pennsylvania serves as an illustration where a party to a suit offered to leave the decision of the justice to the oath of his adversary, who was wholly incompetent to testify except by this kind of consent; yet having accepted the offer, and been

sworn, it was perjury or false swearing to testify falsely. *Shaffer v. Kintzer*, 1 Binn. 542, and authorities there cited. And where a husband was especially incompetent to testify as to a particular fact in divorce proceedings, nevertheless, if he did testify falsely, it would be perjury. *Chamberlain v. People*, 23 N. Y. 85; *Van Steenbergh v. Kortz*, 10 Johns. 166. Where a witness before the grand jury, whether under subpoena or not, did answer questions protected by his privilege to stand silent, he was indictable for perjury, because it did not appear that he was answering under any compulsion, and presumably he had waived his right; but, if compulsion had appeared, the indictment would not have been good. *Pipes v. State* (Tex. App.) 9 S. W. 615. And see *State v. Molier*, 1 Dev. 263; *Patrick v. Smoke*, 3 Strob. 147; *Montgomery v. State*, 10 Ohio, 221; 2 Bish. Cr. Proc. § 1017; 1 Bish. Cr. Proc. §§ 865, 872; 1 Whart. Cr. Law, §§ 489, 493. And it is a personal privilege which the witness may waive, and presumably does waive if he does not set it up, and, after waiver, may be compelled to go on and answer. *Brown v. Walker*, 161 U. S. 591, 597, 16 Sup. Ct. 644; 29 Am. & Eng. Enc. Law, pp. 844, 845; *Mackin v. People*, 115 Ill. 312, 3 N. E. 222; *Mattingly v. State*, 8 Tex. App. 345; *State v. Maxwell*, 28 La. Ann. 361; *State v. Hawkins*, 115 N. C. 712, 20 S. E. 623; *Murphy v. State* (Tex. Cr. App.) 26 S. W. 395. But this principle and these cases are all answered by the peculiar circumstances in this case, which we find conclusive of the fact that this untutored, uninformed, unwarned, and unconscious negro did not waive his privilege and constitutional right, and was answering under a compulsion as potential for him as if he had been under physical, as he was under mental, duress.

In the case of *U. S. v. Farrington*, 5 Fed. 343, Judge Wallace quashed the indictment of a grand jury where it appeared that the attorney employed by the banks to prosecute the defendants was permitted to become a witness before that constitutionally inquisitorial tribunal, and urge their indictment upon the testimony of the defendant Leake, who was examined compulsorily before a commissioner as a witness against the defendant Farrington, his co-offender; and this, too, although the district attorney advised the grand jury that the minutes of the commissioner were not competent testimony against Leake himself. The court disapproved of the contrary ruling in the case of *U. S. v. Brown*, 1 Sawy. 531, Fed. Cas. No. 14,671. And in *State v. Froiseth*, 16 Minn. 296, the same thing was done, for the same reason, because it was a violation of the bill of rights that one should not be compelled to criminate himself. And it is worthy of remark here that these pension examiners, in making their examinations, are, by the very language of the act of congress, constituted prosecutors "to aid in the prosecution of any party appearing on such examinations to be guilty of fraud" (Rev. St. § 4744; as amended, 1 Supp. Rev. St. p. 360). from which we have it as a part of the system that these obnoxious inquisitorial examinations are taken before and by an officer charged with the duty of inaugurating the prosecutions. The hapless witness is examined for information by his adversary, so to speak,—him whose duty it is to unearth his

offenses, and institute a prosecution. Can the fact that the particular disclosures cannot be used as confessions or admissions when the prosecution is instituted lessen the objectionable features so far as they affect injuriously the right to be silent, if the witness choose, is concerned? And does not this peculiarity of the statute impose more imperatively the duty of the examiner to give warning of the danger to the witness, and advise him of his constitutional right, before proceeding? This may lessen the chance to procure evidence, and impair the efficiency of the system as a protection against fraud to the vast appropriations for pensions; but what of that, if it destroy the protection of the constitution for the witness against any invasion of his right to be absolutely silent, which he had in this case? Many writers have admired the efficiency of the French or continental system of espionage and inquisition to suppress crime, but England and America have not wished to adopt it, however tempting and useful it may be.

In *U. S. v. Grottkau*, 30 Fed. 672, an alien made a naturalization affidavit as to his residence, which the naturalization laws forbade as evidence, and it was held that perjury could not be assigned on it, because extrajudicial. The statutes we have under consideration forbid these examinations to be used as evidence in any judicial proceeding against the witness; and, although the same statutes say that this prohibition shall not extend to prosecutions for perjury, the question remains whether the abrogation of their quality as evidence has not impressed them with the valuelessness of extrajudicial oaths, under the law of perjury. They may be useful sources of information for the pension bureau, and yet not available for criminal prosecutions, though it must be confessed that, if they are not protected by the sanction against false swearing, the information might not be very valuable for any purpose. But this may be one of the inconveniences of our fifth amendment to the constitution, protecting criminals against self-incrimination by their testimony. The statute authorizing these examinations by the pension examiners has been commended by Judge Hughes in the case of *U. S. v. James* (Va., A. D. 1894), which is not found reported, but is noted in *Piereson's Compilation of Precedents for the Pension Bureau*, Washington, 1895, p. 57. That learned judge remarks that he "is not prepared to say that the law is unconstitutional or even impolitic. It seems to me a law of necessity, arising out of the peculiar character of the offenses." *Piereson's Precedents*, 57. And I find in the case of *Com. v. Turner* (Ky.) 33 S. W. 88, almost a direct precedent in favor of the constitutionality of this statute. A prosecution was pending against one Harned about a fight between him and Turner. The latter was compelled to answer certain questions by the order of the court against his will and protest, claiming his privilege under the constitution. He was indicted for false swearing in his answers. The trial court charged the jury that, if they found he swore under compulsion, they should acquit; but this instruction was reversed on appeal by the commonwealth under a peculiar practice in Kentucky in that behalf, the court of appeals holding that the decision of the trial court in the original Harned Case, that the questions and

answers were not under the constitutional protection, was conclusive of that question, and could not be reviewed by another trial court in a subsequent trial for perjury by a witness in the original case. It had been already judicially settled that the witness was not protected, and therefore his oath was not against the constitutional privilege, although under compulsion. But the court went further, and broadly decided that, if it had been, nevertheless perjury would lie for the false swearing, because it is the policy of our laws to punish under all circumstances the heinous offense of false swearing; and if one with a privilege to stand mute is still compelled, against his right, to speak, he must speak the truth, notwithstanding the violation of his constitutional guaranty. His only remedy is to stand by his right, refuse to answer, and take the consequences of his disobedience. The court says that it finds no precedent for this judgment, and no case deciding the point. There is great force in this view, undoubtedly, and particularly when it is considered how valuable and necessary it is to protect the operations of a government against fraud by inquisition under oath. What is said by the learned judge is probably obiter, as the decision had already been made that the witness was not within the shelter of the constitution, but stood outside of it, subject to compulsion to testify. In this case, the defendant, Bell, was within the constitutional protection, and was compelled notwithstanding. In my judgment, he cannot have the protection of the constitution, and be compelled to testify in spite of it; and his right to protection is paramount to any public policy or necessity for punishing false swearing, and, like all other desirable ends in government and all other public policies, this must yield to a constitutional guaranty which protects the citizen against invasion of his privileges. The public policy of protecting him is as much cherished by English and American sentiment as is that which insists on the purity of oaths. We must get along as best we can without breaking down the constitutional privilege, no matter what inconvenience or loss may result, or else change the constitution. It is precisely this kind of constitutional restriction which is tolerable as against governmental supremacy. Finally, it seems quite plain that additional legislation is needed by congress to conform this system of administrative examinations in aid of the pension and other executive bureaus to the guaranty of the fifth amendment that no person shall be compelled to give evidence against himself in any criminal case, as has been done by the legislation in aid of the interstate commerce commission, as a result of the resistance in practice to the exercise of their unconstitutional demands for the testimony of witnesses who might incriminate themselves.

All that we now decide to be necessary to afford the protection of the constitution to this defendant is that unless a witness manifestly ignorant of his privilege is informed of it by the examiner, so that he may protect himself, consult counsel if he desires, and assert his right to remain silent, the examination cannot be used in evidence against him, even on an indictment for false swearing in the progress of the examination itself. The examiner must do what the courts generally, if not always, do, in examining a witness in danger of in-

criminating himself,—warn him of the danger, and advise him of his constitutional privilege. That was not done in this case, and the defendant must be acquitted and discharged.

GASKILL et al. v. MYERS.

(Circuit Court of Appeals, Ninth Circuit. July 1, 1897.)

No. 335.

1. PATENTS—VALIDITY OF REISSUES.

It is essential to the validity of a reissue that it shall be for the same invention as the original, as such invention appears from the specifications and claims. *Topliff v. Topliff*, 12 Sup. Ct. 825, 145 U. S. 156, followed.

2. SAME.

The Myers reissue, No. 11,383, for a stove consisting of devices whereby an ordinary coal-oil lamp may be used in a fireplace, is not invalid by reason of a broadening of the claims of the original through the omission of certain unpatentable elements, such as the wheels or rollers upon which the stove is supported, the handles of the reservoir, the length of the lamp chimney, and the cup-shaped shield by which the chimney is protected from liquids. Nor is this reissue invalid by reason of the granting, between the date of the original and the reissue, of the Browne patent for "an appliance for heating, illuminating, or culinary purposes"; Browne having merely substituted a base ring of the Myers original, and added a heat-deflecting ring on the top.

3. SAME—DESIGNS FOR STOVES.

The Myers patent, No. 22,911, for a design for a lamp stove, shows sufficient originality and invention to sustain its validity. Gilbert, Circuit Judge, dissenting.

In Error to the Circuit Court of the United States for the Northern District of California.

G. R. Lukens, for plaintiffs in error.

John L. Boone, for defendant in error.

Before GILBERT and ROSS, Circuit Judges, and HAWLEY, District Judge.

ROSS, Circuit Judge. This was an action at law to recover damages for an alleged infringement of two certain letters patent issued to the defendant in error by the United States,—one, No. 11,383, which was a reissue, and the other a design patent, No. 22,911. The validity of both patents is challenged by the plaintiffs in error. In respect to a reissued patent the settled law is, as recently declared by the supreme court in the case of *Topliff v. Topliff*, 145 U. S. 156, 170, 12 Sup. Ct. 825, 831:

"That the power to reissue may be exercised when the patent is inoperative by reason of the fact that the specification as originally drawn was defective or insufficient, or the claims were narrower than the actual invention of the patentee, provided the error has arisen from inadvertence or mistake, and the patentee is guilty of no fraud or deception, but that such reissues are subject to the following qualifications: First. That it shall be for the same invention as the original patent, as such invention appears from the specification and claims of such original. Second. That due diligence must be exercised in discovering the mistake in the original patent, and that, if it be sought for the purpose of enlarging the claim, the lapse of two years will ordinarily, though not always, be treated as evidence of an abandonment of the new matter to the

public, to the same extent that a failure by the inventor to apply for a patent within two years from the public use or sale of his invention is regarded by the statute as conclusive evidence of an abandonment of the patent to the public. Third. That this court will not review the decision of the commissioner upon the question of inadvertence, accident, or mistake, unless the matter is manifest from the record, but that the question whether the application was made within a reasonable time is, in most if not in all such cases, a question of law for the court."

In the case cited the court proceeded to say:

"To hold that a patent can never be reissued for an enlarged claim would be not only to override the obvious intent of the statute, but would operate in many cases with great hardship upon the patentee. The specification and claims of a patent, particularly if the invention be at all complicated, constitute one of the most difficult legal instruments to draw with accuracy; and, in view of the fact that valuable inventions are often placed in the hands of inexperienced persons to prepare such specifications and claims, it is no matter of surprise that the latter frequently fail to describe with requisite certainty the exact invention of the patentee, and err either in claiming that which the patentee had not in fact invented, or in omitting some element which was a valuable or essential part of his actual invention. Under such circumstances, it would be manifestly unjust to deny him the benefit of a reissue to secure to him his actual invention, provided it is evident that there has been a mistake, and he has been guilty of no want of reasonable diligence in discovering it, and no third persons have in the meantime acquired the right to manufacture or sell what he had failed to claim. The object of the patent law is to secure to inventors a monopoly of what they have actually invented or discovered, and it ought not to be defeated by a too strict and technical adherence to the letter of the statute, or by the application of artificial rules of interpretation."

The statute upon the subject, and thus construed by the supreme court, is as follows:

"Whenever any patent is inoperative or invalid, by reason of a defective or insufficient specification, or by reason of the patentee claiming as his own invention or discovery more than he had a right to claim as new, if the error has arisen by inadvertence, accident, or mistake, and without any fraudulent or deceptive intention, the commissioner shall, on the surrender of such patent and the payment of the duty required by law, cause a new patent for the same invention, and in accordance with the corrected specification, to be issued to the patentee, or, in the case of his death or of an assignment of the whole or any undivided part of the original patent, then to his executors, administrators, or assigns, for the unexpired part of the term of the original patent. Such surrender shall take effect upon the issue of the amended patent. The commissioner may, in his discretion, cause several patents to be issued for distinct and separate parts of the thing patented, upon demand of the applicant, and upon payment of the required fee for a re-issue for each of such re-issued letters-patent. The specifications and claim in every such case shall be subject to revision and restriction in the same manner as original applications are. Every patent so reissued, together with the corrected specification, shall have the same effect and operation in law, on the trial of all actions for causes thereafter arising, as if the same had been originally filed in such corrected form; but no new matter shall be introduced into the specification, nor in case of a machine-patent shall the model or drawings be amended, except each by the other; but when there is neither model nor drawing, amendments may be made upon proof satisfactory to the commissioner that such new matter or amendment was a part of the original invention, and was omitted from the specification by inadvertence, accident, or mistake, as aforesaid." Rev. St. § 4916.

From the statute and from the decisions of the supreme court, it is clear that it is essential to the validity of a reissued patent that it be for the same invention as the original patent, as such invention appears from the specification and claims of such original.

Turning now to the patent to the defendant in error, in lieu of which his patent No. 11,383 was issued, we find the object of his invention therein described declared as follows:

"The object of my invention is to provide a device whereby I am enabled to use an ordinary coal-oil lamp within a grate or fireplace, and, by the employment of a peculiarly constructed inclosing casing, to prevent the flame of the lamp from being affected by the usual strong draft of the chimney flue. It also has for its object a means for providing a proper circulation of air about the lower part of the lamp and oil chamber, without subjecting it to the chimney draft, a means for concentrating the heat and projecting it into the room, and a means for opening communication with the chimney in order to discharge the odors arising when the lamp is extinguished, and prevent their escaping into the room. A valve or damper is so arranged that the top may also be used for cooking purposes."

The specification followed, making reference to annexed drawings for illustration, describing a casing, A, of a segmental or parabolic form, in horizontal section, the axis being in a vertical line, and a corrugated or other reflecting surface, B, fitted around the inner surface. The exterior form of the back, the inventor declared, "is adapted to fit into the fireplace after the basket and ash pan have been removed; but the casing may be made in other forms without altering the character of my invention." The bottom of the casing, B¹, is described as having a large opening through the center, into which the oil reservoir of the lamp, C, is fitted. The reservoir is of large size, and has certain described handles, D, upon each side, by which it may be conveniently taken out or replaced when necessary. The burner, the inventor declared, may be of any well-known or suitable construction, and has a glass chimney, E, extending up into the upper portion of the apparatus. The bottom, B, is described as supported upon a base, F, which has the rear portion approximating in shape to the rear of the curved body, A. The base is described as being of considerable depth, so as to allow the lamp reservoir to be suspended within it without touching the surface upon which the apparatus stands, and the inventor adds:

"I have shown the base mounted upon small wheels or rollers, G, which allows it to be easily drawn out or pushed back into place."

The specification proceeds:

"Through the front and top of this base are made a number of holes, H, and through the top in which the lamp reservoir is suspended the holes are made so that air may readily draw through the openings in the base, and thence up through these holes around the exterior of the lamp, thus producing a circulation of air within the body of the stove and around the reservoir and lamp, to keep the parts cool, and especially to prevent overheating the reservoir by reason of its confinement within the casing. The cap or upper portion, J, is inclosed as shown, and has a horizontal closed top, K, with a number of small holes, K¹, in the front, to allow the heat which rises into the upper portion of the casing from the lamp to pass out through these openings into the room. This device is adapted to be fitted into the fireplace or openings for any grate, by simply removing the basket and ash pan therefrom; and it may be rolled into place upon the rollers, G, so that any odors which may arise from the lamp when it is extinguished will escape through the valve or register, L, which is partially opened for the purpose. The heat will be thrown out by direct radiation, and by the action of the reflector behind the lamp, and the room will at the same time be lighted sufficiently for all ordinary purposes. By the use of the casing closed behind and at the top, the lamp is protected from the strong draft of the fireplace chimney; the open or perforated front and bottom supplies air to keep the lamp cool; the closed top,

with perforations in front, and the open front, with reflector behind, concentrate the heat and throw it out into the room, and at the same time protect the lamp from drafts which would break the chimney or prevent perfect combustion. If it is desired to use the stove for cooking purposes, it is made available by the use of the damper or register, L, which turns in a frame, M, so as to close the openings in said frame, or open them, like the ordinary rotary register. The frame, M, has upwardly projecting points, N, which serve to support any vessel containing material which it is desired to heat or cook at this point. When the device is to be used for cooking in this manner, it is simply drawn out from the fireplace sufficiently to expose the top and the register, which is opened for the purpose of cooking, as before described. When used for heating purposes, it is preferably allowed to stand within the fireplace, and by reason of the peculiar construction a great amount of heat is developed from it. Below the register is suspended a concave or cup-shaped guard, O, which, diverging above the lamp chimney, will prevent any liquids spilled or boiled over the top of the cooking vessel from falling upon and breaking the chimney. By means of the register in the top I am also enabled to regulate the amount of heat without turning the lamp wick down or extinguishing it entirely, for by opening the register much heat will be allowed to escape up the chimney. If the lamp is turned low, any odors arising from imperfect combustion will escape through the register and into the chimney."

Having thus described his invention, the inventor added what he claimed as new and desired to secure by letters patent, as follows:

"(1) A stove, consisting of the body, having a base and wheels or rollers upon which said body is supported, openings around the front of the base for the admission of air, a floor forming the top of said base, with a central opening, a lamp reservoir having handles and fitting said opening, perforations made in the floor surrounding the lamp to allow circulation of air through the base and floor, a top with openings and register, and a curved back adapted to fit the fireplace, and extending downward below the level of the top of the lamp chimney, with perforations for the escape of heat, substantially as herein described. (2) A stove, consisting of the segmental body section with a correspondingly shaped reflector fitted around its inner surface, and adapted to fit the fireplace, a base and floor having openings for the circulation of air, a central opening, a removable lamp, the reservoir of which is adapted to fit said opening and is provided with handles, an upper closed portion or cap into which the chimney of the lamp extends, a register frame having openings and upwardly projecting points to support a utensil for cooking purposes, and a valve by which the openings in said register may be exposed or closed, substantially as herein described. (3) A fireplace stove, consisting of a lamp, a casing closed at the top, back, and sides, within which the lamp is suspended, a base perforated to allow air to circulate, an open front, and a reflector at the rear of the lamp, a closed top into which the top of the chimney extends, and openings in front for the escape of heat, substantially as herein described. (4) A fireplace stove, consisting of a lamp, a casing closed at the top, back, and sides, within which the lamp is suspended, a closed base perforated to allow air to circulate, an open front, an inclosure above into which the top of the lamp chimney extends, a register in the top, and a support for a cooking vessel, and a cup-shaped shield by which the lamp chimney is protected from liquids, substantially as herein described. (5) A stove, consisting of a horizontal bottom supported above the floor level to allow a free circulation of air beneath, and having a central opening in the bottom, a removable lamp reservoir suspended in the opening and projecting below the bottom, perforations in the bottom around the reservoir, a segmental casing extending upward around the rear of the lamp, and an inclosed and perforated top, substantially as herein described."

Although it is quite evident from the specification and claims of this original patent that the construction claimed and thereby patented was a stove for use in, and in connection with, an open fireplace or grate, it does not follow that the thing invented may not be used elsewhere. That there is no essential change in the specification contained in the reissued patent is conceded by the plaintiffs in error. The claims of the reissue are undoubtedly broader than

those of the original. They omit all reference to a fireplace and grate. But neither a fireplace nor a grate constituted any part of the invention. The claims of the reissued patent also omitted certain elements which were embraced in the claims of the original patent, but which really constituted no part of the invention; that is to say, the first claim of the original patent made the "wheels or rollers" upon which the stove is supported one of the elements of the claim. But there is no invention in putting rollers under a stove or other thing to make it movable, as was held by the supreme court in *Hendy v. Iron Works*, 127 U. S. 370, 8 Sup. Ct. 1275. A claim which made what was no part of the invention one of its elements, and consequently essential to its infringement, was therefore clearly defective, which defect was properly cured by omitting the improper element from the reissue. For the same reason the handles of the reservoir, which were made an element of the second claim of the original patent, but which, being attached only for the purpose of the more conveniently removing the reservoir, constituted no part of the invention, were properly omitted from the claims of the reissue, thereby correcting that defect of the second claim of the original patent. The same may be affirmed in respect to the length of the lamp chimney described in the third claim of the original patent, and in respect to the cup-shaped shield by which the lamp chimney is protected from liquids. We are of opinion that the reissued patent did not go beyond the real invention, as shown by the specification and claims of the original patent.

Nor does the fact that, intermediate the issuance of the original patent and the application for the reissue, a patent was granted to F. E. Browne for an "appliance for heating, illuminating, or culinary purposes," defeat the reissue. That Browne was aware of the complainant's original patent is manifest from this statement in his specification:

"Heretofore heating appliances have been constructed with a lamp-sustaining base having a lamp seated within a central opening. My invention is to be distinguished from appliances of such character in that the base of such prior appliances have been made of material having high heat-conducting qualities, and, in order to prevent the heating of the oil receptacle of the lamp, such bases have been perforated around the lamp seat to admit an upward draft of cold air around the lamp, so that the air discharged from the heat-emitting opening, E, has been heated by convection and radiation, and there has been an ascending draft of air all about the lamp exterior to the chimney, which draft carried off the heat to the upper part of the room, thus impairing the effective heating qualities of the appliance. In my heating appliance the draft of air around the lamp chimney is practically done away with, and the heated air which passes from the appliance consists simply of that which has been heated with direct contact of the flame in inducing combustion, and nearly the entire amount of heat is by radiation directed outward at right angles from the lamp chimney and the lamp containing heat deflector, D, instead of ascending to the upper part of the room through the medium of the heated and expanded air which surrounds the lamp chimney, and which in said appliance, as heretofore constructed, rises rapidly, and carries the heat to the upper part of the room, instead of allowing it to pass outward. By making the base ring of nonheating and non heat absorbing material, substantially, such as wood or other suitable material, all danger of heating the oil is avoided. The heat-deflecting wall is perpendicular to the base ring, so that the heat is directed outward horizontally, and not downward upon the base. The upper heat deflector and radiating

drum, H, serves also with great efficiency and economy as a heat radiator, detaining and distributing, by convection, a large portion of the heat which otherwise would pass upward into the upper part of the room, and thereby cease to be effective to heat the lower part of the room, where the heat is required."

His claims are:

"(1) The appliance for heating, illuminating, and culinary purposes, consisting of the combination of the imperforate non heat conducting base ring mounted upon suitable supports, and arranged to receive within its circle a suitable lamp, and having a wall seat arranged at a distance from its inner circle to leave suitable space between the heat-deflector wall when in place upon such seat and a lamp when seated in such seat, a lamp provided with an interior central draft flue, the heat-deflector wall having a heat-emitting side opening, a suitable spider-supporting breast arranged upon such wall, an open spider mounted upon such breast, and a removable heat-deflecting drum arranged to fit upon such breast around such spider. (2) The appliance set forth, consisting of the combination of an imperforate non heat conducting base ring mounted upon suitable supports, and arranged to receive within its circle a suitable lamp, a lamp provided with an interior central draft flue, the heat-deflector wall having a heat-emitting opening, the heat-deflecting drum mounted upon such wall, and a register arranged in the top of the drum."

Browne thus substituted for the metal base ring of the Myers stove a base ring of wood, or other non heat conducting material, and added a heat-deflecting drum on top. With these exceptions, the first claim of the complainant's original patent, which is the same as the fifth claim of the reissue, covered the construction for which Browne's patent was issued.

In respect to the design patent, we are not prepared to say that it does not show originality and the exercise of the inventive faculty. None of the stoves relied on to defeat this patent show a semicylindrical body or case. Form and shape are elements of a design. In *Hammond v. Agricultural Works*, 17 C. C. A. 356, 70 Fed. 716, cited by the plaintiffs in error, what the plaintiff there did, and all that he did, was to substitute for the platform which had been previously used on the rear end of certain existing street cars an open compartment precisely similar to the open compartment which was in use at the front end of those cars, which we held was nothing more than the exercise of the imitative faculty. The judgment is affirmed.

GILBERT, Circuit Judge (dissenting). I concur with the majority of the court in arriving at the conclusion that the judgment of the circuit court should be affirmed, but I am unable to assent to that portion of the opinion which sustains the validity of the design patent of the defendant in error. The claim of that patent is for a "design for a lamp stove consisting of a semicylindrical body with an open front, a cylindrical top surmounting the semicylindrical body, and an ornamental top piece, all as herein shown and combined." It appears from the record that five years before the date when the defendant in error applied for his patent an application for a patent had been filed by Landon Ketchum for a gas stove, with drawings showing a stove with a semicylindrical body and an open front, surmounted by a cylindrical top and an ornamental top piece, containing all the specified features of the patented design of the defendant in error. The plaintiffs in error have constructed a gas stove which likewise contains these general features, but otherwise

no more resembles the design of the defendant in error than it does that of the Ketchum patent. It does not appear, however, that on the trial of the cause the plaintiffs in error requested the court to instruct the jury specially upon that branch of the case, or that they excepted to the submission of both causes of action to the jury, or that they otherwise took steps to segregate the action on the design patent from the case, or to protect their rights as against that patent. I find no error, therefore, for which the judgment should be reversed.

DEWEY ELECTRIC HEATING CO. v. ALBANY RY.

SAME v. CONSOLIDATED CAR-HEATING CO.

(Circuit Court of Appeals, Second Circuit. July 21, 1897.)

PATENTABLE INVENTION—COMBINATIONS—ELECTRIC HEATERS.

The Dewey patent, No. 464,247, is void for want of patentable invention as to claim 9, which is for a combination of heating conductors adapted to be connected in different ways with the supply conductors, a switch for controlling said connections, and an indicator, operated by the movement of the switch, to show how the connections stand. 78 Fed. 483, reversed.

Appeal from the Circuit Court of the United States for the Northern District of New York.

Each of the bills in equity to which these two appeals relate was brought in the circuit court for the Northern district of New York, and was founded upon the alleged infringement of claim 9 of letters patent No. 464,247, issued to Mark W. Dewey on December 1, 1891, for improvements in electric heating apparatus. In the Albany Railway Case, which had progressed to final hearing, the court, being of opinion that claim 9 was valid and had been infringed, passed an interlocutory decree for an injunction and an accounting. 78 Fed. 483. Subsequently a motion for an injunction pendente lite against the infringement of the same claim was granted in the case against the Consolidated Car-Heating Company. From the decree and the order pendente lite the defendant in each case appealed.

Fredk. P. Fish and Charles Neave, for appellants.

Charles H. Duell, for appellee.

Before LACOMBE and SHIPMAN, Circuit Judges.

SHIPMAN, Circuit Judge. The patented improvement was especially intended to be an electric heater for electric cars, which would expose a large radiating surface, and yet not occupy much floor space. Its resistance was divided into sections, so arranged that they were detachable, and, if one was injured, the current could be continued to the other sections while the injured member was being repaired. These sections were also adapted to be connected in different ways with the supply conductor, and thus change the volume of the current. The patentee, in his testimony, describes the apparatus as follows:

"The heating apparatus shown and described in this patent is divided into sections, and these sections are arranged and adapted to be connected in different ways with the supply conductor. A switch is shown and described for changing or altering the connections between the various sections of the heating apparatus and the supply conductors, in order that the heat may be regulated and the consumption of electric current varied as desired. The

switch operates an indicator which shows the amount of current being consumed, or how the connections stand."

Claim 9 is as follows:

"In an electric heating apparatus, having heating conductors or sections adapted to be connected in different ways with the supply conductors, a switch for controlling said connections, and an indicator, operated by the movement of the switch, to indicate how the connections stand."

There is no substantial difference between the parties as to the state of the art of heating by electricity at the date of Dewey's invention, and it is agreed that each of the three elements which are described in the claim was, separately considered, old at that time. The patentee says that he was not the first person who made an electrical heater in sections, or a heater made of several sections of resistance coils; and Mr. Livermore, the complainant's competent expert, says that Dewey "was not the first to make a heater resistance electrically divided so that the portions thereof could be connected with the supply circuit in different ways," but he thinks that Dewey "was the first to employ sections, which, as a matter of construction, were separate, and were electrically separate, except as the connections were made therefrom to one another, or to the conducting wires, as required." This is not material with reference to claim 9, for Mr. Livermore also agrees with the other witnesses that "the individual elements [of that claim], or substantial equivalents therefor, were separately old at the time of the Dewey patent." Dewey was not the first to devise an indicator which was used in some kind of electrical apparatus, and which indicated "how the connections stand," and was operated by the movement of the switch; and a switch for controlling the connections of heating conductors with supply conductors was old. The handle of a switch sometimes served as an indicator, when the number of connections was small, and the changed position of the handle could be plainly seen, and therefore whatever each position indicated could easily be learned by experience. The form of the indicator shown in the drawings of the Dewey patent, viz. a pointer, and the corresponding marks on the case of the heater, was known before the date of the Dewey invention. But it is said, and with truth, that the combination of the three elements, as stated in claim 9, was novel in an electrical heater; and it is urged that the fact of this novel combination, and the important effect resulting from it, tend to characterize it as a patentable invention. We agree with the judge of the circuit court that the claim is a broad one, and was neither confined nor intended to be confined to a particular form of heater or of switch, and that, if it was so confined, it would be worthless. The improvement was generic in character, and consisted in the combination of the three elements, irrespective of their particular form. The gist of the improvement is the indicator in combination with the two other elements; for those had been, in substance, combined before, and there is nothing in the claim or in the specification which suggests novelty in their union. For example, the patent to Carl Seiler, No. 379,822, dated March 20, 1888, describes an electric heater with a large radiating surface of insulating material. This

surface is provided with a number of projections, around and in contact with which the heating constructions are placed. These projections are made in the form of cones, which are preferably made detachable, for convenience of repair or alteration, and the wires through which the current is to pass are wound around the cones. The patent says:

"If desired, there may be combined with the rows of coils, a commutator or switch, L, similar in character to the commutator, G, and contact fingers, I, at the terminals of the rows of coils, may be adapted to bear on the projections of the commutator cylinder, so that, by turning the latter, more or fewer rows of coils may be included in the circuit, according to the amount of heat required."

The difference which the complainant's counsel suggests between the Seiler and the Dewey structures is this: Dewey's sections are separate heaters, separately cased, held in one frame, and removable from it, whereas Seiler's sections are not separately cased, but are in one single case. Whatever may be the patentable value of this difference as applied to other claims of the Dewey patent,—and we do not deny that it has such value,—it is not of importance as regards the combination of heating sections adapted to be connected in different ways with the supply conductors and a switch for controlling the connections. The Seiler coils are capable of being combined or connected in any desired electrical arrangement. They come within the complainant's construction of that part of claim 9 which speaks of sections adapted to be connected in different ways with the supply conductors, and which is, as expressed by Mr. Livermore, as follows:

"If the sections are so constructed that they may be connected in any of the possible electrical arrangements that are used, * * * they would embody the structure referred to in the ninth claim. If, however, the heater was so made that its resisting wire can only be used in a series arrangement (that is, as a single line from a supply conductor), it would not be a structure forming the subject of the ninth claim."

And further he says:

"I understand that the heater sections described by Dewey are adapted to be connected in any desired arrangement. Of course, some specific arrangement must be chosen when they are put into use; and, whatever arrangement may be chosen, I should still regard the apparatus as embodying the invention, as it retained the capability of being used in other arrangements, if desired, even though in a particular instance such capability was not utilized, and the arrangement first chosen was adhered to."

But the Seiler heater had no indicator, unless the handle of the switch can be called such a device; and, as this heater tells with sufficient accuracy a known method of electrical heating at the date of the Dewey invention, it directly raises the question of importance in the case, which is, was the improvement of claim 9, though novel and useful, patentable? That an indicator which enables the railroad car conductor to regulate accurately and promptly the heat produced by the apparatus is useful, is a matter of course. It indicates to him "which one of the number of possible heat-producing effects is at any time brought into operation." The position of the handle of an uncovered switch would testify to an experienced operator the strength of the current, but it is important to have the apparatus covered by a case; for strong currents are used, and in that event the

presence of an indicator is very helpful to an inexperienced person, for it tells him with precision how to increase or decrease the heat. The utility of an indicator is so well known that its use had become very extensive in electrical apparatus, and the general knowledge of its utility and of its method of construction had caused its employment to become a matter of mechanical, rather than inventive, skill. Thus, Mr. Livermore says, in substance, in regard to the use of indicators in electrical apparatus generally at the date of the Dewey invention, that it was a matter of common knowledge to employ with or apply to a hand operated switch an indicator, when such an adjunct was desirable to facilitate intelligible operation of the switch. To add to the switch of an electrical heater a pointer controlled by the switch, to tell its position and designate the way in which it is to be moved in order to increase or to decrease the heat, seems a matter for the shop rather than for the laboratory. In view of the existing state of facts in regard to the employment of switches and indicators controlled by them which is set forth in the record, as well as in the testimony of the patentee and his experts, as in the testimony introduced by the defendant, we are of opinion that the improvement described in claim 9 was not of a patentable character. The interlocutory decree in the Albany Railway Case is reversed, with costs, and the case is remanded to the circuit court, with instructions to dismiss the bill. The order for an injunction in the case against the Consolidated Car-Heating Company is reversed, without costs, as the actual defendant in each case is the same.

CITY OF SEATTLE v. McNAMARA.

(Circuit Court of Appeals, Ninth Circuit. June 7, 1897.)

No. 330.

PATENTS—ACTION AT LAW FOR INFRINGEMENT—DAMAGES.

In an action at law for infringement, where plaintiff shows no established license fee, no market price, and no other use of the invention than that by defendant, there can be no recovery beyond nominal damages, and it is error to leave it to the jury to determine what would be a reasonable royalty.

In Error to the Circuit Court of the United States for the District of Washington, Northern Division.

Frank A. Steele, for plaintiff in error.

John Wiley and Alpheus Byers, for defendant in error.

Before GILBERT and ROSS, Circuit Judges, and HAWLEY, District Judge.

GILBERT, Circuit Judge. The defendant in error, James McNamara, brought this action against the city of Seattle to recover damages for the infringement of letters patent No. 521,767, centering for tunnels, issued to James McNamara on June 19, 1894. It was shown on the trial that the inventor, while employed as a masonry foreman in constructing sewer tunnels for the city of Seattle, conceived the form of centering of tunnels which was afterwards em-

bodied in his patent. The city used the device for 18 months, during which time the patentee continued in its employment as foreman. He was then discharged, and he soon after gave notice to the city that he had applied for a patent for his invention. The city continued to use his device, and it is for such subsequent use that the damages are claimed. It appeared on the trial that the patentee had made no sale of his device, or of the right to use the same, and had granted no licenses, and that no royalty had been established therefor, and that the device had never been used except by the plaintiff in error. The defendant in error was permitted by the court, against the objection of the plaintiff in error, to state the sum which, in his opinion, would be a reasonable royalty for the latter's use of the patented device. The principal assignment of error is that the court instructed the jury as follows:

"The jury are instructed upon the measure of damages that in this case the proper method of assessing plaintiff's damages, if you find that he is entitled to recover any, is for you to ascertain and determine what would have been a reasonable royalty for the defendant to have paid for the use of the invention at so much for each one made and used; and in determining this point, if there was an established royalty, that sum would have been the measure of damages; but in this class of cases, where no royalty has been established, there are, necessarily, no data from which the value of the royalty can be calculated with mathematical certainty, and damages, like damages in many other classes of cases, are calculable upon such evidence as it is in the nature of the case to produce. The amount of damages it is the province of the jury to determine, taking into consideration the whole evidence."

The latter portion of this charge embodies the views which were expressed by this court in the case of *Packing Co. v. Cassiday*, 12 C. C. A. 316, 64 Fed. 585, in which we approved the doctrine declared in section 563 of *Walker on Patents*, which is thus expressed:

"Where damages cannot be assessed upon the basis of a royalty, nor on that of lost sales, nor on that of hurtful competition, the proper method of assessing them is to ascertain what would have been a reasonable royalty for the infringer to have paid."

Since that decision was rendered, the supreme court, in the case of *Coupe v. Royer*, 155 U. S. 565, 15 Sup. Ct. 199, reversing *Royer v. Coupe*, 29 Fed. 371, has announced the doctrine that in an action at law to recover damages for the infringement of letters patent the damages are measured only by the extent of the plaintiff's loss as proved by the evidence. The court said:

"At law the plaintiff is entitled to recover as damages compensation for the pecuniary loss he has suffered from the infringement, without regard to the question whether the defendant has gained or lost by his unlawful acts. * * * It is evident, therefore, that the learned judge applied the wrong standard in instructing the jury that they should find what the defendants might be shown to have gained from the use of the patented invention. * * * Upon this state of facts the evidence disclosing the existence of no license fee, no impairment of the plaintiff's market,—in short, no damages of any kind,—we think the court should have instructed the jury, if they found for the plaintiff at all, to find nominal damages only."

It is true that in *Coupe v. Royer* there was no evidence tending to show what would have been a reasonable royalty for the use of the plaintiff's device, the evidence upon that branch of the case being confined to proof of the advantage which the defendant would gain

through the use of the invention, and the profits he would derive therefrom; and the court did not expressly hold that in an action at law the plaintiff might not prove as the measure of his damages the sum that would be a reasonable royalty for his invention, and did not in terms disaffirm the doctrine expressed in *Walker on Patents* and in *Packing Co. v. Cassiday*, above referred to; yet the plain purport of the decision is to that effect. It declares the broad doctrine that there is no remedy at law for the infringement of a patent unless the plaintiff show actual damage to himself, or show that prior to the act of infringement a sufficient number of sales of the patented invention, or of the right to use the same, had been made at a settled price, to establish a royalty, or a market price, for the use of the invention, so that by the defendant's act his market had been impaired. There had been no such established royalty in the present case. The invention had not been used except by the plaintiff in error, and the right to use the same had not been sold to any one. It cannot be said, therefore, that a market for his invention has been created which could be the subject of impairment by the act of the infringer. Under the authority of *Coupe v. Royer* we are compelled to reverse the judgment at the cost of the defendant in error, and remand the case for a new trial.

FORGIE V. DUFF MANUF'G CO.

(Circuit Court of Appeals, Third Circuit. July 19, 1897.)

1. PATENTS—MECHANICAL EQUIVALENTS.

To convert a plate yielding bodily to effect a tripping by the receding of a lug when it comes in contact with the object to be tripped into a plate having yielding lugs performing the same functions is not invention, but mere use of a mechanical equivalent.

2. SAME—JACKING APPARATUS.

The Barrett patent, No. 455,993, for a jacking apparatus, construed, and held infringed as to claims 1 and 6. 78 Fed. 626, affirmed.

Appeal from the Circuit Court of the United States for the Western District of Pennsylvania.

William L. Pierce, for appellant.

James I. Kay, for appellee.

Before DALLAS, Circuit Judge, and BUTLER and KIRKPATRICK, District Judges.

KIRKPATRICK, District Judge. This matter comes before the court on an appeal from a decree of the circuit court for the Western district of Pennsylvania (78 Fed. 626), granting to the complainants a preliminary injunction based upon two patents, No. 455,993, July 14, 1891, and No. 527,102, October 9, 1894, issued to Josiah Barrett, and assigned to the Duff Manufacturing Company. The claims involved are 1 and 6 of patent No. 455,993, and claim 19 of patent No. 527,102; but, inasmuch as the defendant, in his answer, consents that decree be made against him as to claim 19, patent No.

527,102, the court is only concerned with the consideration of the claims 1 and 6 of patent No. 455,993, which are in the following words:

Claim 1: "In a jack, the combination of a bar having teeth on one side thereof, a pivotal lever, two pawls pivoted to said lever, and having fingers rigid therewith, and a yielding tripping plate having lugs thereon adapted to engage with said fingers, and through the same draw the pawls from engagement with the toothed bar, substantially as and for the purpose set forth."

Claim 6: "In a jack, the combination of a bar having teeth on one side thereof, a pivotal lever, a pawl pivoted to said lever and having a finger rigid therewith, and a yielding tripping plate mounted on the frame, and having a lug adapted to contact with said finger, and through the same draw the pawl from engagement with the toothed bar, substantially as and for the purposes set forth."

In a former suit brought in this circuit entitled *Manufacturing Co. v. Forgie*, 57 Fed. 748, upon full consideration the court held this patent, No. 455,993, to be valid, and decided that the complainant was entitled to have such a broad construction put upon his claims as would enable him to obtain the benefit of the full scope of his invention. The validity of the patent having been so sustained, the only question now before us for consideration is one of infringement, and in determining it the court should be guided by the rules of construction laid down in the case above referred to, and which are in conformity with the decision in *Electric Co. v. La Rue*, 139 U. S. 601, 11 Sup. Ct. 670. In the opinion which has been filed in this cause, and which forms the basis of the decree appealed from, the learned judge sets forth clearly and fully the state of the art before and at the time application was made by Barrett for his patent No. 455,993, and the need which existed for further improvement in the then existing mechanism to adapt the lifting jack of Barrett, manufactured under patent No. 312,316, to the requirements of an "oil-well jack." This mechanism had been provided with a rigid tripping plate, and, in order to provide for the withdrawals of the pawls during the reversing operation, there were pivoted to said pawls spring-actuated fingers, which, when the lever was operated, moved in contact with the tripping plate in such a way as to draw the pawls away from the teeth of the rack. In applying this mechanism to the purposes of an "oil-well jack," it was found that when the joint was tightly coupled together, and the wrenches still applied thereto, the wrenches exerted a very strong pressure against the carriage and the fixed post on the rack bar, and the operation to remove the wrenches from the drill rod so as to permit the latter to be used was found to be very difficult. To overcome this difficulty was the object of the yielding tripping plate provided for in the claims of patent No. 455,993, above set forth. By the substitution of the yielding tripping plate having a lug or lugs thereon adapted to engage with said fingers, and through the same draw the pawls from the toothed bar "for the device described in patent No. 312,316, Barrett gained for his new machine simplicity and strength,—simplicity, in that the parts were reduced in number by the removal of the levers and one of the springs; and strength by his ability to increase the size of the pawls, and relieve them from the strain of carrying the reversing mechanism." In patent No. 455,993 we find

the following elements in combination: A rack bar having teeth upon one side, a frame for pivoted lever, a lever pivoted on a frame and provided with a long and short pawl pivoted thereto, fingers rigidly connected with the pawl, a yielding tripping plate having lugs which, when the plate is in a given position, will engage the rigid fingers on the pawl; the construction specified to produce "power mechanism in which a step by step movement back and forth is obtained, said movement being actively operated in one direction to move a load, and passively operated in the other direction to control the movements of a load." In so far as the rack bar, the pivoted levers, the pawls having fingers, and the tripping plate in general combination are concerned, they are the same in patents No. 312,316 and No. 455,993, but the constructions differ in that in the prior patent the fingers are pivoted on the pawls, and the springs which accumulate and apply the power to withdraw the pawls from engagement with the rack bar are also mounted on the pawls, while the tripping plate is rigid during its operation. In the patent in suit the fingers are made rigid on the pawls, and the spring which accumulates the power, and applies it to withdraw the pawls from engagement with the rack bar, is transferred to the tripping plate, constituting one element which is called the "yielding tripping plate," the claims of the patent being for the combination of rack bar, pivotal levers, and pawls of fingers, a tripping plate, and springs for applying power to the pawls through the fingers, when the finger is rigidly connected with the pawl, and the storage spring with the tripping plate. The claims of the patent No. 455,993, which are under consideration, cover broadly the idea of the yielding plate without limitation as to the position or form of the plate, the only requisite being that it shall yield in such a way as to accomplish its purposes, viz. the withdrawal of the pawls from engagement with the toothed bar. This will be apparent by reference to page 2, line 10, of the specification of the patent: "The tripping plate is mounted in any suitable way upon the jack frame, being shown in the drawings as pivoted to the same, though it is evident that it may be mounted to slide therein." The device was wholly new. Nothing in anticipation thereof has been brought to the attention of the court, nor cited by way of reference in the patent office. If we turn to the Forgie machine, marked "Exhibit Forgie Jack," and which is claimed to be an infringement, we find a rack bar with teeth on one side, a pivoted lever, and two pawls with rigid fingers pivoted to said lever. These are the same elements found in the Barrett patent, needing only in combination the "yielding tripping plate" to make it similar throughout. To perform the functions of the complainant's yielding tripping plate, the defendant has adopted an ingenious device. Instead of pivoting the tripping plate to the jack frame, and placing a spring under the same by which the whole body of the tripping plate is pressed upwardly against the rigid fingers of the pawl, he has devised a plate which slides in the frame, and secured within the plate, and projecting up therefrom in position to be engaged by the rigid fingers of the pawls are the spring fingers, so that, while the plate as a whole is rigid, yet, with the yielding fingers placed thereon, the same result is obtained

in practically the same manner as in the patent in suit. The yielding of the plate within itself is the clear equivalent of the bodily yielding of the plate, while the spring fingers form lugs which store the power, and give a movement the same in principle as that of the complainant's jack. To convert a plate yielding bodily to effect a tripping by the receding of a lug when it comes in contact with the object to be tripped into a plate having yielding lugs performing the same functions, requires no exercise of the inventive genius. The latter seems to us but the equivalent of the former. The defendant's machine being similar in its other elements, to which reference has been made, and the tripping mechanism being but the equivalent of the complainant's tripping plate, we are of the opinion that the infringement of claims 1 and 6 of complainant's patent No. 455,993 is clearly shown, and that the decree of the circuit court should be affirmed.

STEEL-CLAD BATH CO. v. DAVISON.

(Circuit Court of Appeals, Second Circuit. July 21, 1897.)

PATENTS—INVENTION—BATH TUBS.

The Booth patent, No. 458,995, for a bath tub composed of a smooth sheet-metal casing, having a lining of copper or other light, flexible material, hammered, rolled, or pressed into close contact therewith, is void for want of invention, in view of Holmes patent, No. 189,559. 80 Fed. 904, affirmed on application for rehearing.

On Application for Rehearing.

Before WALLACE, LACOMBE, and SHIPMAN, Circuit Judges.

SHIPMAN, Circuit Judge. This is a petition by the complainant and appellee in the above-entitled cause for a rehearing of the appeal which was recently decided by this court in favor of the appellant. 80 Fed. 904. The earnest belief of the counsel for the complainant in the strength of its patent, and that the court was led astray by a misapprehension of the mechanical facts of the case, induce us to restate our views respecting the patentable character of the invention. The bath tubs most frequently in use before the date of the Booth invention in houses which had a permanent water supply and drainage system were, as Mr. Benjamin, one of the complainant's experts, says, "commonly made of thin metal, usually copper, arranged in what was practically a wooden box, permanently fastened in place." The wooden cases possessed alleged dangers, some of which were a tendency to decay, and consequently to produce or to harbor germ life. To eliminate this wooden box, the same expert says, was one of his (the patentee's) principal objects. He substituted a sheet-steel casing for the wooden casing, and a lining of thin copper pressed, as the pre-existing lining had been, into close contact with the exterior casing. Claim 1 describes the invention which he desired to secure as "a bath tub composed of a smooth sheet-metal casing having a lining of copper, aluminum, or other light, flexible material, hammered, rolled, or pressed into close contact with its outer casing, substantially as and for the purpose specified." The questions which naturally first presented themselves were the

novelty and the patentability of the improvement described in this claim. One of the methods of making bath tubs which existed before the date of the Booth invention was shown in the Holmes portable tub, patented April 17, 1877, which consisted of a zinc body and a tin lining, made into a compound sheet. "The sheet was formed by uniting a thin sheet of tin and a thicker sheet of zinc by rolling the two sheets together, soldering them face to face, or otherwise producing a homogeneous sheet having tin for a facing and zinc for the body." The difference which the complainant's experts pointed out between the two tubs was that the Holmes tub was made of a homogeneous sheet having one metal for the facing and other metal for body, whereas the Booth structure was an inner tub of thin metal resting in contact with and supported by an outer steel casing. Upon the point of homogeneity, the court thought that the independency of the two sheets of metal was not regarded by the patentee as important, or, in the language of the opinion, that the distinction "was not recognized" in the original Booth specification, which said that his "lining was hammered, rolled, or pressed, so as to be practically integral with its outer casing." The opinion further said that "the body of each tub can be made by rolling the two sheets together." The first misapprehension of facts which the complainant thinks existed was that the two methods of rolling were the same, whereas the Holmes sheets were placed together flatwise, and, as thus superposed, were united together, while the lining sheet of the Booth tub, when flat, was passed between rolls under pressure in such wise as to bend or curl it into curved form. The second alleged misapprehension was a failure to understand that the Booth tub was made of two independent sheets of metal, one nested within the other, and in mechanical contact only with each other. The language of the opinion probably justifies the complainant's belief that this misapprehension existed; but the fact that the copper lining was nested within the outer steel casing, and that the sheets were not homogeneous, was both apparent and was well understood. The court was also aware that the mechanical process by which a flat sheet of copper was hammered, rolled, or pressed so as to become curved and conform to the curvatures of an exterior sheet-steel case was not the same as that by which two flat sheets of metal, having been united together, were bent into a tub, but was also of opinion that under the Booth patent the particular mechanical means of union were not of patentable importance. Booth's actual invention consisted in making a bath tub with a sheet-steel case and a copper lining, instead of a tub with a wooden case and a copper lining, and he nested the lining within the exterior case as the wooden case had been lined; but the patentee deemed himself entitled to a broader patent, and claim 1 was not limited to any particular kind of metal, or to any particular manner by which the two sheets were to be pressed, hammered, or rolled together. They could be brought together by the nesting process, as in the wooden bath tub and in the William Gee patent of October 22, 1867, or by bending the combined sheets into the required shape by means of suitable rollers, as in the Willis L. Brownell patent of October 21, 1879, or by bending two sheets which had been united so as to be

homogeneous as in the Holmes patent. The complainant desires that the claim should be so construed that the completed metallic tub must be a water chamber nested within an outer sheet-metal casing. The objection to that construction is that the patentee took a patent for a metallic tub of any two kinds of sheet metal, which were to be brought together in close contact by pressing, hammering, or rolling. The application for rehearing is denied.

CRAIG et al. v. MICHIGAN LUBRICATOR CO. et al.

(Circuit Court of Appeals, Sixth Circuit. July 6, 1897.)

No. 414.

PATENTS—INFRINGEMENT—STEAM-ENGINE LUBRICATORS.

The Craig patent, No. 398,583, for an improvement in sight-feed steam-engine lubricators, construed, limited, and *held* not infringed.

Appeal from the Circuit Court of the United States for the Eastern District of Michigan.

J. W. Raymond and Edmund Whitmore, for appellants.

George S. Payson and George N. Lothrop, for appellees.

Before TAFT and LURTON, Circuit Judges, and SAGE, District Judge.

SAGE, District Judge. This appeal is from a decree dismissing bill for alleged infringement of letters patent No. 398,583, issued to W. H. Craig, February 29, 1889, for an improvement in steam-engine lubricators. See 72 Fed. 173.

The defendants are the Michigan Lubricator Company and Frank W. Marvin, as its president and individually. By stipulation, Max Nathan was made a party complainant, because of certain rights held by him under the patent. The suit was not pressed against Marvin, and no appeal was taken from the dismissal of the bill as to him. The bill, which is in the usual form, charges infringement of claims 2, 4, 5, 6, and 7. The answer sets up the invalidity of the claims of the patent for want of novelty or invention; that they are limited to the construction shown in the patent drawings; that they are for nonpatentable aggregations; that by limitations imposed by the patent office, and accepted by Craig, without appeal, the claims are restricted to the construction shown in the drawings of the letters patent; that a cup embodying Craig's alleged invention was publicly used and sold for more than two years prior to his application; and that the defendants do not infringe.

The object of the invention, as set forth in the specification, is "to provide a means of equalizing the steam pressure in a lubricator provided with a sight feed or an observation chamber, in which the drops of oil may be seen in or on their way to the part or parts of the engine to be lubricated in cases where the oil-discharge conduit leading from such lubricator is subject to a variation therein of pressure not incident at the time to the boiler from which steam is conducted into the lubricator."

The drawings show a steam-engine lubricator, which has a globular, metallic condenser, immediately above and connected with a sight

feed or observation chamber, which has a glass pane, d, a reflecting partition, e, and a nipple of small pipe, f, to lead oil from the reservoir into the observation chamber when, the patentee says,—

"The latter is charged with water that may have escaped from the condenser down through the educt pipe or conduit, g, leading from the observation chamber up into the condenser to near the top thereof, such pipe, g, being to receive live steam from the condenser steam-induct pipe or conduit.

"From the condenser at its lower part, a passage, h (see Fig. 2), extends and opens into a narrow space between a reflector, i, and the glass pane, k, of another sight feed, l, such space opening into the oil reservoir. A screw plug, m, arranged as shown in Fig. 2, serves to interrupt the flow of water from the condenser to the said narrow space.

"The oil reservoir is furnished with means for supplying it with oil, such being an induct, n (see Fig. 1), provided with a screw plug, o. Furthermore, there is in rear of the partition, e, an oil exit or discharge pipe, r, to lead the oil to the part or parts of the engine to be lubricated.

"The above-described lubricator is essentially like that exhibited in letters patent No. 277,464, dated May 15, 1883, and granted to me. I have made additions to it for the object or purpose, hereinafter mentioned; that is to say, I have provided the condenser with a pipe or conduit, p, to lead from it to the boiler, in order to conduct steam from the boiler into the condenser, such pipe having in it a stopcock, q.

"The steam-educt pipe or conduit, g, has its upper end in close juxtaposition with the steam-induct pipe or conduit, p, and its other end is connected with the top of a steam-equalizing chamber near the point where the oil-discharging conduit connects. Thus, live steam passes direct from the induct pipe or conduit, p, through the educt conduit, g, to the top of the observation chamber. This produces a compact device. The pipe, g, is wholly within the lines of the lubricator, being a part thereof, and requiring no fitting or adjusting when the device is placed on a boiler. This educt or steam pipe, g, leads into a steam space or duct connected to the observation chamber. This space forms a steam chamber, which enhances materially the value of the lubricator.

"When the lubricator is being used, live steam passes down the induct, p, into the condenser, b, a portion of it being condensed, and passing down the passage, h, into the oil cup, a, as usual. A modicum of the live steam from induct, p, passes as live steam down the educt, g, into the steam chamber, and, with the oil which rises through the sight-feed chamber, passes off through the exit, r, into the oil pipe, such outflow being regulated, as desired, by the stopcock, s. I have also provided the oil-exit pipe or conduit, r, with a stopcock, s, arranged on it as represented.

"From the above it will be seen that in this, my improved steam-engine lubricator, the steam enters directly into the condenser without first passing upward through the pipe therein. The water of condensation from such steam flows from the condenser down through a conduit to the oil reservoir, and the live steam passes down the pipe, g. The oil observation chamber being charged with water, the oil, in drops, passes through such water, and over the partition, e, into the oil-exit passage, and thence through such to the part or parts of the engine to be lubricated. The stopcock, s, being slightly open, the oil discharged in consequence thereof is met by the steam passing from the condenser downward through the pipe, g, therein into and through the exit pipe, such oil, by such steam, being carried to the part or parts of the engine to be lubricated.

"The object of the stopcock, s, in the exit pipe, r, when used with the above-described lubricator, A, provided with the steam pipe leading into the upper part of its condenser, is to throttle or regulate or wholly interrupt the discharge of the oil and steam in case of the steam for supplying the valve chest of the engine being wholly or partially shut off, such steam being supplied to such valve chest by a conduit separate from the oil-exit pipe of the lubricator. Therefore, with the cock, s, to the oil lubricator exit pipe, and with the steam let into the upper part of the condenser, and also from the condenser into the exit pipe, it will be seen that I can maintain a constant or nearly constant or uniform pressure of steam within the lubricator, even when the steam from the boiler to the valve chest of the engine may be cut off, such enabling me to maintain a uniform or practically uniform feed of oil through its sight-feed or observation chamber when the steam to the valve chest of the engine may be shut off.

"The steam chamber above referred to possesses very material advantages. It furnishes at this point a body of hot, live steam, that communicates with the sight-feed chamber. It keeps the lubricator sufficiently hot in cold weather, so as to have the oil in a good fluid condition without boiling it. The condense water passing by this chamber is kept warm, and, as warm water enters the oil chamber, softens the oil. This steam chamber also has a most valuable function as an equalizer, and forms in the lubricator an equalizing chamber, the exit of which is controlled by the valve, *s.* By means of this valve the exit is so controlled as to diminish the flow of steam through the steam chamber when desired, so that the steam pressure in the lubricator is regulated or equalized, which permits the oil under all circumstances only to be fed by the action of the pressure of the condense water.

"I do not claim a lubricator constructed as represented in the United States patent No. 262,774, in which oil passes in the sight-feed or observation tube downward through steam, and not through water, as in my lubricator."

The drawings are here presented as they appear in the letters patent.

The claims charged to be infringed are as follows:

"(2) A lubricator combining these elements: A condenser, a reservoir for oil, an observation chamber in which oil rises through water, an oil-discharging conduit leading from the top of the observation chamber, a conduit for conveying steam from the boiler into the condenser, and another conduit wholly within the lines of the lubricator, and for conveying live steam from the induct conduit of the condenser to the top of the observation chamber, as set forth."

"(4) In a sight-feed lubricator through water in which oil rises, the combination of the oil reservoir, a steam chamber at the top thereof, the oil-discharge conduit, and the condenser having a pipe to lead steam thereto, and also a pipe to lead steam into the said steam chamber and oil-discharging conduit.

"(5) In a sight-feed lubricator of the character described, a steam chamber located near the top of the oil reservoir, and communicating with the sight-feed chamber through which oil rises through water, and also having a pipe to lead steam into such chamber, and also communicate with the steam condenser of such lubricator, and another pipe to lead steam to the condenser, and communicate with the steam chamber or pipe leading thereto, whereby an equalizing pressure is obtained, as set forth.

"(6) A steam chamber located at the top of the oil reservoir, and having a pipe to lead steam into such chamber, and also to communicate with the condenser, and a pipe to lead steam to such condenser, such steam chamber also communicating with a sight-feed chamber through which oil rises through water, and also having an oil-discharge passage to communicate with a pipe to convey the oil or oil and steam to the part or parts of the engine to be lubricated, all being substantially as set forth.

"(7) In a sight-feed lubricator in which oil rises through water, and having a steam chamber at the top part of the oil reservoir of such a lubricator, the combination of the following: The steam chamber referred to, a condenser, a pipe to lead steam thereto, and another pipe to lead steam into the said steam chamber, a conduit communicating with the sight-feed and steam chambers, a choked oil-discharge conduit communicating with the two last named chambers, the oil reservoir, and feed-regulating valve, all being combined to operate substantially as set forth."

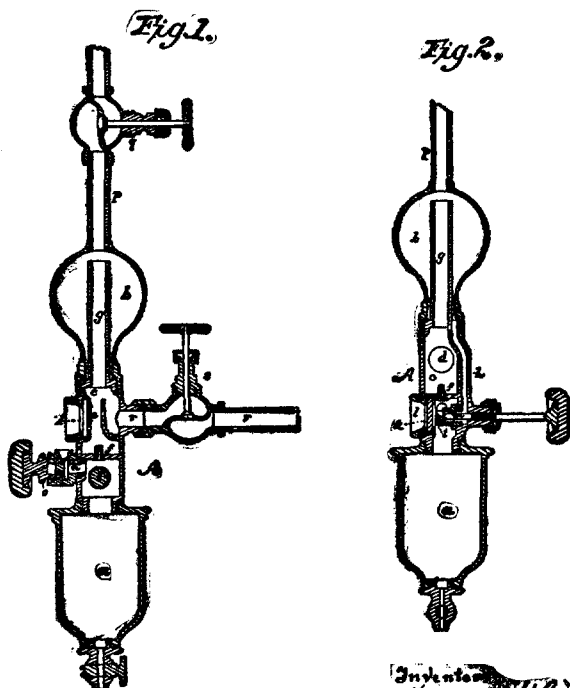
The problem which those engaged in devising steam lubricators had to encounter was how to introduce the necessary supply of lubricating oil regularly, and with any desired flow into the steam or valve chest of the engine against the pressure of the steam when the engine was in operation. The problem was solved, in a measure at first, by so connecting the oil reservoir with the steam pipe or boiler as to apply to its contents a counter steam pressure to balance the pressure in the steam chest, and then by some additional force, as gravity, feed the oil as needed into the steam chest and the parts to be lubricated.

(No. Model.)

W. H. CRAIG.
LUBRICATOR.

No. 398,583.

Patented Feb. 26, 1889.



Witnesses:
Thos. Houghton
Chas. A. Belmont

Inventor
Warren H. Craig
per H. H. Singleton
att'y.

Prior to Craig's device, there were some 30 patents designed to accomplish this result, which are pleaded and put in evidence by defendants as anticipations. Among them, one of the most prominent is the Siebert patent, No. 179,226, dated June 27, 1876, application filed January 3, 1876. That patent was for an improvement on his own invention, covered by letters patent No. 111,881, issued February 4, 1871. He states that in the lubricator covered by that patent the steam pressure upon the oil cup was balanced, and the only force for feeding out the oil was the hydrostatic pressure arising from the column of condensed steam in the reservoir. The equality of pressure was maintained only so long as the steam was admitted to the steam pipe through which the oil passed to the parts to be lubricated. When steam was shut off from that pipe, there being no pressure left to equalize the steam pressure through the condensing pipe, the oil was forced out from its cup, and into the steam chest, in excessive quantity, causing waste, and emptying the cup. To

overcome that difficulty, Siebert devised the improvement covered by his patent of June 27, 1876. It consisted of adding a supplemental pipe connected directly at one end with the condensing pipe or with the boiler, and at the other end with the steam pipe through which the oil passed to the parts to be lubricated. The supplemental pipe acted in unison with the steam pipe, so long as steam was admitted to that pipe, but supplied its place and acted independently to accomplish the same result whenever steam was shut off from that pipe or from what was known as the "dry pipe." The claim was for the supplemental, or, as it was termed, the "auxiliary" pipe, in connection with the lubricator.

Attention was directed by Craig to his patent No. 277,464, granted May 15, 1883, as being essentially like the patent in suit, but he states in his specification that he has made additions to the former patent, "for the object or purpose hereinbefore mentioned; that is to say, I have provided the condenser with a pipe or conduit, p, to lead it from the boiler in order to conduct steam from the boiler into the condenser, such pipe having in it a suitable cock, q."

By reference to the earlier patent it will be seen that the two condensers are identical, excepting that the screw plug in the top of the condenser of the first has been taken out, and a pipe, p, connected at that point. The steam inlet in that patent was below the condenser, and was provided with a tube or pipe, extending up into the condenser, where the steam was condensed to supply the water for displacing the oil, which, when displaced, passed out by means of a tube from the oil chamber through water condensed in a trap in the lower portion of the steam inlet, and thence through the observation chamber to the steam pipe of the engine cylinder. There is no intimation in that patent, or in the patent in suit, that the pipe, g, as it is lettered in the patent in suit, or b, as it is lettered in the prior patent, can be located elsewhere than within the condenser. In the specification of the patent in suit it is described as "wholly within the lines of the lubricator, being a part thereof," and as an educt pipe or conduit "leading from the observation chamber up into the condenser to near the top thereof, such pipe, g, being to receive live steam from the condenser steam induct pipe of conduit." In addition to this, and not less significant, it appears from the file wrapper and contents that the patent office understood that within the lines of the lubricator meant within the condenser of the lubricator. In the opinion of the examiners in chief on appeal in the matter of the interference between the application of Craig and patent No. 308,258, granted November 18, 1884, to Clarence B. Hodges and Elija McCoy, the examiners in chief stated that:

"The essence of the matter in issue, as well as Craig's claims *ex parte*, lies in the conduit to lead steam from the boiler into the condenser of a side-feed lubricator of the character described, in combination with another conduit within, and to lead steam from the condenser into the oil-discharging conduit, so as to provide a circulation when the throttle of a locomotive engine is closed, and thus prevent the pumping action of the cylinders from draining the oil chamber. This is what Craig now alleges to be his invention and discovery, and, in consequence, obtained a judgment of patentability on."

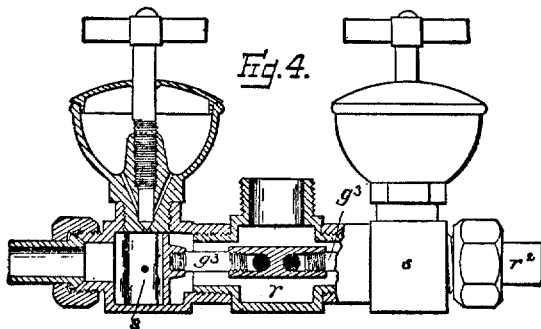
It appears that Craig, in order to save his claim to priority, had introduced testimony to prove the possession of this device in 1883, and prior thereto. The examiners in chief said that that proved too much,—

"For if the lubricator which he had in use on stationary engines, and advertised for such use, contained the invention which he now bases his claim on, the same matter is clearly shown by the evidence to have been known and used by others as early as 1879. Craig cannot blow hot and cold with the same breath. He cannot plead that he had not the invention when public use is in question, and by the same evidence show that he had it when priority of invention is in question. He was given the benefit of the doubt on his own qualifications and distinctions, and 'ut res magis valeat quam pereat' to save forfeiture, but the invention cannot now be expanded to save priority."

This decision was affirmed by the acting commissioner, who subsequently denied a motion for rehearing. Later, in his official capacity as assistant commissioner, he granted a motion to reopen the case, and a former decision awarding priority to Hodges and McCoy and other parties in the interference was vacated, and Craig was declared to be the prior inventor. But the limitation above quoted of the pipe, g, was never removed, and it binds Craig and those holding under him.

The appellees' lubricator is manufactured in two forms, but the difference between them is so slight as to be unimportant. The blue print of the first shows a cup in which the inflowing steam and the outflowing oil are brought together in a chamber from which steam is taken to the condenser, and oil to the parts to be lubricated. The cup comprises a condenser and an oil reservoir connected with the condenser by means of a pipe controlled by a valve. At each side of the lubricator there is a sight feed of the up-drop variety, like that shown in patent 196,650, to G. H. Flower, dated October 30, 1877. These sight feeds are exactly alike, one connecting with the right-hand steam chest, and the other with the left. At their upper ends they connect with passages g³, shown in complainants' exhibit defendants' blue print Fig. 4, which leads into a chamber, r, into which also enters a steam-supply pipe, p.

*Complainants Exhibit
Defendants Blue Print
Lawrence Bond, n. p.*



The steam is supplied to the condenser by a branch of this pipe, p, leading from the chamber, r; and from the chamber, r, the oil and steam are led off to the steam chests, through choked tubes, marked "s²." The branch of the pipe, p, leading from the chamber, r, which is the conduit communicating with the sight-feed and steam chambers, is placed outside the condensing chamber, and not inside the condensing chamber, as in the complainants' patent. Counsel for the complainants insist that in both cases this pipe performs the same function, and produces the same result, and that the sole difference is one of location. They contend that the defendants' pipe is "wholly within the lines of the lubricator," as they interpret that expression; that is to say, that it "is a part of the lubricator proper (not necessarily inclosed within the main chambers or castings of the lubricator), included between the points at which the lubricator is connected with the boiler and engine, as distinguished from some part of the piping outside of the lubricator, which has to be taken care of by the person connecting the lubricator with the boiler and engine, and may or may not be properly supplied by the person making the connections."

We do not concur in this interpretation. To infringe, the pipe must be within the condenser, substantially as shown in the drawings and described in the text of the complainants' patent, limited, as it is, by his acceptance of the rulings of the examiners in chief. The defendants therefore do not infringe.

This conclusion renders it unnecessary to consider whether the complainants' patent, as limited, is valid, or whether, as was held by the court below, it is anticipated by prior inventions. The decree appealed from is affirmed, with costs.

LAILAW v. OREGON RY. & NAV. CO. et al.

(Circuit Court of Appeals, Ninth Circuit. June 28, 1897.)

No. 332.

1. CIRCUIT COURTS OF APPEAL—JURISDICTION—ADMIRALTY APPEALS.

In a suit in admiralty, where the district court has jurisdiction of the parties and the res, but dismisses the libel on the ground that the cause of action is barred by lapse of time, the question involved, on an appeal from such decree, is not one concerning the jurisdiction of the district court, so as to prevent the circuit court of appeals from taking jurisdiction.

2. APPEALABLE DECREES—PROCEEDINGS SUBSEQUENT TO MANDATE.

A new question arising in the trial court in proceedings subsequent to the mandate of an appellate court, and not included therein, may be the subject of another appeal.

3. STATUTES OF LIMITATION—COMMENCEMENT OF SUITS—ADMIRALTY CASES.

A provision in a state statute that an action shall be deemed commenced as to each defendant when the complaint is filed and the summons is served on him, etc., does not apply to admiralty suits in the federal courts. 73 Fed. 846, reversed.

4. SAME.

After a vessel libeled for collision had been released on stipulation, the personal representatives of one killed in the collision intervened to recover damages under a state statute. Monition and citation based thereon were

duly issued and published, but the ship was not then seized, on the theory that the stipulation therefor given stood for her in respect to the claim set up by the intervening petition. A recovery was had in the district court, but on an appeal it was held that the liability of the claimant on the stipulation could not be increased by the subsequent intervention of new claims, and that, when subsequent intervening claims are filed, the vessel must be again arrested. The court therefore reversed the decree, and remanded the cause for further proceedings, but without prejudice to the right of the court below to treat the intervening petition as an independent libel, and issue process thereon. This was accordingly done, and the vessel was again arrested. *Held*, that the intervening suit was to be deemed commenced from the original filing of the intervening petition so as to stop the running of limitation, and not merely from the date of the issuance of process. 73 Fed. 846, reversed.

Appeal from the District Court of the United States for the District of Oregon.

Williams, Wood & Linthicum, for appellant.

W. W. Cotton, for appellees.

Before ROSS, Circuit Judge, and HAWLEY and MORROW, District Judges.

ROSS, Circuit Judge. December 31, 1889, a libel in admiralty was filed by John Simpson, master of the British ship *Clan Mackenzie*, against the steamer *Oregon*, to recover damages for a collision between the two vessels, which occurred December 27, 1889, in the Columbia river. The libel charged the *Oregon* with fault in not having a proper lookout or a competent pilot, and in failing to keep out of the way of the *Clan Mackenzie*, which was then at anchor. Upon the arrest of the *Oregon*, a claim to her was interposed by the *Oregon Short Line & Utah Northern Railway Company*, and a stipulation given in the sum of \$260,000 to answer the libel. Subsequently, intervening petitions were filed by James Laidlaw, as administrator of the estates of Charles Austin and Mathew Reed, two seamen of the ship, who were killed in the collision; by James Simpson and his wife, individually; and by 18 others of the crew of the *Clan Mackenzie*, for loss of their property, clothing, and effects in the sinking of the ship; and by James Joseph, another of the crew, for injuries received by him. Exceptions to these petitions were filed by the claimant, denying the right to intervene after the vessel had been discharged from arrest. As to the intervention of Laidlaw, the further objection was made that the right of action for the deaths of Austin and Reed did not survive to the administrator of their estates. The exceptions were overruled, and the claimant ordered to answer. Answers were accordingly filed. Subsequently, and on April 5, 1890, the *Oregon Short Line & Utah Northern Railway Company*, charterer of the *Oregon*, filed a cross libel against the *Clan Mackenzie*, charging that the collision occurred through the fault of the latter, in certain particulars. A stipulation was given in the sum of \$50,000 to answer this cross libel, and the cases came on to a hearing in the district court. That court found both vessels in fault, and adjudged a division of the damages. The intervening petitions were held to have been properly filed, and one-half of the petitioner's claims was ordered to be paid by the *Oregon*,

and the other half out of the money found to be due to the Clan Mackenzie. 45 Fed. 62. From that decree both parties appealed to the circuit court, which affirmed the decree of the district court, and the case was then taken to the supreme court of the United States, where it was held, among other things, that the liability of the claimant on its stipulation could not be increased by the intervention of new claims made after the stipulation was filed and the steamship discharged; that if, after the stipulation is given, and the vessel is discharged from custody, other libels are filed, a new warrant of arrest must be issued, and the vessel again taken into custody. Accordingly, the decree appealed from was "reversed, with costs to the original libelants as against the steamship Oregon, and with costs to the Oregon as against the interveners, and the case remanded to the circuit court for further proceedings in conformity with this opinion; without prejudice, however, to the right of the court below, or of the district court, in its discretion, to treat the intervening petitions as independent libels, and to issue process thereon against the steamship Oregon, her owners or charterers, or to take such other proceedings therein as justice may require." 15 Sup. Ct. 804. In pursuance of the mandate of the supreme court, the trial court entered an order permitting the libels of intervention to stand as original libels from the date of their filing, and directing process to issue for the seizure of the Oregon. Upon the making of that order exceptions were filed to the libels of intervention, upon the ground that the claims made therein are stale, and are barred by the laches of each of the libelants, and that as to the claim of Laidlaw, as administrator, the facts relied upon are not sufficient to entitle the administrator to the relief prayed for. The court below overruled all of the exceptions other than those to the petition of Laidlaw as administrator, in which the claimant set up laches and the statute of limitations in bar of that intervenor's right to recover, in respect to which the exceptions were sustained; and Laidlaw, as such administrator, not desiring to plead further, the court entered a decree dismissing his libel, with costs to the complainant. 73 Fed. 846. It is from that decree that the present appeal was taken.

A motion to dismiss the appeal is made by the claimant upon the following grounds:

"First. That the only question in issue is the jurisdiction of the district court. Second. In case this appeal may be regarded or treated by the appellant or by this court as an appeal from a decree entered by the district court of the United States for the district of Oregon upon a mandate issuing out of the circuit court of the United States for the district of Oregon, this court is without jurisdiction to entertain said appeal."

Neither ground is well taken. It is a mistake to say that the question involved is one of jurisdiction. The cause of action was within the admiralty jurisdiction of the court, and there is no doubt about the jurisdiction of the court over the parties and over the res. The real and only question involved is whether the libelant's cause of action is barred by lapse of time.

In respect to the second ground of the motion, it is sufficient to say

that the question out of which the appeal arises was not involved in the original suit, and was not included in the mandate of the appellate court. It arose in the course of the subsequent proceedings of the trial court, and is a proper subject of appeal. The motion to dismiss is, therefore, denied.

The statutes of Oregon, in which state is the place where the collision in question occurred, provide as follows:

"When the death of a person is caused by the wrongful act or omission of another, the personal representatives of the former may maintain an action at law therefor against the latter, if the former might have maintained an action, had he lived, against the latter, for an injury done by the same act or omission. Such action shall be commenced within two years after the death." Hill's Ann. Code, § 371.

"Every boat or vessel used in navigating the waters of this state * * * shall be liable and subject to a lien * * * for all * * * damages or injuries done to persons or property by such boat or vessel." Id. § 3690.

It was held by this court in the case of *The Willamette*, 18 C. C. A. 366, 70 Fed. 874, that the lien given by the latter section accompanies the right of action given by the former to the representatives of deceased persons. The local law thus giving a lien upon the offending thing for such damages as are here involved, it is the settled law that the aggrieved party may proceed in rem in the proper court of admiralty. *The Corsair*, 145 U. S. 335, 12 Sup. Ct. 949. The local law giving the lien, however, conditions the right upon the commencement of the action within two years after the death. Time has thus been made "of the essence of the right, and the right is lost if the time is disregarded." *The Harrisburg*, 119 U. S. 199, 7 Sup. Ct. 140. Has it been disregarded in the present case? is the question to be decided upon the merits. That depends upon what constitutes the commencement of the libelant's suit. If the filing of his petition of intervention, which, by the order of the court, is permitted to stand as his independent libel, constitutes such commencement, he is, of course, in time, for that was filed within two months after the collision which caused the death of the libelant's intestates. If, however, the time of the seizure of the Oregon under the petition of intervention, treated as an independent libel, is to be taken as the time of the commencement of the suit, then the libelant is clearly barred. In this connection, there is cited and relied upon, both by the claimant and the learned judge of the court below, a provision of the Oregon statute to the effect that an action shall be deemed commenced as to each defendant when the complaint is filed and the summons is served on him, and that an attempt to commence an action shall be deemed equivalent to the commencement thereof when the complaint is filed and the summons delivered, with the intent that it shall be actually served, to the sheriff. That is a mere statutory provision respecting the remedy, and that, too, it would seem, in actions at law. It is inapplicable to the procedure of admiralty courts. In the exercise of their admiralty and maritime jurisdiction, says Justice Story in the case of *The Chusan*, 2 Story, 455, Fed. Cas. No. 2,717, "the courts of the United States are exclusively governed by the legislation of congress, and, in the absence thereof, by the general principles of the maritime law. The

states have no right to prescribe the rules by which the courts of the United States shall act, or the jurisprudence which they shall administer. If any other doctrine were established, it would amount to a complete surrender of the jurisdiction of the courts of the United States to the fluctuating policy and legislation of the states. If the latter have a right to prescribe any rule, they have a right to prescribe all rules, to limit, control, or bar suits in the national courts. Such a doctrine has never been supported, nor has it for a moment been supposed to exist, at least so far as I have any knowledge, either by any state court or national court within the Union." See, also, *Steamboat Co. v. Rea*, 18 How. 223; *The Selah*, 4 Sawy. 40, Fed. Cas. No. 12,636; *Watts v. Camors*, 10 Fed. 148; *The Kate Tremaine*, 5 Ben. 60, Fed. Cas. No. 7,622; *New Zealand Ins. Co. v. Earnmoor Steamship Co., Limited* (decided by this court February, 1897) 24 C. C. A. 644, 79 Fed. 368.

The intervening petition of Laidlaw, as administrator, was not directed against the owner of the Oregon, but was a proceeding against the ship itself, and prayed that it be condemned and sold to pay the damages alleged to have been caused by it. Motion, and citation based thereon, were duly issued and published, as in other proceedings in rem. The ship was not then seized under process issued upon the intervening petition, upon the mistaken theory that the stipulation theretofore given in the proceeding in which the intervention took place stood for the ship in respect to the claims made by the intervening petition as well as in respect to those it was given to meet. But the basis of such seizure was laid by the filing of the intervening petition shortly after the cause of suit arose, and has continued to exist ever since. It was the basis for the order for the seizure of the ship that was made by the court below. The delay in making the seizure after the filing of the petition in intervention was occasioned by the error of the intervening petitioner, already referred to, and into which both the district and circuit courts also fell. The intervening petitioner's proceeding was, however, from the beginning, a proceeding in rem, and at no time one in personam. His error in considering and treating the stipulation as the res, did not deprive him of the right of seizing the res upon discovering the error, the basis for such seizure continuing to exist. This evidently was the view of the supreme court in reversing the decree in the original cause, as it did, without prejudice to the right of the lower court, in its discretion, to treat the intervening petition as an independent libel, and to issue process thereon against the Oregon. While it is true that in a proceeding in rem a court of admiralty does not acquire jurisdiction of the res until its seizure, the filing of the libel constitutes the commencement of the suit. Ben. Adm. p. 241, § 413; 1 Conk. Adm. p. 417, c. 13.

We are of opinion that the libellant's cause of action was not barred by lapse of time, and the judgment of the court below is accordingly reversed, and the cause remanded for further proceedings.

RAY v. PEIRCE.

(Circuit Court, D. Indiana. July 14, 1897.)

REMOVAL OF CAUSES—AMOUNT IN CONTROVERSY—RECEIVER.

Where a suit is instituted in a state court against the receiver of a railroad appointed by the federal circuit court for that district without leave of the court by which he was appointed, and the amount in controversy is \$2,000 or less, the receiver has no right to the removal of such cause to the court by which he was appointed, where his petition fails to show a state of facts making the removal necessary to the promotion of the ends of justice.

This is an action for personal injuries, brought in the state court by Harrison Ray against Robert B. F. Peirce, as receiver of the Toledo, St. Louis & Kansas City Railroad Company. A petition by defendant for removal was denied by the state court, whereupon he procured a transcript, and filed it in this court. Heard on motion to remand.

Blacklidge & Shirely, for plaintiff.

Clarence Brown and Charles A. Schmettau, for defendant.

BAKER, District Judge. On November 28, 1896, the plaintiff commenced an action, without having procured the previous leave of this court, in the circuit court of Howard county, Ind., against the defendant as receiver, to recover damages sustained by the plaintiff by reason of injuries to his person and property by coming in collision with a locomotive engine and train of cars controlled and operated by the defendant, as receiver, under such circumstances as to render such receiver liable in damages therefor. The plaintiff, in his complaint, asked damages in the sum of \$2,000. The defendant was duly served with summons to answer the complaint, returnable on December 21, 1896. On the return day the defendant filed in the state court his petition and bond for the removal of the case into the circuit court of the United States for the district of Indiana. The removal, after consideration, was denied by the state court on January 29, 1897. The defendant, notwithstanding the ruling of the state court, having procured a transcript of the pleadings and proceedings in the cause, filed the same in the office of the clerk of this court on April 3, 1897. The verified petition of the receiver showed that on January 23, 1895, in the suit of the Continental Trust Company et al. against the Toledo, St. Louis & Kansas City Railroad Company et al. for the foreclosure of a mortgage on the assets and property of that railroad company, the defendant, Robert B. F. Peirce, was appointed receiver of the assets and property of the railroad company, and is still acting as such receiver; that the present action was brought against the defendant as such receiver, and in his official capacity as an officer of this court, for damages for personal injuries and injury to personal property alleged to have been sustained by the plaintiff by reason of the negligence of the receiver's employés.

The petitioner bottoms his right of removal on two grounds: First, that the suit is one arising under the laws of the United States; and, second, that it is one arising out of the transactions of the defendant

in his official capacity as receiver of the Toledo, St. Louis & Kansas City Railroad, and in its operation under the authority of this court, and as such that it is a suit ancillary to the suit now pending in this court in which the defendant was appointed receiver. The fact that the suit is one arising under the laws of the United States does not entitle the defendant to remove the same from the state to the national court unless the matter in dispute exceeds, exclusive of interest and costs, the sum or value of \$2,000. 25 Stat. 434, § 2. Hence, if the suit is removable on the application of the receiver, such right of removal is dependent on the ground that the suit is one growing out of the acts and transactions of the receiver as an officer of this court, and as such is ancillary to the suit now pending in this court in which the defendant was appointed receiver. When a court exercising jurisdiction in equity appoints a receiver to hold the property of an insolvent corporation, that court assumes the administration of the estate. The possession of the receiver is the possession of the court, and the court itself holds and administers the estate through the receiver, as its officer, for the benefit of those whom the court shall ultimately adjudge to be entitled to it. *Porter v. Sabin*, 149 U. S. 473, 13 Sup. Ct. 1008; *White v. Ewing*, 159 U. S. 36, 15 Sup. Ct. 1018. The possession of the court, through its receiver, draws to the jurisdiction of that court the control of the assets of the insolvent, so far as persons having claims to participate in the distribution of such assets are concerned, and parties must go into that court in order to assert their rights, prove their claims, and secure whatever may be due them, or their share or interest in the estate. It is the settled law that every person having a claim or demand against an estate in the possession of a receiver, or against the receiver for any act or transaction of his in his official capacity, must assert such claim or demand in the court in which such receiver was appointed, without regard to the nature of the controversy, the citizenship of the parties, or the sum or value of the matter in dispute. The prosecution against the receiver of any such claim or demand in any other court without the leave of the court appointing such receiver would be regarded as a contempt of its authority, and any judgment recovered against him in his official capacity in any other court would be treated as unauthorized and void by the court having jurisdiction of the estate of the insolvent in the possession of its receiver. Such are the general principles of the law, uninfluenced by legislation applicable to receiverships. The consequences flowing from these principles of the law were found to be intolerably burdensome to persons having small claims and demands against the insolvent or against the receiver for his acts or transactions in his official capacity. To compel the claimant to prosecute a suit against the receiver of a railroad for a small demand in the court of his appointment, generally remote from the claimant's residence, involved such inconvenience and expense as to amount in many cases to a practical denial of justice. Even an application to the court who appointed the receiver for leave to sue in another court nearer the residence of the claimant and his witnesses was found to be inconvenient and expensive, and fre-

quently such applications were met with denial. With the multiplicity of railroad receiverships the evil became so intolerable that legislation was found necessary to secure relief. Section 3 of the act of March 3, 1887, as amended and re-enrolled in the act of August 13, 1888 (25 Stat. 436), provides:

"That every receiver or manager of any property, appointed by any court of the United States, may be sued in respect of any act or transaction of his in carrying on the business connected with such property, without the previous leave of the court in which such receiver or manager was appointed; but such suit shall be subject to the general equity jurisdiction of the court in which such receiver or manager was appointed, so far as the same shall be necessary to the ends of justice."

It is apparent that this provision of the statute still leaves claimants at liberty to prosecute their claims against a receiver in the court of his appointment, and therefore it follows that the jurisdiction of the courts of the United States to hear and determine such claims when prosecuted by claimants remains unaffected.

It is also clear that such claimants are at liberty, without previous leave of the courts of the United States, to sue the receiver of such courts in any other court in respect of any act or transaction of his in carrying on the business of such receivership. On the part of the claimant it is contended that such right to sue the receiver, given by the statute, carries with it the right to pursue the case to final judgment in the court in which the suit was brought, when the matter in controversy is \$2,000 or less in value. On the part of the receiver the contention is that the present suit is ancillary to the principal suit now pending in this court, and hence is removable from the state court into this court, although the matter in controversy is only \$2,000 in value. The question here involved has never been decided by the supreme court, and, so far as this court is advised, it has never been passed upon but once by a circuit court. The right of receivers to remove any suit brought in a state court where the matter in dispute, exclusive of interest and costs, exceeds the sum or value of \$2,000, remains unaffected by the act of 1887-88. The right of removal in such cases rests upon the fact that the suit is one against a receiver appointed by a court of the United States, and is, therefore, one arising under the laws of the United States. The right to sue in the state court without procuring the leave of this court includes the right to prosecute such suit to final judgment when the amount involved is \$2,000 or less. When the amount in controversy is \$2,000 or less, perhaps under the last clause of section 3, if the petition for removal showed a state of facts making a removal necessary to the promotion of the ends of justice, this court would permit the removal, and take jurisdiction, even though the state court had denied a removal. But no such state of facts is disclosed by the petition for removal filed in this case. As was said by the supreme court in the case of *Railway Co. v. Johnson*, 151 U. S. 81, 103, 14 Sup. Ct. 250, 256:

"Certainly the preservation of general equity jurisdiction over suits instituted against receivers without leave does not, in promotion of the ends of justice, make it competent for the appointing court to determine the rights of persons who were not before it, or subject to its jurisdiction; and the right to sue without resorting to the appointing court, which involves the right to obtain judgment, can-

not be assumed to have been rendered practically valueless by this further provision of the same section of the statute which granted it."

If, in suits involving \$2,000 or less, brought in a state court, the receiver may at once remove them into a court of the United States, then the right to sue secured to the claimant by the statute is rendered practically valueless. Such a construction would defeat the true meaning and intent of the statute. The statute abrogates the old rule on the subject of suing receivers. It is made lawful now to sue a receiver appointed by a court of the United States without procuring the leave of that court. The court has no discretion to say when or where its receiver may be sued. The right to sue is given without condition or limitation, and, as was said by the supreme court, it "cannot be assumed to have been rendered practically valueless by this further provision of the same section of the statute which granted it." The cases cited and relied on in the case of *Carpenter v. Railroad Co.*, 75 Fed. 850, decide nothing in conflict with the foregoing views, as a brief review will show. The case of *McNulta v. Lochridge*, 141 U. S. 327, 12 Sup. Ct. 11, was one where *Lochridge*, the defendant in error, began two suits in a state court against *McNulta*, the plaintiff in error, as receiver of the Wabash, St. Louis & Pacific Railway Company, to recover damages for the death of *James and Mary E. Molohan*, alleged to have been occasioned by the negligent management of an engine at a public crossing. At the time the cause of action arose, *Thomas M. Cooley* was receiver of the road under an order of the circuit court of the United States for the Southern district of Illinois, in a suit to foreclose a mortgage upon the road. Judge *Cooley* having resigned his receivership, *McNulta* was appointed his successor, and was in possession and operating the road at the time the suits were brought. Demurrers were interposed to the declarations, and overruled, and the suits were subsequently consolidated, tried, and a verdict was returned, and judgment entered thereon in favor of the plaintiff for \$6,000. This judgment was subsequently affirmed by the appellate court, and again by the supreme court of the state. 27 N. E. 452. Defendant thereupon sued out a writ of error to the supreme court of the United States, and assigned as error—First, that the supreme court of the state erred in holding that under the act of congress of March 3, 1887, the plaintiff was entitled to maintain the action, when it appeared from the record that *McNulta* was not the receiver when the cause of action accrued; and, second, in holding that under said act *McNulta* could be sued as receiver with respect to any act or transaction which accrued before his appointment, without the previous leave of the court of the United States by which he was appointed. The supreme court held that the first assignment of error did not present a federal question, but a question of general law, namely, whether one person holding the office of receiver can be held responsible for the acts of his predecessor in the same office. The court further held that the substance of the second assignment was that the supreme court of Illinois erred in holding that such suit could be maintained against the present receiver for the acts of his predecessor, without the previous leave of the court appointing him. The

court were of opinion that there was no foundation for the contention of the receiver that the state court erred in so holding. They said:

"The act of March 3, 1887, declares that every receiver * * * may be sued in respect of any act or transaction of his in carrying on the business connected with such property without the previous leave of the court in which said receiver or manager was appointed. We agree with the supreme court of Illinois that it was not intended by the word 'his' to limit the right to sue to cases where the cause of action arose from the conduct of the receiver himself or his agents; but with respect to such liability he stands in the place of the corporation."

It was also observed that:

"The receivership was continuous and uninterrupted until the court relinquished its hold upon the property, though its personnel may be subjected to repeated changes."

The court then proceeded to say:

"Actions against the receiver are in law actions against the receivership, or the funds in the hands of the receiver; and his contracts, misfeasances, negligences, and liabilities are official, and not personal, and judgments against him as receiver are payable only from the funds in his hands. As the right given by the statute to sue for acts and transactions of the receivership is unlimited, we cannot say that it should be restricted to causes of action arising from the conduct of the receiver against whom the suit is brought, or his agents."

This case did not present, nor did the court decide, the question of the right of the receiver to remove from a state into a national court a suit against him involving \$2,000 or less.

In the case of *White v. Ewing*, 159 U. S. 36, 15 Sup. Ct. 1018, the question certified to the supreme court was this: Has the circuit court of the United States, in a general creditors' suit properly pending therein for the collection, administration, and distribution of the assets of an insolvent corporation, the jurisdiction to hear and determine an ancillary suit instituted in the same cause by its receiver in accordance with its order, against debtors of such corporation, so far as in said suit the receiver claimed the right to recover from any one debtor a sum not exceeding \$2,000? The court said the question so certified did not demand their opinion whether or not a single bill against all the defendants would lie for the amounts severally due by them, but whether, so far as in said suit the receiver claimed the right to recover from any one debtor a sum not exceeding \$2,000, the court had jurisdiction to render judgment against him. The court held that the question must be answered in the affirmative. The third section of the act of March 3, 1887, has no application to this question, and it was not cited or referred to by the court in its opinion. The case was decided on the general principles of law applicable to receiverships, and what was said by the court on that subject was a statement of general principles, uninfluenced by the statute. It cannot be claimed that the general expressions found in the opinion of the court throw any light on the meaning and effect of section 3 of the statute in question. The question for decision there did not involve any consideration of that section, and the case was decided exclusively upon the general principles of the law of receiverships. The cases of *Rouse v. Letcher*, 156 U. S. 47, 15 Sup. Ct. 266, and *Rouse v. Hornsby*, 161 U. S. 588, 16 Sup. Ct. 610, did not involve the question now before

the court, and the opinions of the court in those cases reflect no light upon the construction and effect of the statute in its application to the question at bar.

We are aware that the views expressed here are in conflict with the opinion of the court in *Carpenter v. Railroad Co.*, supra; but, after an attentive consideration of that case, the court finds itself unable to follow it. The order of the court is that the cause be remanded to the circuit court of Howard county, Ind., at the costs of the receiver.

SULLIVAN v. BARNARD.

(Circuit Court, W. D. Missouri. July 17, 1897.)

REMOVAL OF CAUSES—RECEIVER—AMOUNT IN CONTROVERSY.

Where a suit is instituted in a state court against the receiver of a railroad appointed by the federal court for that district without leave of the court by which he was appointed, the receiver may remove the cause to the court administering the trust, although the amount in controversy is less than \$2,000.

This is an action by Joseph W. Sullivan against J. T. Barnard, as receiver of the Omaha & St. Louis Railway Company, for personal injuries, removed from the state court on petition of defendant. Heard on motion to remand.

H. Q. Bridges, for plaintiff.

Theodore Sheldon, for defendant.

PHILIPS, District Judge. This is a motion to remand the cause to the state court from which it was removed into this court. The ground for removal is that the amount in controversy is less than \$2,000, exclusive of interest and costs. To understand this contention, it must be stated that defendant, as the petition alleges, at the time of the institution of the suit in the state court was a receiver appointed by the United States circuit court for the Southern district of the state of Iowa, and also in the United States circuit court for this district; and he was sued as such receiver in the state circuit court for Gentry county, in this district. The action is to recover damages for personal injuries alleged to have been sustained by plaintiff, as employé of the railroad, while being managed and controlled by the receiver. The amount of damages claimed in the petition is \$1,999. Such an exact and unusual sum was evidently consented to by plaintiff as the measure of his damages for the purpose, as he conceived, of avoiding the jurisdiction of the United States court. It has been directly held in *Carpenter v. Railroad Co.*, 75 Fed. 850, that an action against a receiver appointed by a federal circuit court, growing out of the operation of a railroad, is ancillary to the suit in which the receiver was appointed, and that such a controversy is cognizable in the United States court, regardless of the citizenship of the parties, the nature of the controversy, or the amount involved. This ruling was bottomed upon the proposition established by the supreme court that actions against receivers, in contemplation of law, are actions against the receivership, or the funds in the hands of the

receiver; that his contracts and negligent acts are official, and not personal; and any judgment against the receiver is payable only out of the funds in his hands. *McNulta v. Lochridge*, 141 U. S. 327, 332, 12 Sup. Ct. 11. In *White v. Ewing*, 159 U. S. 36, 40, 15 Sup. Ct. 1018, 1019, Mr. Justice Brown said:

"The circuit court obtained jurisdiction over the Cardiff Coal & Iron Company [that is, the insolvent company] by the filing of the original creditors' bill by Bosworth, a citizen of Massachusetts, and by the appointment of a receiver; and any suit by or against such receiver, in the course of winding up of such corporation, whether for the collection of its assets or for the defense of its property rights, must be regarded as ancillary to the main suit, and is cognizable in the circuit court, regardless either of the citizenship of the parties or the amount in controversy."

The suit against the receiver in the case at bar is predicated of his misfeasance or negligence in operating the property intrusted to his care and control. Any judgment recovered against him would be a charge against the estate, and, if paid, would be taken out of the trust funds being administered by the court. It therefore concerns the court itself, which is managing the estate through the receivership, and affects the property in the custody of the court. The plaintiff in this case, just as the plaintiff in the case of *Rouse v. Letcher*, 156 U. S. 47, 15 Sup. Ct. 266, did, might have filed his intervening petition for relief against the receiver, either in the United States circuit court of Iowa or in this district, and had his claim investigated by the master, and his judgment ordered paid out of the assets in the hands of the receiver. But, availing himself of the privilege of the present judiciary act to institute his suit in the state court without leave of the court administering the estate, can it be that he can thereby escape the right of removal to the United States court? It is true, as contended by plaintiff's counsel, that the present judiciary act authorizes a plaintiff to bring his suit either in the United States court or in the state court where he may find the receiver, without leave of the court. But there is nothing in the statute that denies to the receiver the right of removal of the cause into the United States court. That right remains just as it did before the enactment of the statute of 1887-88. It is to be observed that the second section of the act does not limit this right of removal into the circuit court administering the estate. The statute simply declares "that any suit of a civil nature," etc., "arising under the constitution or laws of the United States of which the circuit courts of the United States are given original jurisdiction by the preceding section, brought in any state court, may be removed by the defendant to the circuit court of the United States for the proper district"; that is, the United States court sitting in the district where the suit was instituted.

It is suggested by counsel for plaintiff that the case of *Carpenter v. Railroad Co.*, supra, is distinguishable from the case at bar on the ground that in the *Carpenter* Case the suit was removed from the state court of the district of the United States court administering the insolvent estate; whereas, in the case at bar, the suit was instituted against the receiver in a district other than that presided over by the United States court of primary jurisdiction. And the argument is

made that, because the plaintiff, a resident citizen of this district, could not have sued the nonresident receiver in this court in the first instance, therefore the suit is not removable. If the jurisdiction depended solely on the diverse citizenship of the parties, it would be sufficient answer to this contention that the suit may be instituted in the United States circuit court in the district whereof the plaintiff is a citizen and the nonresident defendant is found. *Machine Co. v. Walthers*, 134 U. S. 41, 10 Sup. Ct. 485. There is nothing in the record in this case to negative the presumption that the process which brought the defendant into the state court was served on him personally in the county from which the cause was removed. But, waiving this, and conceding that such right of removal depended upon the fact that the cause of action arises under the laws of the United States, the petition for removal sworn to recites the fact that defendant was appointed receiver of the railway in question "by the circuit court of the United States for the Western district of Missouri and the Southern district of Iowa." Conceding that the receivership here is ancillary to that of the Iowa court, this court is auxiliary to the Iowa court, assisting in administering the estate in custodia legis. In this view of the record, it is not necessary that I should discuss the right of removal in such case as that assumed by counsel in his brief. Until the case of *Carpenter v. Railroad Co.*, supra, is overruled by the supreme court, I deem it but respectful and conservative to follow it. The motion to remand is denied.

METROPOLITAN LIFE INS. CO. v. McNALL.

(Circuit Court, D. Kansas, First Division. June 29, 1897.)

No. 7,490.

1. JURISDICTION OF FEDERAL COURTS—SUITS AGAINST STATE OFFICERS.

A suit by a nonresident insurance company to enjoin a state superintendent of insurance from revoking its license to do business in the state is not a suit against the state, so as to prevent a federal court from taking jurisdiction. In re *Ayers*, 8 Sup. Ct. 164, 123 U. S. 443, distinguished.

2. FOREIGN INSURANCE COMPANIES—REVOCATION OF STATE LICENSE—STATE SUPERINTENDENT.

The superintendent of insurance of Kansas has no authority under the state statutes to arbitrarily revoke the license of a life insurance company of another state to do business in Kansas merely because it refuses to pay an alleged loss, which it claims is fraudulent and illegal, until the same has been established by the judgment of a court.

3. SAME.

In the Kansas act of 1889 (chapter 159) entitled "An act relating to insurance, and amendatory of section 24 of chapter 132, Laws of 1885," etc., which latter act concerns mutual fire insurance companies, the provisos limiting the power of the superintendent of insurance in respect to the granting and revocation of licenses to do business in the state apply to all insurance companies, including life insurance companies.

This suit is brought by the complainant, the Metropolitan Life Insurance Company, against Webb McNall, as superintendent of insurance of the state of Kansas, for the purpose of obtaining a perpetual

injunction restraining him from revoking the license of the complainant to do business in the state of Kansas.

The bill avers: That the complainant is a corporation organized and existing under the laws of the state of New York, and is a citizen of that state. That it has a capital stock of \$2,000,000, actually paid up. That its capital stock and assets amount to over \$3,000,000. That it is carrying on the business of life insurance in various states of the Union, including the state of Kansas. That in transacting its said business within the state of Kansas it has fully complied with all the laws for the regulation of life insurance companies, and with all legal rules and regulations of the department of insurance of said state. That it has been transacting business in Kansas since 1894, and prior thereto. That it has established a large number of agencies, and expended large sums of money in advertising and soliciting business, and has acquired a large and profitable business within said state. That license and permission to transact business within said state has been granted to it, and has been renewed and extended by the superintendent of insurance from year to year, for several years past. That on February 10, 1887, on due proceedings had before him, said Webb McNall, as superintendent of insurance of the state of Kansas, properly and legally renewed and extended the certificate of authority of complainant to transact business in said state until the last day of February, 1898, and did then and there issue and deliver to complainant a certificate of authority therefor. A copy of the certificate is attached to the bill. That complainant paid to defendant for issuing said certificate the full sum required by law to be paid, to wit, the sum of \$50, and also other fees in the sum of \$50. That since February, 1897, complainant has continued to transact the business of life insurance in said state under the authority of said certificate, and is now engaged in transacting a large and profitable business, and has at this time full authority to continue in the transaction thereof, and that there is no legal or valid reason why it should be prevented or forbidden from so continuing to transact its business in said state until the last day of February, 1898. The complainant then recites at length the facts concerning the issuance of two policies of insurance on the life of one Perth A. Emery, of Wyandotte county, Kan., during the year 1896, one in the sum of \$288, and the other in the sum of \$500, and alleges that in her written applications for said policies she purposely made false and fraudulent representations and concealments concerning her health and physical condition, etc.; that the assured died on the 3d day of February, 1897; and that by reason of her fraudulent representations and concealments said policies were void, and complainant is not, and should not be, held to the payment of the same. The complainant further avers: That on the 11th day of May, 1897, the defendant wrote and mailed a letter to complainant, of which the following is a copy:

"Topeka, May 11, 1897.

"George B. Woodward, Secretary Metropolitan Life Insurance Company, New York—Dear Sir: From evidence presented to this department, I find that on the 19th day of October, 1896, your company issued policy No. 13,863,661 to Perth A. Emery, of Wyandotte county, Kan., in the sum of \$288; that the terms and conditions of such policy provide that one-fourth of the above sum is payable if death occurs within six months from date. Mrs. Emery died on the 3d of February, 1897. There is due upon said policy the sum of \$72. Further, your company on the 24th day of November, 1896, issued to the same party policy No. 36,620, in the sum of \$500. Under the terms and conditions of this policy a deduction should be made in the sum of \$23.58, leaving the amount of the sum due at the time of her death, \$476.42, making in the aggregate due on both policies \$548.42. Proofs of loss were made in the above cases and delivered to your company. The beneficiaries of these policies are the heirs. The attorneys for the heirs are the firm of Morse & Morse, Kansas City, Kan. No settlement has been made upon these policies. Permit me to say that the letters concerning your company in this state are becoming entirely too frequent, and that if you desire to remain in Kansas, and transact business, you would better adjust this loss."

That on the 15th day of May the complainant wrote and mailed to the defendant a letter, of which the following is a copy:

"New York, May 15, 1897.

"Hon. Webb McNall, Superintendent of Insurance, Topeka, Kansas—Dear Sir: We have received your letter of the 11th of May in reference to the claims on these policies. Your letter closes as follows: 'Permit me to say that the letters concerning your company in this state are becoming entirely too frequent, and that this department desires to suggest that if you desire to remain in Kansas, and transact business, you had better adjust your losses as they occur.' We respectfully protest against this sentence. We have no knowledge of the frequency of the letters concerning this company received by you. We have, however, before this, received only one communication from you. That was concerning a death claim, known from your statements in the newspapers as the 'Dunn Claim,' which had been paid several days before your letter was received. Your letter was entirely unnecessary in that case. The claim was investigated and paid in due course of business, without any knowledge on our part that it had been brought to your notice, and payment had never been refused. As this is the only case to which you have ever previously called our attention, we protest that it does not form a basis for the threat contained in your letter. We also protest against the prejudgment of the two policies, numbered above, which is involved in the concluding sentence of your letter: 'My advice to you is to proceed and adjust this loss.' We do not owe anything upon these policies. You say the claimant has put her claim in the hands of lawyers. We are entirely willing that they shall bring suit, and to abide by the result of the trial. If the court shall adjudge that we owe this money, we will pay it; otherwise not, for we do not owe it. We protest against your assumption that we owe this claim without having heard the evidence. We do not know any reason why insurance companies' rights to a fair day in court are not equally guaranteed by the constitution and laws with the rights of other citizens. We deny your jurisdiction to deliver judgment, and assert that if you had jurisdiction it would be your duty to hear both sides before deciding. It is our custom to pay just claims, and many unjust claims, as soon as they are received. Occasionally, however, but very seldom, we have been imposed upon to such an extent that we believe it is our duty to the public to defend the claims to prevent conspiracies to rob insurance companies. The amount of the claims in these two cases is small, and our defense of them will probably cost more than the amount. The fraud attempted, however, was so aggravated, that we believe it to be our duty to contest the cases in the public interest. The insured under these policies had, at the time of making application to us, for many years been suffering from angina pectoris. She concealed this fact from our agent and from our physician. It is not a disease such as can at all times be detected by physical examination. It is a disease, however, which is certain to progress, and is certain to be fatal, and is incurable. Our physician who examined the lady in question asked her the questions contained in the applications about diseases of the heart, as well as other organs, and about her previous attendance by physicians. She denied any disease, and she denied any attendance by a physician, except that she admitted having been attended for some nervous prostration during change of life. We now find the fact to be that this woman had been under the care of a physician for many years, the attendance going back as far as the year 1887,—the policies being dated in 1896. We find she knew perfectly well of the disease she had, and that it was serious, and that she took care of herself on account of it. We have witnesses to prove this, and that the examination made by our physician was careful; that the questions were put one by one, and the answers given were correctly recorded. Under the terms of the contract the policy was avoided by this deliberate misrepresentation and fraud of the insured. We live up to our contracts, and other people should be required to do the same. Under these circumstances, we decline to pay this claim."

That each and every statement in said letter was authorized by the complainant, and was true. That said McNall, as superintendent of insurance, received said letter about the 20th day of May, 1897, and immediately thereupon, without legal authority so to do, and arbitrarily, capriciously, and maliciously, attempted to exclude complainant from transacting life insurance

business in the state of Kansas, and to revoke the authority of complainant to do business in said state by virtue of the license theretofore duly granted, and did arbitrarily, capriciously, and maliciously issue his order directing complainant to "cease soliciting business, receiving premiums, and issuing policies after this date in this state." That said order is as follows:

"Topeka, May 20th, 1897.

"Haley Fiske, Vice Prest. Metropolitan Life Ins. Co., New York, N. Y.—Dear Sir: I have received your communication, dated May 15th, concerning the claim of the heirs of Pertha E. Emery under policy No. 13,863,661 and No. 38,620. I also note that you say you will not pay the death loss accruing upon such policy as requested by this department, and that the parties are at liberty to sue as soon as they see fit; that you propose to contest said claims upon the ground that Pertha E. Emery made false and fraudulent representations to your company at the time the aforesaid policies were issued. Permit me to say that I know of no reason why you should not contest every policy in existence in this state upon which a loss occurs, but while you are doing so you will be required by this department to refrain from doing business in this state; hence I have this day revoked your authority to do business in this state by virtue of the license granted to you on the 6th day of February, 1897. You will govern yourselves accordingly, and cease soliciting business, receiving premiums, and issuing policies after this date in this state.

"Respectfully yours,

Webb McNall, Superintendent."

That defendant at the same time wrongfully and maliciously printed in the State Journal, a paper having a general circulation in the city of Topeka, the following notice:

"Notice.

"To Whom it may Concern: I hereby certify that on this, the 20th day of May, 1897, I have revoked the authority of the Metropolitan Life Insurance Co. of New York, N. Y., to do business in the state of Kansas. All persons interested will take notice, and govern themselves accordingly.

"Witness my hand and seal this 20th day of May, 1897.

"[Seal.]

Webb McNall, Commissioner."

That said defendant has ever since said date wrongfully and unlawfully attempted to enforce his said order against complainant, in violation of its rights and privileges, the said defendant well knowing that said complainant was perfectly solvent, and had paid every valid claim or obligation incurred or owing by it. That the defendant is without authority to impose the terms and conditions which he has attempted to impose upon the complainant, nor has he legal authority to arbitrarily exclude the complainant from the transaction of business within the state of Kansas. That said defendant has unjustly discriminated against the complainant, and between it and other life insurance companies transacting business in said state, and threatens to commence other proceedings against complainant, and to interfere with and utterly destroy its business within the state of Kansas. That if he is permitted to carry out his said order, the complainant will be unable to transact any business within said state. That said order has prevented complainant from receiving premiums in the usual and ordinary course of its business, not only in Kansas, but in other states, and has already obstructed and injured the complainant in its business, in Kansas and elsewhere, in the sum of \$50,000. That defendant threatens to persist in his purpose to prevent complainant from transacting any further business in said state, and threatens that he will wholly destroy its business if said complainant shall presume to insist upon its legal rights. That the damage to complainant will be irreparable unless the defendant is restrained by the order of this court from attempting to prevent the complainant from doing business in the state, and that complainant would be compelled to resort to a multiplicity of suits in order to enforce its legal rights. The complainant further avers that said defendant is wholly insolvent, and unable to pay any damages that may accrue to the complainant on account of his wrongful acts aforesaid, and that it has no adequate remedy at law; and complainant prays that an injunction issue out of this court against said defendant, as superintendent of insurance, restraining him from interfering with or attempting to in-

terfere with, complainant's business of life insurance, and in soliciting and receiving premiums and issuing policies.

Upon presentation of said bill, and on the 1st day of June, this court issued a temporary restraining order as follows:

"It is by this court ordered, adjudged, and decreed that the said defendant, Webb McNall, as superintendent of insurance of the state of Kansas, his agents and employes, and all persons acting for or under him, be restrained from in any manner interfering with the Metropolitan Life Insurance Company, its officers, agents, and employes, in the transaction of life insurance business in the state of Kansas, and also from interfering or attempting to interfere with said insurance company soliciting life insurance business, receiving premiums, and issuing policies on the lives of individuals within the state of Kansas, and that also the said Webb McNall, as superintendent of insurance, be restrained from enforcing or attempting to enforce his order of the 20th of May, 1897, attempting to revoke the authority of said insurance company to do business in the state of Kansas."

The matter comes on for hearing, upon the application for a temporary injunction, upon the verified bill of complaint and affidavits in support thereof.

Waggener, Horton & Orr and D. R. Hite (Albert H. Horton, of counsel), for complainant.

David Overmyer, David Martin, and A. B. Quinton, for defendant.

FOSTER, District Judge (after stating the facts as above). The defendant challenges the jurisdiction of the court in this: that the bill charges the wrongful acts of the defendant to have been done as superintendent of insurance, and purely in his official capacity, and seeks by mandatory injunction of this court to compel said officer to reissue the certificate of authority, and is in reality a proceeding against the state of Kansas. It will be observed that the restraining order heretofore issued is the ordinary injunction. It will be further observed that the bill charges that the defendant's acts were wrongful and malicious, and without authority of law, and illegal and void. It is earnestly contended by counsel for the defendant that this court has no jurisdiction, and in support of this contention counsel relies largely upon *In re Ayers*, 123 U. S. 443, 8 Sup. Ct. 164.

In the case of *Reagan v. Trust Co.*, 154 U. S. 362, 14 Sup. Ct. 1047, which was long subsequent to the *Ayers Case*, the supreme court had occasion to review at great length this question, and there laid down the doctrine that the court had jurisdiction, and that it was not in violation of the eleventh amendment of the federal constitution to proceed by injunction against an officer of the state seeking to enforce the provisions of an unconstitutional act of the legislature, and the order in that case enjoined the defendants in their official capacity as state officers. The court in said case (page 390, 154 U. S., and page 1051, 14 Sup. Ct.) uses the following language:

"Neither will the constitutionality of the statute, if that be conceded, avail to oust the federal court of jurisdiction. A valid law may be wrongfully administered by officers of the state, and so as to make such administration an illegal burden and exaction upon the individual. * * * They may go beyond the powers thereby conferred, and, when they do so, the fact that they are assuming to act under a valid law will not oust the courts of jurisdiction to restrain their excessive and illegal acts."

In *Cunningham v. Railroad Co.*, 109 U. S. 446, 452, 3 Sup. Ct. 292, 297, it was said:

"In these cases he is not sued as, or because he is, the officer of the government, but as an individual, and the court is not ousted of jurisdiction because he asserts authority as such officer. To make out his defense he must show that his authority was sufficient in law to protect him."

In *Re Ayers*, 123 U. S. 500, 8 Sup. Ct. 180, the court quotes with approval the doctrine established in *Allen v. Railroad Co.*, 114 U. S. 311, 5 Sup. Ct. 925, 962, and *Poindexter v. Greenhow*, 114 U. S. 270, 5 Sup. Ct. 903, 962, and says:

"The vital principle in all such cases is that the defendants, though professing to act as officers of the state, are threatening a violation of the personal or property rights of the complainant, for which they are personally and individually responsible. * * * 'A defendant sued as a wrongdoer, who seeks to substitute the state in his place, or to justify by the authority of the state, or to defend on the ground that the state has adopted his act and exonerated him, cannot rest on the bare assertion of his defense. He is bound to establish it. * * * It is necessary, therefore, for such a defendant, in order to complete his defense, to produce a law of the state which constitutes his commission as its agent and warrant for his act. This the defendant in the present case undertook to do.'"

And in the *Poindexter Case*, cited, the court uses this language:

"The case, then, of the plaintiff below, is reduced to this: He had paid the tax demanded of him by a lawful tender. The defendant had no authority of law thereafter to enforce other payment by seizing his property. In doing so, he ceased to be an officer of the law, and became a private wrongdoer. It is the simple case in which the defendant, a natural private person, has unlawfully, and with force and arms, seized, taken, and detained the personal property of another."

See, also, *U. S. v. Lee*, 106 U. S. 196, 1 Sup. Ct. 240.

So it will be seen that, so far as the case at bar is concerned, there is nothing in the *Ayers Case* that justifies the contention of the defendant that the state of Kansas is in reality the defendant in this action. The complainant has predicated its case on the want of legal authority of the defendant under the laws of Kansas to do the act complained of. The superintendent of insurance seeks to justify his action under the statutes of the state, but, in the words of the supreme court:

"The court is not ousted of jurisdiction because he asserts authority as such officer. To make out his defense, he must show that his authority was sufficient in law to protect him."

The defendant insists that under the laws of Kansas he not only has authority to arbitrarily refuse permission to insurance companies to do business in the state, but also to revoke such licenses without giving any cause therefor. The complainant contends that there is no law of the state authorizing the defendant to revoke its certificate for the reasons given by him. It further contends that, if the state has given such authority, it is repugnant to the constitution of the United States. The case chiefly relied on by defendant is *Insurance Co. v. Wilder*, 40 Kan. 561, 20 Pac. 265, and it becomes necessary to briefly examine that case, and see what were the facts, and just what was decided by the court. It appears from the record that one D. W. Wilder, then being superintendent of insurance of the state, arbitrarily refused to issue a permit to said insurance company, though solvent, responsible, and law-abiding, to continue its business in the

state. Whether it was mere caprice of the superintendent, or a desire for notoriety, or even a baser motive, does not appear. The court decided that the defendant's duties in granting authority to insurance companies were not entirely of a ministerial nature, but were largely discretionary, and could not be controlled or directed by the writ of mandamus. It is not to be inferred, however, that the court meant to decide that there was no limit to discretionary power, nor was there involved in that case the power of the superintendent to revoke a certificate of authority already issued. It is not my purpose to detract from that decision, but it is safe to say that no court will be likely to enlarge or extend by implication the doctrine therein enunciated. In the case at bar the superintendent had exercised his discretionary powers, and had found the company entitled to a certificate to do business in the state, and had issued authority for the period of a year, received the fees (\$100) therefor, and subsequently collected other fees and charges from the company, none of which sums of money have been returned or tendered to the company. The defendant shortly afterwards revoked or attempted to revoke the certificate, alleging as a cause that the company refused to pay its losses. The complainant asserted that the claim of loss was fraudulent and illegal, and desired to contest it in the courts. Thereupon the defendant, without investigating the facts, laid down the ultimatum that the company should pay the claim or quit doing business in the state. The company refusing to yield, the defendant revoked its authority to do business in the state, and further ordered that it "cease soliciting business, receiving premiums, and issuing policies after this date in this state."

Reverting, again, to the proposition before stated, has the superintendent of insurance, under the statutes of Kansas, the authority, arbitrarily and without cause, to revoke and cancel the certificate of the complainant to transact business in the state? The cause assigned for the act of the defendant is no cause recognized by law. The complainant has the legal right to resort to the courts for the settlement of controversies between it and its policy holders, and to say that it must either forego its legal rights in that respect, and submit to pay all claims made against it, or quit business in the state, is arbitrary, unreasonable, and dictatorial. Is there anything, express or implied, in the statutes of Kansas, indicating any such intent of the legislature, or giving any authority to the superintendent to dictate such terms? In the case of *Insurance Co. v. Wilder*, supra, the court uses this language:

"One of the principal objects of the act creating the insurance department, and the office of superintendent, is the protection of the insured by excluding from the state such companies as are unsound and irresponsible. To accomplish this, large powers and considerable discretion must necessarily be lodged with some one."

Again, the court says:

"The superintendent has no right to discriminate in favor of one company and against another of the same character and standing, nor to arbitrarily and capriciously exclude any company from the state. He is expected to honestly investigate, and determine, under the rules furnished for his guidance, whether the conditions and requirements of the legislature have been complied with."

In reference to the authority of the superintendent of insurance to revoke the authority granted to companies to do business within the state, 1 Gen. St. 1889, p. 971, § 11 (paragraph 3324), provides as follows:

"Whenever it shall appear to the superintendent of insurance from the report of the person appointed by him, or other satisfactory evidence, that the affairs of any company, partnership or association, not organized under the laws of this state, are in an unsound condition, he shall revoke the authority granted to such company to do business in this state, and cause a notice thereof to be published in at least one newspaper published in the city of Topeka; and after the publication of such notice, it shall not be lawful for the agents of such company to procure any new applications for insurance, or issue any new policies."

Section 17 of the act provides what fees and moneys shall be paid by foreign insurance companies to entitle them to licenses to transact business within the state, and it is provided by the last clause of said section as follows:

"In case of neglect or refusal by any such company to pay said sum, the superintendent of insurance shall revoke the authority or license granted such company."

Section 80 (paragraph 3404) 1 Gen. St. 1889, reads as follows:

"Whenever any insurance company incorporated under the laws of any other state or country shall become liable to pay any loss to any person in this state, and shall neglect or refuse for three months after final judgment to pay the same, and all costs of suit incurred in prosecuting the claim of the insured to judgment, the said company may be perpetually enjoined from doing any business in this state until said claim and costs shall be fully paid."

The act of 1889 (chapter 159) contains the following provisions concerning the issuance and revocation of certificates of authority:

"Provided, however, that the superintendent of insurance shall have no power or authority to refuse an insurance company a certificate of authority to do business in the state, if such company is solvent, and has fully complied with the laws of the state; and provided further, that such superintendent of insurance shall have no authority to revoke or suspend the certificate of authority of any association or corporation transacting insurance business, if such association or corporation is solvent and complies with all the laws of the state. And also, it is further provided, that in all actions brought against the superintendent of insurance to compel him by mandamus or otherwise, to issue certificates of authority to any association or corporation desiring to transact insurance business in this state, and in all cases brought against the superintendent of insurance to restrain or enjoin him from revoking or suspending the certificate of authority of any association or corporation transacting insurance business in this state, such action or actions must be commenced and maintained in the county where the office of the superintendent of insurance is located and carried on."

These are the only provisions found in the statutes of Kansas touching the authority of the superintendent of insurance to revoke certificates granted to insurance companies to do business in the state, and, so far from giving the authority assumed by the defendant in this case, it clearly appears that his action is beyond any express or implied sanction of the law; indeed, section 80, above quoted, indicates clearly that the legislature intended that insurance companies should have the right to contest claims against them in the courts, and it provides that, unless judgments so obtained against them shall be paid within the period of three months, they shall be prevented from transacting

any further business within the state, not by revocation of their license, but by judicial process.

The complainant contends that the act of 1889, which was passed subsequent to the decision of the Wilder Case, has materially restricted the powers of the superintendent of insurance. That act is entitled "An act relating to insurance, and amendatory of section 24 of chapter 132, Laws of 1885," etc. Here are two clauses named in the title,—the first, an act relating to insurance; the second, amendatory of another act. Section 1 is chiefly given to amending the law of 1885 concerning mutual fire insurance companies, but there are three provisos inserted in the section. These provisos, in terms, limit and restrict the powers of the superintendent of insurance, not to mutual fire insurance companies alone, but to all insurance companies. Note the general terms of the second and third provisos before quoted. The superintendent of insurance shall have no authority to revoke or suspend the certificate of any association or corporation transacting business if such corporation is solvent and complies with the laws of the state. The third proviso requires any association or corporation bringing suit to compel the superintendent to issue certificates, or to enjoin him from revoking them, to bring the suit in the county where he keeps his office, which is the county where this suit is brought. Now, can it be said that the legislature intended that all these regulations and privileges should apply to mutual fire insurance companies alone, while the great mass of the insurance business was transacted by other companies? The title of the act is sufficiently broad, and the terms of the provisos sufficiently general, to include any and all insurance companies; and it is evident to me such was the legislative intent.

In reference to the authority of this court to grant the relief under the last proviso of the act, it was expressly decided in the Reagan Case (see pages 391, 392, 154 U. S., and page 1047, 14 Sup. Ct.) that under a similar statute of the state of Texas the federal courts have equal jurisdiction with the courts of the state, if complainant was a citizen of another state. If the statutes of Kansas would bear the construction contended for by defendant, giving him authority to revoke the certificates of authority of insurance companies because they refused to give up their rights to resort to the courts for redress and settlement of disputed claims, the question arises, could the state impose such terms on the companies? It must be admitted that the state of Kansas has the right to exclude foreign corporations entirely from doing business in the state, and it may impose any terms not objectionable to the constitution, or laws of the United States, on any such corporations, as a condition to their doing business in the state. *Insurance Co. v. French*, 18 How. 404; *Paul v. Virginia*, 8 Wall. 168; *Insurance Co. v. Morse*, 20 Wall. 456; *Doyle v. Insurance Co.*, 94 U. S. 535; *Barron v. Burnside*, 121 U. S. 199, 7 Sup. Ct. 931. The defendant relies upon the *Doyle* Case to sustain his contention. In that case, the laws of Wisconsin in terms required the defendant to do the act complained of, to wit, revoke the license of the insurance company, and the company had signed and filed its consent to the law as a condition to receiving permission to do business in the state, which

consent was that it would not remove its suits from the state to the federal courts. This decision, sustaining the law, was made by a divided court; but in the later case of *Barron v. Burnside*, 121 U. S. 199, 7 Sup. Ct. 931, the court affirmed the *Morse Case*, which held such a stipulation invalid, and explained and limited the *Doyle Case*. The court, speaking of the rule established in the *Morse Case*, says (94 U. S. 538):

"This was upon the principle that every man is entitled to resort to all the courts of the country, to invoke the protection which all the laws and all the courts may afford him, and that he cannot barter away his life, his freedom, or his constitutional rights."

The temporary injunction will be granted.

DESPEAUX et al. v. PENNSYLVANIA R. CO.

(Circuit Court, E. D. Pennsylvania. May 19, 1897.)

DEPOSITIONS—PRACTICE.

The act of March 9, 1892 (27 Stat. 7), entitled "An act to provide an additional mode of taking depositions of witnesses in causes pending in the courts of the United States," which provides that in taking such depositions the usage of the state in which the cause is pending may be followed, does not extend the right to examine parties to the cause in advance of trial. It only affects the mode of making the examination. *Shellabarger v. Oliver*, 64 Fed. 306, and *Register Co. v. Leland*, 77 Fed. 242, followed.

Motion on behalf of plaintiffs for an order on A. J. Cassatt to testify, under a pending eight-day rule, touching an agreement between the Pennsylvania Railroad Company and the National Transit Company, dated August 22, 1884.

These were suits to recover the amount of alleged excessive charges collected upon oil transported by defendant for plaintiffs between July, 1881, and January, 1890, and also to recover treble damages for the collection of such excessive charges, under the provisions of the act of assembly of Pennsylvania approved June 4, 1883 (P. L. p. 72). Mr. A. J. Cassatt had been a director of the defendant since 1883. Before that time he had been one of its executive officers. A jury had been sworn in the cause, and some testimony, including that of Mr. Cassatt, who was called for cross-examination by the plaintiffs, had been taken, when, by agreement of the parties, a juror was withdrawn. He was recalled for examination in advance of trial, under a rule which is set out at large in the opinion. Under advice of counsel, he declined to answer as to the agreement referred to in the motion. The cases cited upon plaintiffs' brief on motion for reargument, which are referred to in the opinion, are *Shellabarger v. Oliver*, 64 Fed. 306, and *Register Co. v. Leland*, 77 Fed. 242.

Jas. W. M. Newlin, for plaintiffs.

David W. Sellers, for defendant.

DALLAS, Circuit Judge. The plaintiffs have moved "for an order on A. J. Cassatt, requiring him to testify, under the eight-day rule pending herein," touching a certain agreement. The eight-day rule referred to was entered under clause 3 of rule 10 of the rules at law

of this court, which were adopted in or about the year 1882. That clause is as follows:

"A rule may be entered by either party to take the depositions of witnesses, without regard to the circumstance of their being ancient, infirm, or going witnesses, stipulating, however, eight days' notice to the adverse party; subject, nevertheless, in all other respects, to existing rules and regulations."

This provision was included, as I am informed, in a body of rules which the bar, or a committee thereof, submitted to the court, and which was therefore promulgated, about 18 years ago. This clause seems to have been derived from a rule of the courts of the state of Pennsylvania, in which, no doubt, it may be properly enforced; but its validity as prescribing a mode of procedure for this tribunal is attacked, both on behalf of the witness and of the defendant, upon the ground that it is in conflict with section 861 of the Revised Statutes. It is not desirable that I should pass upon this broad question on this application. It is enough for the present purpose that I should say that it is not pretended, in this instance, that any fact exists to bring the proposed examination within any of the specified exceptions to the section which has been referred to, and which is in these words: "The mode of proof in the trial of actions at common law shall be by oral testimony and examination of witnesses in open court, except as hereinafter provided." In my opinion, the very question now presented was decided in *Ex parte Fisk*, 113 U. S. 713, 5 Sup. Ct. 724, and in such manner as to preclude the granting of the order now asked for. I cannot agree that "the question is one of personal privilege of A. J. Cassatt." It is a question of the court's authority. The statute having prescribed "the mode of proof," neither as respects the witness nor a party can a different mode be substituted.

Nor can I sustain the plaintiffs' contention that "the defendant is estopped." It is not necessary to determine the dispute as to which side introduced the agreement about which it is proposed to examine this witness. The plaintiffs' right to examine him, at the proper time and place, upon that or any other subject, is not now for decision; but that the court has no power to subject him to the particular examination proposed, or to any other, by the method now insisted upon, I have no doubt.

The motion for an order requiring A. J. Cassatt to testify is denied.

On Motion for Rehearing.

DALLAS, Circuit Judge. The two cases referred to in the properly candid brief submitted by plaintiffs' counsel upon his motion for reargument of his motion for an order requiring Mr. Cassatt to testify are both squarely against the granting of the original motion. I follow the decisions in those cases with entire satisfaction. I think it would be unfortunate if the act of March 9, 1892, had been differently construed. Where, as in this instance, no good reason appears for taking the testimony of a witness by deposition and in advance of the trial, instead of in open court, the latter, which is the usual and regular course, is much to be preferred. The motion for reargument is denied.

BLACKMORE v. PARKES et al.

(Circuit Court of Appeals, Sixth Circuit. July 6, 1897.)

No. 457.

1. FRAUDULENT CONVEYANCE—CONSIDERATION—PREFERRING CREDITORS.

A conveyance of real estate, made in good faith by a failing debtor, in consideration that the grantee assumes and agrees to pay bona fide debts of the grantor to an amount near the value of the property, will not be set aside as in fraud of other creditors, although it appears that the purpose was to prefer certain creditors.

2. SAME—KINDRED OF DEBTOR AND CREDITOR.

The fact that a son of an insolvent debtor, who conveyed property in consideration of the assumption of certain of his debts by the grantee, subsequently purchased the principal part of the debts assumed, is not of itself sufficient to establish fraud in the conveyance.

Appeal from the Circuit Court of the United States for the Middle District of Tennessee.

Champion, Head & Brown, for appellant.

Henderson & Eggleston, for appellees.

Before TAFT and LURTON, Circuit Judges, and SEVERENS, District Judge.

LURTON, Circuit Judge. This is a bill by a judgment creditor of the defendant J. L. Parkes to reach and subject to the satisfaction of complainant's judgment certain real estate in the town of Franklin, Williamson county, Tenn., theretofore conveyed by Parkes to the defendant J. P. Hanner by deed bearing date March 12, 1886. The deed mentioned was duly registered, and conveys to the said Hanner two lots and storehouses in consideration of the assumption and payment by him of certain debts particularly described as due from the grantor to the several persons named in the deed, and aggregating some \$6,000. This bill was filed October 25, 1894. The other defendants to the bill are J. L. Parkes, Jr., a son of the grantor, and W. A. Roberts, to whom a lease of one of the storehouses has been made by the grantee with an option of purchase. It appears that in 1892 one of the storehouses so conveyed to said Hanner was sold by the grantee to Maria and Mattie Vaughn in consideration of \$3,000 paid to said Hanner, and deed with covenants duly executed and registered. The bona fides of this purchase by the Misses Vaughn is not assailed, and the purchasers are not, therefore, made parties. In this situation no further consideration need be given to so much of complainants' bill as seeks to set aside the conveyance of that particular property to the defendant Hanner. So far as the defendant W. A. Roberts has acquired any interest in the remaining storehouse by virtue of his contract of purchase and under his lease, he is entitled to protection as an innocent purchaser without notice of any fraudulent purpose; and complainants practically concede that any recovery by them must be subject to his rights under his lease and option, the purchase money to be paid by him under his contract

standing in the place of the property, should he exercise his option of purchase. Subject to the equitable rights of said Roberts, we come to the question as to whether the circuit court erred in dismissing complainants' bill. The conveyance to Hanner was upon consideration that he should assume and pay off certain specified debts of the grantor, aggregating \$6,000. The bona fide character of these debts is abundantly established, and it is also shown that the property conveyed did not exceed in value the consideration upon which the deed was made. The grantor, J. L. Parkes, was largely indebted at the time of this transaction, and was involved in liabilities upon which suit was then pending which culminated in a large judgment. He then owned the property described in that deed, his home place, and a third parcel of land, containing some five acres. The home place was valued at between \$3,000 and \$4,000, and was at the same time conveyed by deed to his son, the defendant J. L. Parkes, Jr., in consideration that he would assume and pay off debts of the grantor named in the deed aggregating \$3,600. The third parcel was also conveyed at same time to one W. J. Petway in payment of a debt due the grantee of \$1,000. The evidence makes it clear that all the debts described as due from the grantor in these several conveyances were in fact existing bona fide debts, and that the property conveyed did not appreciably exceed the debts assumed or paid as the consideration by the several grantees. This agreement by the vendee, Hanner, to pay off the debts of the vendor specified as the consideration for the deed, made the vendee personally liable in equity to the creditors of the vendor, and was a promise to pay his own debt to the persons designated by the vendor. This assumption constituted the purchase price which, by direction of the vendor, was made payable to the creditors, of the latter. *O'Conner v. O'Conner*, 88 Tenn. 76-82, 12 S. W. 447; *Moore v. Stovall*, 2 Lea, 548; *Lawrence v. Fox*, 20 N. Y. 268; *Burr v. Beers*, 24 N. Y. 178; *Thompson v. Bertram*, 14 Iowa, 476; *Thompson v. Thompson*, 4 Ohio St. 333; 3 Pom. Eq. Jur. § 1206; *Crawford v. Edwards*, 33 Mich. 354.

Though no express lien was retained to secure the payment of the debts thus assumed by the vendee, yet an equitable lien arose, and the land, in equity, would be charged with the payment of the purchase money, which constituted the consideration upon which the conveyance was made. 3 Pom. Eq. Jur. § 1206; *Railroad Co. v. Houston*, 85 Tenn. 224, 2 S. W. 36; *Crawford v. Edwards*, 33 Mich. 354; *Miller v. Thompson*, 34 Mich. 10. The intention that the land should be subject to an equitable lien to secure the payment of the debts assumed as the purchase price is strongly implied by the circumstances. That the impulse which led to this conveyance was an intent to prefer the debts named in this deed is clear. But this is not evidence of fraud, nor was such a preference prohibited by the law of the state. That the grantor and grantee were close relations and intimate friends is sometimes a circumstance from which fraud may be inferred. It is, however, a circumstance insufficient in itself alone, and in this case clearly of no moment, in view of the evidence as to the bona fides of the debts assumed, and the relation the amount of these debts bore to the value of the property. That the grantee

was permitted to manage and control the property conveyed, and to receive the rents, was a circumstance needing explanation. But the evidence is clear that no such agreement preceded the deed. Pending an advantageous sale, Hanner, by a subsequent agreement, permitted the grantor to collect the rents and look after the property, the latter agreeing to keep down the interest on the debts and keep the property insured and in repair by applying the rents to these objects. This seems to have been a purely business arrangement, and applied only so long as suited the wishes of both, and was not objectionable to the creditors interested. The proceeds of the sale of the storehouse sold to the Misses Vaughn were applied to the payment of such of the debts as were most pressing. The remaining property was conditionally sold to the defendant Roberts, but has not yet been confirmed.

The chief attack upon the conveyance, so far as this unsold property is concerned, arises from the fact that Parkes, Jr., claims to be the owner of a majority of the debts assumed by the grantee, Hanner. For complainants it is insisted that J. L. Parkes, Jr., holds these claims for his father, and has in fact paid them off for his father, and that the latter has thereby acquired an interest in the property which complainants may subject to their judgment. The evidence fails to establish this contention. Parkes, Jr., is shown to have been for several years a thrifty, energetic, young business man, and to have made a series of transactions out of which he realized a profit sufficient to enable him to buy in these claims. His evidence is that certain of these creditors became urgent for their money, and were annoying his father; that his uncle, Dr. Hanner, had not been able to make a satisfactory sale of the property, and was anxious to save himself and the grantor by procuring as large a price as possible that he might pay off all the debts assumed. To satisfy these creditors and prevent a forced sale of the property, Parkes, Jr., says he paid off the pressing creditors, and took an assignment to himself, believing the security ultimately good, and being willing to thus relieve both his father and uncle from the urgency of the creditors whose claims he bought. His testimony is uncontradicted, and is in part confirmed by other witnesses, and we see no sufficient reason, on the proof in this record, for doubting his motives or questioning his veracity. There is absolutely no affirmative evidence that the money used in buying these claims was furnished by Parkes, Sr., or that the latter was to acquire any interest by the transaction. The filial affection of the son quite accounts for his willingness to invest his own means in a way which would relieve the urgency of his father's creditors, and at the same time enable Dr. Hanner to sell the property to the best advantage, and thus save himself from loss through a transaction into which he seems to have entered from kindly consideration towards his relative, Parkes, Sr. We cannot say that the complainants have not shown many circumstances calculated to arouse the suspicion that J. L. Parkes had either retained or subsequently acquired some interest in the property conveyed to Hanner. Neither can we say that all of these circumstances have been explained with absolute satisfaction. But upon the whole case we reach the conclu-

sion that complainants have not made out a case which would justify this court in reversing the action of the circuit court. It is therefore ordered that the decree be affirmed.

BRADSHAW et al. v. MINERS' BANK OF JOPLIN et al.
(Circuit Court of Appeals, Seventh Circuit. July 17, 1897.)

No. 390.

1. INJUNCTION—JUDGMENT AGAINST GUARANTOR—INDEMNITY.

The payors of a note, who have a legal defense to an action thereon, may enjoin the enforcement of a judgment rendered without their fault or laches against a guarantor of such note who holds valuable stock belonging to them as collateral security to indemnify him against the payment of the note.

2. NOTE—CONSIDERATION—DEFENSE.

A note given for the purchase price of property, and made payable to a bank at the request and for the benefit of the seller, is subject, in the hands of the bank, to all infirmities in the original consideration between the payors and such seller, in the absence of circumstances creating an estoppel in equity.

3. APPEAL—PARTY NOT SERVED.

The right of appeal is not affected by the fact that there is no decree against one of the respondents, who was not served with process, and who, though a proper, is not a necessary, party to the suit.

4. FEDERAL COURTS—JURISDICTION—ANCILLARY PROCEEDINGS.

A bill to enjoin the prosecution of a creditors' suit pending in the same court is ancillary to such suit, and jurisdiction does not depend on the diverse citizenship of the parties.

Appeal from the Circuit Court of the United States for the Northern Division of the Northern District of Illinois.

This was a suit in equity to enjoin the prosecution of a creditors' bill filed by the Miners' Bank of Joplin to enforce collection of a judgment against the respondent Corwin C. Thompson. Demurrers were sustained to the original and amended and supplemental bills, and decree entered dismissing the suit as against the bank for want of equity. Complainants appeal.

In this case, now here the second time, the suit was brought by the appellants, Frank M. Bradshaw and George W. Henry, citizens of Illinois, against the Miners' Bank, a corporation of Missouri, the Illinois & Missouri Lead & Zinc Company, a corporation of Illinois, and Corwin C. Thompson, a citizen of Illinois. On the first appeal, which was from an order dissolving a temporary injunction, it was held that upon the facts stated in the bill the appellants were not entitled to relief. *Bradshaw v. Bank*, 46 U. S. App. 663, 23 C. C. A. 578, and 77 Fed. 932. The substance of the original bill was that the appellants purchased certain property of the Illinois & Missouri Lead & Zinc Company, for which they executed their promissory notes in the aggregate amount of \$4,050 to the Miners' Bank, which, it was averred, had no interest of its own in the notes, but was made payee at the request and solely for the benefit of the Illinois & Missouri Lead & Zinc Company; that at the same time Thompson executed to the Miners' Bank a separate writing, whereby he guaranteed the payment of the notes; that on that guaranty the Miners' Bank had recovered judgment in the court below against Thompson for the full amount of the notes, and upon a creditors' bill in the same court showing execution upon the judgment returned nulla bona had procured the appointment of a receiver of Thompson's property; that by reason of false representations of the character and condition of the property for which the notes were given

the appellants had a legal defense to any action thereon; that, pending the suit on the guaranty, and after plea of the general issue to the declaration, they informed Thompson and his attorney of the facts constituting their defense, and of the evidence obtainable to establish it, and offered to employ an attorney to represent their interest in the suit and to assist in making the defense; that the offer was declined, and that Thompson's attorney neglected to set up the defense by a special plea, and that when the cause was reached for trial neither Thompson nor his attorney appeared in court, and a verdict was taken, and the judgment rendered upon which the subsequent proceedings mentioned were had. The concluding averment was that, notwithstanding the negligence of Thompson, through his attorney, in failing to prepare to make a proper defense, the complainants felt in equity bound to protect Thompson from any loss or damage by reason of having executed the guaranty in their behalf, and that they were ready and willing to pay to the Illinois & Missouri Lead & Zinc Company, or to the Miners' Bank, as agent of said company, any amount which the court upon the hearing should find to be equitably due. After the cause had been remanded, the appellants filed an amended and supplemental bill, whereby, after reiterating the averments of the original bill, they alleged, among other things, that the Illinois & Missouri Lead & Zinc Company owned no property except the notes in controversy, had ceased to do business in Illinois, and had not been served with process, and that Thompson, against whom the judgment had been rendered, held as collateral security for its payment stock belonging to them of the value of \$5,000, which, after the filing of the original bill in this cause, was by agreement of parties placed in the hands of the American Surety Company to indemnify it as surety on the injunction bond, and also as a security for the payment of the judgment against Thompson, and for his protection from liability thereon in case he should not be relieved by the proceedings in this suit, and that Thompson was insolvent. Thereupon the Miners' Bank was permitted to withdraw its answer to the original bill, and to interpose a demurrer to the original and the amended and supplemental bills, which demurrer the court sustained, and, the complainants having elected to abide by the ruling, a final decree was entered dismissing the suit as against the Miners' Bank for want of equity. On the original bill and amendments a judgment pro confesso was taken against Thompson, but the court denied the motion of the complainants for a preliminary injunction against him according to the prayer of the bill.

Frank A. Johnson, for appellants.

E. A. Otis and D. W. Graves, for appellees.

Before WOODS, JENKINS, and SHOWALTER, Circuit Judges.

WOODS, Circuit Judge, after making the foregoing statement, delivered the opinion of the court.

We are of the opinion that upon the amended bill the appellants are entitled to relief. To the extent of the value of the stock pledged to indemnify Thompson against loss by reason of his contract of guaranty, the appellants have a real and substantial interest that the judgment in favor of the Miners' Bank against Thompson shall not be enforced. It is urged, and the authorities cited to the point are perhaps conclusive, that Thompson is not in a position to ask equitable relief against the judgment, but it is on that account only the more important that relief should not be denied to the appellants, who were not parties to the action at law, and were not permitted to present in that action, or to assist Thompson in presenting, the defense which, as they duly advised him and his attorney, they were able to make. They would not be in a worse plight, nor with less fault on their own part, if Thompson had been in a conspiracy to enable the bank to obtain a judgment for which there

was no just foundation, and against which, unless in the way proposed, there can be no effective remedy.

It is urged on the authority of *Railroad Co. v. National Bank*, 102 U. S. 14, and other cases which follow *Swift v. Tyson*, 16 Pet. 1, that the Miners' Bank, on the facts alleged, became an innocent holder for value of the notes of the appellants, and that its right to enforce the guaranty cannot be affected by an inquiry into the consideration of the notes. The doctrine of *Swift v. Tyson*, so far as we know, has never been applied in the manner proposed. It is averred in the bill that the notes were made payable to the Miners' Bank as agent or trustee for the Illinois & Missouri Lead & Zinc Company, but, if that were not so, and the beneficial interest in the notes were in the bank, yet the title, having come to it as the original payee of the notes, and not as transferee, would be subject, we suppose, to all infirmities in the original consideration between appellants and the Illinois & Missouri Lead & Zinc Company, unless in the circumstances and conditions of the transaction there was in favor of the bank an estoppel in equity. There is none in the law merchant.

The right of appeal from the decree in favor of the Miners' Bank is not affected by the fact that there has been no decree against the Illinois & Missouri Lead & Zinc Company. That company, though named in the bill as a respondent, was not served with process, and therefore is not a party to the record, and its presence, though proper, is not necessary to a complete adjudication of the controversy between the appellants and the Miners' Bank and Thompson.

The suit is to be regarded as ancillary to the proceedings on the creditors' bill of the Miners' Bank against Thompson in the same court, and the jurisdiction, therefore, in no manner depends on the diverse citizenship of the parties. *Krippendorf v. Hyde*, 110 U. S. 276, 4 Sup. Ct. 27. The decree of the circuit court is reversed, and the cause remanded, with directions to overrule the demurrer of the Miners' Bank to the bill, and to proceed in accordance with this opinion.

LEWIN et al. v. WELSBACH LIGHT CO. et al.

(Circuit Court, E. D. Pennsylvania. May 3, 1897.)

1. EQUITY JURISDICTION—SUFFICIENCY OF BILL.

A bill which sets forth that the respondents have brought suit against the complainants for the alleged infringement of a certain patent, and that in advance of any adjudication of the validity of the patent the respondents have circulated among the customers of the complainants, with intent to destroy the complainants' business, circulars which are "false, injurious, malicious, scandalous, threatening, and intimidating," alleges facts which, if sustained, entitle the complainants to equitable relief.

2. SAME—GROUND OF RELIEF.

Where a bill in equity is brought, by a respondent in a suit based upon the alleged infringement of a patent, to restrain the complainant in the patent suit from threatening and intimidating the customers of the respondent in that suit from dealing with it, the only legitimate inquiry is whether the acts and conduct of the complainants in the former suit are such as a court of

equity should restrain the owner of a presumptively valid patent from doing and pursuing.

3. EQUITY PLEADING—DEMURRER—ADMISSION.

Where, in such a case, the bill contains an allegation that the patents of the respondents are invalid, and, even if valid, are not infringed, a demurrer to the bill is neither an admission nor a denial of invalidity or noninfringement, but simply challenges the right of the complainants to have either of these questions tried in the manner proposed.

4. SAME—SUFFICIENCY OF BILL—ALLEGATION OF CONSPIRACY.

The allegation of conspiracy in such a bill is of no potency, since, if what has been done is wrongful, its continuance should be enjoined, if done only by one of the defendants, as if done by both of them in co-operation; and, if what has been done is not wrongful, the fact that the defendants may have combined to do it would not make it so.

Charles G. Coe and Strawbridge & Taylor, for complainants.
Wm. Findlay Brown and John R. Bennett, for defendants.

DALLAS, Circuit Judge. The bill sets forth that the complainants are now endeavoring to become active competitors of the defendants in the sale of incandescent lights, etc., and that one of the defendants manufactures such lights, etc., and the other of them is engaged in selling goods made by the former. It states that the Welsbach Light Company has brought suit against these complainants, in this court, for alleged infringement of a certain patent, and that the complainants have duly appeared in that suit. It avers that the patent so sued upon is solely for a process, and that the complainants cannot be held to be infringers thereof, because, as alleged, they are not manufacturers, but are exclusively engaged in selling the products of a certain manufacturer, against whom the Welsbach Light Company has brought suit, in the Southern district of New York, for alleged infringement of the same patent, and which suit the said manufacturer, who is amply responsible, is vigorously contesting. The bill also avers that the patent referred to is now invalid, under section 4887 of the Revised Statutes, by reason of the expiration of a certain Spanish patent for, as alleged, the same invention. The foregoing is the substance of paragraphs 1 to 8 of the bill. The gist of the complaint is presented in the paragraphs which follow, and may, I think, be fairly reduced to the statement that the defendants in this suit, with knowledge of the matters already mentioned, and with intent to destroy the complainants' business, have conspired to threaten, intimidate, and prevent the customers, present and prospective, of the latter, from dealing with them, "by the systematic and formulated plans, methods, and concerted conduct and action, in manner and form following," namely, by publishing and distributing "false, injurious, malicious, scandalous, threatening, and intimidating circulars or printed letters," containing intimidating threats of suit on the patent before referred to; by distributing such circulars among the customers and prospective customers of the complainants, and among the trade and the public generally; by spying upon the complainants' business, with the aid of detectives and others, and thus ascertaining their customers; by causing the defendants' attorneys to write letters to the complainants' customers (so ascertained), threatening suit against them on the patent aforesaid;

and by causing the agents of the defendants to call upon the customers of the complainants and make like threats. The prayers are for an injunction to restrain the commission of the acts complained of, and for a decree for such damages as may be found by a jury upon a feigned issue to be awarded.

The allegation that the patent under which the defendants justify is invalid, and, even if valid, is not infringed by the complainants, is one which, of course, might be made in defense of the suit which it is admitted the defendants have brought against the complainants. However impregnable that defense may be thought to be, it must be maintained in that proceeding before its availability can be assumed or adjudged in another. It is a mistake to suppose that, by demurring, the defendants have conceded its sufficiency. The demurrer avers that the bill does not show title to the relief sought, but this averment involves neither admission nor denial of invalidity or of noninfringement, but simply challenges the right of the complainants to have either of those questions tried in the manner they propose; and, in my opinion, it is clear that they are not entitled to have them tried in this suit. Accordingly, the only legitimate inquiry now is: Are the acts and conduct of the defendants, as alleged in the bill, such as a court of equity should restrain the owner of a presumptively valid patent from doing and pursuing? The allegation of conspiracy is of no potency. If what has been done is wrongful, its repetition or continuance should be enjoined quite as surely if done by only one of the defendants as if done by both of them in co-operation; and it is also true that, if that which has been done or is anticipated is not wrongful, the fact that the defendants may have combined to do it would not make it so. I attach no importance to the circumstance that the defendants have informed themselves respecting the customers of the complainants, or to their method of doing so. It is not asserted that this, in itself, has worked any injury to the complainants. It is the use made of the information so obtained, and not the obtaining it, which is the real ground of complaint. What, then, does the bill allege that the defendants have actually done to the injury of the complainants? If nothing more were alleged than that the defendants have given notice, in good faith and in temperate language, of their purpose to proceed against alleged infringers, I would have no hesitation in holding that they had not exceeded their right. But the bill goes somewhat further. It alleges the intent of the defendants to be, not to protect and maintain their own rights, but, under color and pretense of that object, to destroy the complainants' business, in advance of any adjudication of the question of their right to maintain and continue it, and that, in pursuance of such intent, the circulars or letters complained of have not been properly framed, but are "false, injurious, malicious, scandalous, threatening, and intimidating." It is not manifestly impossible that this allegation may be sustained, and in such manner as to entitle the complainants to relief, though I may say that it does not seem to me to be probable, in view of the fact that the complainants have themselves been sued on the patent, that the defendants' good faith in notifying their purpose to proceed against other alleged infringers

(if that is the substance of all they have done) can be successfully attacked; and the criticism of defendants' counsel upon the omission to set out any of the circulars in the bill calls attention to a matter which may be not without significance. If, upon the one hand, those circulars should turn out to be such notices as the defendants could rightly give; or if, on the other hand, they shall, when produced, appear to be mere libels,—this suit could not be sustained. But my examination of the case, as it is now presented, has led me to believe that the bill should be retained, but that the questions which have been adverted to should be reserved for further consideration hereafter; and, accordingly, the demurrer is overruled, but without prejudice, and with leave to the defendants to again present the same matter by answer.

BURKE v. DAVIS.¹

(Circuit Court of Appeals, Seventh Circuit. July 17, 1897.)

No. 380.

1. APPEAL—REVIEW—MASTER'S REPORT.

In the absence of exceptions to the report of a master, there can be no inquiry into the correctness of the facts found, but his misapprehension of the legal consequences of the facts reported is open to correction.

2. EQUITY—PLEADING—ABANDONMENT OF DEFENSE.

Where an answer sets up only an agreement for a share in profits, and on hearing before the master that contention is abandoned, and no new claim substituted, the defendant is entitled to no relief.

3. SAME—FINDING UNSUPPORTED BY PLEADING.

In a suit in equity, where the complainant is entitled to, and is awarded, the relief prayed in his bill, it is error to require, as a condition precedent to the enforcement of the decree, that he pay a sum found by the master to be due the defendant, where the facts on which such finding is based are not pleaded.

Appeal from the Circuit Court of the United States for the Northern Division of the Northern District of Illinois.

This was a suit in equity by William H. Burke against Frank L. Davis. From a decree entered on the report of a master, complainant appeals.

The facts stated in the bill are substantially these: In the year 1888 the complainant, the appellant here, was engaged in the manufacture, importation, and sale of marble and mosaic decorations for buildings, having establishments at Chicago, Buffalo, New York, London, and Paris. During the time from August, 1889, to July, 1891, he imported large quantities of marbles and mosaics, to be entered at the ports of Chicago and St. Louis, and, for convenience, consigned to the defendant and appellee, Davis, who was in his service as a clerk or agent at Chicago. This course was adopted for convenience on account of the frequent absences of the complainant. Many controversies arose concerning the duties chargeable on the goods imported, and appeals were taken and prosecuted in the name of Davis from the decisions of the collector to the board of general appraisers, and, in many instances, from that board to the courts. These appeals were successful, and resulted in allowances and judgments in the name of Davis in amounts exceeding \$9,000. On June 30, 1891, Davis left the service of the complainant, and upon demand made refused to execute an assignment of the judgments and claims so standing in his name. Thereupon the bill was filed, alleging the facts stated, and praying that the defendant be decreed to assign to the complainant the judgments and

¹ Rehearing denied October 7, 1897.

claims, and, pending the suit, restrained from collecting, selling, or otherwise disposing of the same. A demurrer to the bill having been overruled, the defendant answered, admitting the importation of the merchandise described in the bill and the schedules attached thereto and the recovery of judgments in his name for the excessive duties paid, but denying the complainant's interest in the judgments and claims, denying that the defendant was the clerk, agent, or representative of the complainant, denying that the merchandise imported in his name was the property of the complainant, and alleging that he paid the duties and prosecuted the appeals for the recovery thereof for himself, and not as agent or trustee for the complainant. The answer avers affirmatively that in the month of August, 1888, the defendant became connected in business with the complainant upon these terms, viz.: That the defendant was to take charge and management of the business in Chicago for three months at \$10 per week, and that he took charge and management of the business under an agreement that at the expiration of three months, in case his services should prove satisfactory to the complainant, and he should desire to continue in charge of the business, another arrangement should be made; that at the expiration of the three months the complainant and defendant entered into a new agreement, whereby the defendant agreed to continue in charge and management of the business and the complainant agreed that he should receive a portion of the profits realized, according to the amount of business done and the profits accruing therefrom; that under that arrangement he continued in charge until July 1, 1891, meanwhile procuring and superintending the performance of a large number of contracts from which a large profit was derived; that on or about July 1, 1891, he requested the complainant to make an accounting and settlement of the amount and share of the profits due him, which complainant refused to do, and thereupon he withdrew from the further management of the business; that the profits which accrued amounted to at least \$55,000; that the amount equitably due the defendant is at least the sum of \$10,000, which the complainant refuses to pay; and that, even if complainant should be found to be the equitable owner of the judgments and claims set forth in the bill, he should be compelled to pay the defendant the amount due him before the defendant is ordered or directed to assign to the complainant the judgments and claims in controversy. A replication was filed, and the case referred to a master, whose report, after stating the issues, proceeds as follows:

"Upon this hearing a large amount of testimony has been taken, which is herewith reported, and made a part hereof, and I have heard the arguments of counsel at length, upon consideration of all which I find and report: That the allegations in the bill of the complainant are established by the testimony to the extent hereinafter stated; that the consignments of merchandise referred to in the bill were made as therein stated, and that the defendant, Frank L. Davis, received the same as the consignee of the complainant, having no interest therein, but acting as the agent and representative of the said complainant in respect thereto, having been named as such consignee for the purpose of convenience, the said complainant at the time being a citizen of London, England, engaged in the manufacture and importing of said articles in said city and in Paris, France. I find that during the time of such importations, and the proceedings had thereunder, the defendant, Frank L. Davis, was not a partner, as originally claimed, in the firm of Burke & Co., consignors, and had no interest in said consignments, or control over them, except such as might result to him through the nature of his employment, and was necessary for the purpose of his local representation herein in connection with the firm of Burke & Co., and is not beneficially interested in the result of the proceedings which have been had in regard to said property; the use of his name as plaintiff in said proceedings resulting and having become necessary only by reason of his having been, for purposes of convenience, named as consignee in said cases. I find, therefore, that the complainant, doing business under the name of Burke & Co., is the sole owner of said consignments, and entitled to the benefits of all of the proceedings had under them and the results of said proceedings. And I respectfully recommend that a decree be entered herein requiring said defendant, Frank L. Davis, to assign to said complainant by a good and sufficient assignment each and every of said judgments rendered, as

set forth in said bill, and each and every of said claims for the several amounts of excessive duty ordered to be refunded as therein set forth. The claim insisted upon by the defendant that the complainant should be required to pay to the defendant the amount found to be due him as a condition of granting the relief prayed for is, I think, not well taken, and I have disregarded it for the reason that in my judgment its application to this case is not justified by the pleadings or the facts. I find that in the month of August, 1888, negotiations were had between the complainant and defendant for the employment of the latter in connection with the complainant's business then about to be established in this city, resulting in an arrangement by which defendant entered upon such employment in October, 1888, by which defendant was to receive for the first three months the sum of ten dollars per week and after that the sum of fifteen dollars per week, with the promise of additional compensation provided the defendant proved himself competent to the position and valuable to the complainant in that relation; that as a result of this arrangement payments were regularly made at the rate provided for, and until the 30th of June, 1891, when the defendant left the employment of the complainant. In the year 1890 an offer was made by the complainant to pay the defendant the sum of five hundred dollars additional compensation, upon which two hundred and fifty dollars has already been paid, and it is insisted that the defendant is limited to this rate of compensation, and that a finding upon the basis of a quantum meruit cannot, under the pleadings, be made in his favor. If the court should be of the opinion that this position is well taken, the defendant would be entitled to the payment of the sum of two hundred and fifty dollars, only, in addition to that which he has already received, for the full term of his service. The position which was taken originally by the defendant, that he became a partner of complainant after the expiration of the first three months of his agreement, has been abandoned, and no finding is asked for him on that basis. It is also not insisted that he should receive commissions upon the work done during the term of his employment, but it is contended that by reason of the terms of the original engagement he is entitled to compensation for the services which he rendered said complainant upon the basis of the value of such services, as established by the testimony. I am impressed with the belief that it was the intention of the parties that after the expiration of the three months of trial which the defendant was subjected to that he should receive such compensation for the balance of the term of his services as the character of his work and his devotion to the interests of the complainant should entitle him to. The testimony shows that during all of this time the defendant devoted himself faithfully and earnestly and efficiently to the work which was committed to him. The volume of the business done during this time by Burke & Co. was very large, and was successfully prosecuted, during a portion of which time the complainant was absent in Europe attending to his business there, the defendant remaining here in sole charge of the execution of the contracts which were made between Burke & Co. and others here and elsewhere. For these services it is claimed by the defendant that he should receive compensation at the rate of twenty-five hundred dollars a year, which, after deducting payments made to him and moneys received by him during the period of his engagement would leave a balance now due him of three thousand nine hundred and fifty-five dollars and thirty-five cents. I am of the opinion, however, in view of all the testimony and the spirit and evident intention of the original engagement between these parties, and the character and the amount of work done by the defendant, that he is reasonably entitled to the payment of the sum of fifteen hundred dollars per year from the time of the expiration of the first three months of the term, making now due, with the deductions before stated, the sum of one thousand four hundred and fifty-five dollars and thirty-five cents, for the payment of which to him I recommend that a decree be entered."

To this report the defendant excepted on the ground that the master had failed and refused to recommend that the payment of the sum found due the defendant from the complainant should be made a condition precedent to the assignment by the defendant to the complainant of the claims and judgments mentioned in the report. This exception the court sustained, and accordingly

entered a decree which in other respects conformed to the report. No exceptions were filed by the complainant within 30 days after the filing of the report, and the motion thereafter made for leave to file exceptions was denied by the court. The evidence reported by the master is not in the transcript of the record.

Samuel S. Page and William E. Church, for appellant.
Ira W. Buell and Charles C. Buell, for appellee.

Before WOODS, JENKINS, and SHOWALTER, Circuit Judges.

WOODS, Circuit Judge (after stating the facts as above). In the absence of exceptions to the report, there can be no inquiry into the correctness of the master's findings of fact; but whether the proper decree was entered upon the report is nevertheless open to consideration. The master's mistaken apprehension of the legal consequences of the facts reported, as Daniell states it, "may be opened to further directions, without exceptions." 2 Daniell, Ch. Prac. p. 1310; *Hayes v. Hammond*, 162 Ill. 133, 44 N. E. 422. The recommendation of the master that a decree should be entered for the defendant for the amount reported due him in addition to the fixed wages agreed upon was erroneous, both because it was not claimed in the answer and because it was not in accord with the agreement found to have been made between the parties, under which the services supposed to entitle the defendant to further compensation were rendered. The answer sets up only an agreement for a share in the profits, but that contention, the report says, was abandoned, and no different claim was substituted. The agreement found to have been actually made was that Davis should receive for the first three months \$10 per week and after that \$15 per week, with the promise of additional compensation provided he proved himself competent and valuable. Under this agreement the defendant served and received compensation at the specific rates stipulated until June 30, 1891, when, according to the answer, he demanded an accounting and a settlement of the share of the profits due him. It is not found that any other agreement between the parties, either for a share in the profits or for other form of compensation than that stated, was made, except that in 1890 the appellant offered to pay a further sum of \$500, of which one-half had been paid. There is, therefore, no justification in the facts reported, when reasonably interpreted, for the belief with which the master declared himself impressed that it was the intention of the parties that, after the expiration of the three months of trial, the defendant should receive such compensation for the balance of the term of his service as the character of his work and his devotion to the interests of the complainant should entitle him to. That is not consistent either with the answer or with the master's own statement of the agreement made, in which no term of service was stipulated; and, instead of the time of trial being limited to three months, it was agreed that after the expiration of that period the compensation should be a fixed sum per week, until the parties should agree upon additional compensation, which, in the indefinite way stated, the appellant promised should be done. The alternative recommendation

of the master that the defendant should be allowed to recover the sum of \$250, if not awarded the larger sum, rests upon an indefinite and inadequate statement of facts, and has no support in the answer.

It is contended on behalf of appellant that the relief awarded the defendant was affirmative in its nature, and could not be granted upon an answer, and that, being of a purely legal character, the defendant's demand could not be made the subject of a cross bill; but these are questions which we need not consider. Upon the facts found the appellee at most has a demand for only \$250, and that not being set up in the answer need not be considered. It appears that the appellant is a citizen of London, England, but it is not shown that he is a nonresident or insolvent, and that appellee may not obtain adequate relief in a suit at law in the local courts. On the contrary, it was asserted at the hearing, and in the briefs, and not denied, that such a suit has been brought and is pending. It follows that the court erred in requiring that, as a condition precedent to the enforcement of the relief awarded him, the appellant should pay the sum named in the decree to the defendant, and also in adjudging against the appellant a part of the costs of the suit. The decree is therefore reversed, and the cause remanded, with directions to enter a decree for the appellant not inconsistent with this opinion.

THOMAS v. CINCINNATI, N. O. & T. P. RY. CO.

(Circuit Court, S. D. Ohio, W. D. July 1, 1897.)

No. 4,598.

CONTRACT—ACTS OF PARTIES—CONSTRUCTION.

Where the representatives of a city which owns and leases a railroad have for 15 years accepted the quarterly installments of rent reserved after maturity, and without interest, the lessees always claiming the right to pay at any time within 90 days without being liable for interest, the parties have, by their acts thereunder, placed a practical construction on the contract by which both are bound; the right to interest under its terms being open to doubt.

On the Intervening Petition of Samuel M. Felton, Receiver. In the matter of payment of interest upon the rent due to the city of Cincinnati.

The city of Cincinnati is the owner of a railway running from Cincinnati to Chattanooga. The railway is held for the city by the trustees of the Cincinnati Southern Railway. On the 12th of October, 1881, the trustees of the railway, by virtue of the power conferred by the general assembly of the state of Ohio, leased the road to the Cincinnati, New Orleans & Texas Pacific Railway Company for a period of 25 years at an annual rental expressed in the lease as follows:

"The annual rental hereby reserved, which the party of the second part covenants and agrees for itself, its representatives and assigns, in lawful money of the United States of America, at the treasury of the city of Cincinnati, Ohio,

payable quarterly on the 12th days of January, April, July, and October in each and every year of said term hereby granted, shall be the sums following, to wit: During the first period of five years of the term hereby granted, the annual rental of eight hundred thousand dollars (\$800,000); during the second period of five years of the term hereby granted, the annual rental of nine hundred thousand dollars (\$900,000); during the third period of five years of the term hereby granted, the annual rental of one million dollars (\$1,000,000); during the fourth period of five years of the term hereby granted the annual rental of one million and ninety thousand dollars (\$1,090,000); during the fifth period of five years of the term hereby granted, the annual rental of one million two hundred and fifty thousand dollars (\$1,250,000)."

The question which arises on this intervening petition, to which the trustees have been made parties defendant and have appeared, is whether the delay in the payment of any of the quarterly installments due under the lease for 90 days or less imposes upon the lessee the obligation to pay interest upon such installment. Clause 13 of the lease is as follows:

"It is further covenanted and agreed by and between the parties hereto that in case the party of the second part shall, at any time or times hereafter, during the term herein granted, fail to pay the rent herein reserved or provided to be paid by the said party of the second part, or any part of such rent, when the same shall become payable as herein specified, or shall fail to pay the rates, taxes, assessments, or other charges herein provided to be paid by the party of the second part, or shall fail or omit to keep and perform any of the covenants and agreements herein contained by the said party of the second part to be kept and performed, and shall continue in default in respect to the performance of such covenant and agreement for the period of ninety days, then, and in either, any, and every such case, it shall be lawful for the said party of the first part, without having made any demand for such rent, or the performance of such covenant, to re-enter into and upon said railway and premises hereby leased, and any and every part thereof, and remove all persons therefrom, and from thenceforth the said leased railway and premises, with the appurtenances thereof, and all additions and improvements which shall or may have been made to the same, to have, hold, possess, and enjoy, as in the first and former estate of the said lessor therein; and upon such re-entry all the estate, right, title, interest, possession, claim, and demand whatsoever of the said party of the second part in and to the said leased railway and premises, or any part thereof, shall wholly and absolutely cease, determine, and become void; anything herein contained to the contrary in any wise notwithstanding. In case of such re-entry the rent reserved herein from the time of the last preceding payment of any installment thereof up to the time of such re-entry shall be apportioned, and such portion thereof as would have been payable in respect to the intervening time, if the whole period in respect to which such installments were payable had elapsed, shall be deemed and taken to be due and payable, and shall be paid by the said party of the second part. Such re-entry shall not waive or prejudice any claim or right of said party of the first part to or for damages against the party of the second part on account of the nonperformance or breach of any of the terms of this lease, and all such claims and rights are expressly preserved to the said party of the first part. And a right and power of re-entry shall arise on each and every forfeiture, breach, or default as herein provided, notwithstanding the waiver of any prior right of re-entry or forfeiture under the foregoing provisions."

No interest at any time since 1881 until the present day has ever been paid by the lessee company or the receiver to the city of Cincinnati. The amounts due under the lease, the dates when paid, the days overdue, and the amount of interest at 6 per cent. which ought to have been collected if due, appear in the following table:

Statement of Rents Paid to the City of Cincinnati, Showing Dates Due, Dates Paid, and Interest at 6% Per Annum on Overdue Amounts, October 12th, 1881—January 12th, 1897.

Quarter Ending	Amount.	Due.	Days		Interest.
			Date Paid.	Overdue.	
Jan. 12, 1882	\$200,000 00	Jan. 12/82	Jan. 12/82	—	—
Apl. 12, "	200,000 00	Apl. 12/82	Apl. 12/82	—	—
July 12, "	200,000 00	July 12/82	July 13/82	1	32 88
Oct. 12, "	200,000 00	Oct. 12/82	Oct. 12/82	—	—
Jan. 12, 1883	200,000 00	Jan. 12/83	Jan. 12/83	—	—
Apl. 12, "	200,000 00	Apl. 12/83	Apl. 12/83	—	—
July 12, 1883	200,000 00	July 12/83	July 13/83	1	32 88
Oct. 12, "	200,000 00	Oct. 12/83	Oct. 15/83	3	98 64
Jan. 12, 1884	200,000 00	Jan. 12/84	Jan. 21/84	9	295 92
Apl. 12, "	200,000 00	Apl. 12/84	Apl. 16/84	4	131 52
July 12, "	200,000 00	July 12/84	Sept. 17/84	67	2,202 96
Oct. 12, "	200,000 00	Oct. 12/84	Jan. 9/85	89	2,926 32
Jan. 12, 1885	200,000 00	Jan. 12/85	Apl. 10/85	88	2,893 44
Apl. 12, "	200,000 00	Apl. 12/85	July 7/85	86	2,827 63
July 12, "	200,000 00	July 12/85	Oct. 8/85	88	2,893 44
Oct. 12, "	200,000 00	Oct. 12/85	Jan. 9/86	89	2,926 32
Jan. 12, 1886	200,000 00	Jan. 12/85	Apl. 9/86	87	2,860 56
Apl. 12, "	200,000 00	Apl. 12/86	July 8/86	87	2,860 56
July 12, "	200,000 00	July 12/86	Oct. 9/86	89	2,926 32
Oct. 12, "	200,000 00	Oct. 12/86	Dec. 31/86	80	2,630 40
Jan. 12, 1887	225,000 00	Jan. 12/87	Mar. 3/87	50	1,849 50
Apl. 12, 1887	225,000 00	Apl. 12/87	June 11/87	60	2,219 40
July 12, "	225,000 00	July 12/87	Sept. 5/87	55	2,034 45
Oct. 12, "	225,000 00	Oct. 12/87	Nov. 7/87	26	961 74
Jan. 12, 1888	225,000 00	Jan. 12/88	Jan. 12/88	—	—
Apl. 12, 1888	225,000 00	Apl. 12/88	May 31/88	49	1,812 51
July 12, "	225,000 00	July 12/88	Sept. 12/88	62	2,293 38
Oct. 12, "	225,000 00	Oct. 12/88	Nov. 28/88	47	1,738 53
Jan. 12, 1889	225,000 00	Jan. 12/89	Mar. 29/89	76	2,811 24
Apl. 12, "	225,000 00	Apl. 12/89	June 14/89	63	2,330 37
July 12, "	225,000 00	July 12/89	Sept. 26/89	76	2,811 24
Oct. 12, "	225,000 00	Oct. 12/89	Nov. 28/89	48	1,775 52
Jan. 12, 1890	225,000 00	Jan. 12/90	Jan. 11/90	—	—
Apl. 12, "	225,000 00	Apl. 12/90	May 27/90	45	1,664 55
July 12, "	225,000 00	July 12/90	July 23/90	11	406 89
Oct. 12, "	225,000 00	Oct. 12/90	Oct. 12/90	—	—
Jan. 12, 1891	225,000 00	Jan. 12/91	Feb. 16/91	35	1,294 65
Apl. 12, "	225,000 00	Apl. 12/91	June 22/91	71	2,626 29
July 12, "	225,000 00	July 12/91	Sept. 15/91	65	2,404 35
Oct. 12, "	225,000 00	Oct. 12/91	Nov. 9/91	28	1,035 72
Jan. 12, 1892	250,000 00	Jan. 12/92	Mar. 18/92	66	2,712 60
Apl. 12, "	250,000 00	Apl. 12/92	May 31/92	49	2,013 90
July 12, "	250,000 00	July 12/92	Sept. 12/92	62	2,548 20
Oct. 12, "	250,000 00	Oct. 12/92	Nov. 22/92	41	1,685 10
Jan. 12, 1893	250,000 00	Jan. 12/93	Mar. 30/93	77	3,164 70
Apl. 12, "	125,000 00	Apl. 12/93	May 29/93	47	965 85
Apl. 12, "	125,000 00	Apl. 12/93	July 7/93	86	1,767 30
July 12, "	125,000 00	July 12/93	Sept. 16/93	66	1,356 30
July 12, "	125,000 00	July 12/93	Oct. 10/93	90	1,849 50
Oct. 12, "	125,000 00	Oct. 12/93	Nov. 29/93	48	986 40
Oct. 12, "	125,000 00	Oct. 12/93	Dec. 30/93	79	1,623 45
Jan. 12, 1894	125,000 00	Jan. 12/94	Mar. 12/94	59	1,212 45
Jan. 12, "	125,000 00	Jan. 12/94	Apl. 7/94	85	1,746 75
Apl. 12, "	50,000 00	Apl. 12/94	June 4/94	53	435 66
Apl. 12, "	200,000 00	Apl. 12/94	July 11/94	90	2,959 20
July 12, "	250,000 00	July 12/94	Oct. 9/94	89	3,657 90

Quarter Ending	Amount.	Due.	Date Paid.	Days Overdue.	Interest.
Oct. 12, 1894	125,000 00	Oct. 12/94	Nov. 28/94	47	965 85
Oct. 12, "	125,000 00	Oct. 12/94	Dec. 22/94	71	1,459 05
Jan. 12, 1895	250,000 00	Jan. 12/95	Apl. 4/95	82	3,370 20
Apl. 12, "	125,000 00	Apl. 12/95	July 1/95	80	1,644 00
Apl. 12, "	125,000 00	Apl. 12/95	July 9/95	88	1,808 40
July 12, "	250,000 00	July 12/95	Sept. 23/95	73	3,000 30
Oct. 12, "	250,000 00	Oct. 12/95	Dec. 14/95	63	2,589 30
Jan. 12, 1896	125,000 00	Jan. 12/96	Mar. 30/96	78	1,602 90
Jan. 12, "	125,000 00	Jan. 12/96	Apl. 9/96	88	1,808 40
Apl. 12, "	125,000 00	Apl. 12/96	June 30/96	79	1,623 45
Apl. 12, "	125,000 00	Apl. 12/96	July 8/96	87	1,787 85
July 12, "	125,000 00	July 12/96	Oct. 5/96	85	1,746 75
July 12, "	125,000 00	July 12/96	Oct. 10/96	90	1,849 50
Oct. 12, "	125,000 00	Oct. 12/96	Nov. 12/96	31	637 05
Oct. 12, "	125,000 00	Oct. 12/96	Dec. 19/96	68	1,397 40
Jan. 12, 1897	272,500 00	Jan. 12/97	Mar. 24/97	71	3,180 09

Total \$121,765 97

The payments into the city treasury were made upon certificates of the board of trustees of the city of Cincinnati, as follows:

Office of Board of Trustees of Cincinnati Southern Railway.

Cincinnati, —, 18—.

—, Esqr., City Treasurer,

Cincinnati, Ohio.

This is to certify that there is due to the trustees of the Cincinnati Southern Railway from the Cincinnati, New Orleans and Texas Pacific Railway Company the sum of — (\$—) dollars, being the quarterly installment of rent due for the quarter ending — 12th, 18—, under the lease of said railway to said company. You are hereby authorized to receive the said sum, to be kept and reserved for the payment of interest on, and provide a sinking fund for, the final redemption of the bonds issued under and by virtue of the act of the general assembly of Ohio, passed May 4th, 1869, entitled "An act relating to cities of the first class having a population exceeding one hundred and fifty thousand inhabitants."

By order of the board.

—, President.

Office of the City Treasurer of the City of Cincinnati.

Cincinnati, —, 18—.

Received of the Cincinnati, New Orleans and Texas Pacific Railway Company the sum of — dollars, for the purpose stated in the above certificate.

\$—.

—, City Treasurer.

The certificate never stated anything more than the exact installment of rent, and never included interest. The certificate was drawn upon the day when the payment was made, but was usually dated back to the day upon which the installment under the lease was due. The quarter rent payable on January 12, 1884, was not paid until January 21, 1884, the lessee company making the claim that whereas, under and by virtue of clause 13, no forfeiture could arise until the failure to pay the rent had continued for 90 days, this gave them an option at any time within 90 days to pay the rent without interest; that on the 1st day of February, 1884, the city council passed the following resolution:

"Resolved, that the city solicitor be, and is hereby, directed to inquire into and report to this board at the next regular meeting why the lessees of the Cincinnati Railway do not pay into the city treasury the interest on the last quarterly installment, ending January 12th, 1884."

To this the city solicitor answered as follows:

February —, 1884.

To the Trustees of the Cincinnati Southern Railway—Gentlemen: At a meeting of the board of councilmen of Cincinnati held February 1st, 1884, the following resolution was adopted: "Resolved, that the city solicitor be, and he is hereby, directed to inquire into and report to this board at the next regular meeting why the lessees of the Cincinnati Southern R. R. do not pay to the city treasurer the interest on the last quarterly installment, ending January 12th, 1884." Under the lease to the Cincinnati, New Orleans and Texas Pacific Railway Company, quarterly installments of rent of \$200,000 each are payable on the 12th day of January, April, July, and October in each and every year for the first period of five years. The installment due January 12th, ult., I am informed by the city treasurer, was not paid until January 21st,—a default of nine days. No interest has been paid for such time. I call the attention of the trustees to the matter for such information as the resolution contemplates, and for such action as they may deem right under the law.

Very respectfully,

J. Dawson, City Solicitor.

On February 2, 1884, the board of sinking fund trustees, a board which is charged under the law with the duty of providing for the payment of the interest on the bonded debt of the city, including the Southern Railway debt, and its final redemption, and the consent of which was necessary to the making of the lease of the railroad herein, passed the following resolution:

"The president offered the following, which was unanimously adopted:

"The clerk is directed to enter the following memorandum on the minutes, and to send copies of it to the president of the lessee company:

"Memorandum.

"The quarterly installment of \$200,000 rent on the lease of the Southern Railroad from the lessee company which is required to be entered to the credit of this trust, and was due on January 12th of the present year, was not paid into the treasury until the 21st of the same month after 3 o'clock p. m. The delay was accompanied by an incorrect claim or suggestion of right on the part of the lessee company to withhold it for ninety days. This board is not charged with the duty or responsibility of collecting the rent, but is charged with the duty of expecting its payment when due, and of taking such action for the use or disposition of the money as circumstances may require. The delay connected with the incorrect claim or suggestion of right is regarded by this board as an unsatisfactory method of dealing with the subject, which cannot fail to be inconvenient, and, if continued, to be injurious to the trust."

The board of trustees of the Cincinnati Southern Railway seem to have made no reply to the inquiries directed to this subject by either the council or the sinking fund trustees. On January 5, 1885, September 13, 1888, November 2, 1888, and on February 3, 1891, the board of sinking fund trustees passed similar resolutions, and in one instance recited the amount of interest due on delayed payments to be \$40,000. Since 1891 the board of sinking fund trustees has taken no action of any kind. On March 18, 1893, the petitioner Felton was appointed receiver by this court, and took possession of the leasehold premises. Soon after his appointment, the receiver applied to the court for authority to make partial payments, and it was granted. Thereafter two kinds of certificates and receipts

were issued by the board of Southern Railway Trustees,—one for partial payments of an installment on account, and the other for a payment of the remainder of the installment in full. The certificate and receipt of the former kind were as follows:

Office of Board of Trustees Cincinnati Southern Railway.

Cincinnati, May 29, 1893.

Henry M. Ziegler, Esq., City Treasurer, Cincinnati, Ohio: This is to certify that there is due to the trustees of the Cincinnati Southern Railway from the Cincinnati, New Orleans and Texas Pacific Railway Co. the sum of —, being the quarterly installment of rent due for the quarter ending —, under the lease of said railway to said company. Under an order of the circuit court of the United States in and for the Southern district of Ohio, Western division, made in the case of Samuel Thomas against the Cincinnati, New Orleans and Texas Pacific Railway Company, now pending therein, you are hereby authorized to receive from Samuel M. Felton, the receiver appointed by said court, the sum of — on account of said quarterly installment, to be kept and reserved for the payment of interest on and providing a sinking fund for the final redemption of the bonds issued under and by virtue of the act of the general assembly of Ohio passed May 4, 1869, entitled "An act relating to cities of the first class, having a population exceeding one hundred and fifty thousand inhabitants." The receipt of said sum on account is not to be held or construed as a waiver of any lien or right of forfeiture reserved in said lease which the said trustees may have.

By order of the board.

E. A. Ferguson, President.

Office of the Treasurer of City of Cincinnati.

Cincinnati, May 29, 1893.

Received of the Cincinnati, New Orleans and Texas Pacific Railway Company the sum of — dollars for the purpose and upon the terms stated in the above certificate.

Fred. Raine, Bk.,

For City Treasurer.

The certificate and receipt of the latter kind—that is, for the remainder of the installment—were as follows:

Office of the Board of Trustees Cincinnati Southern Railway.

Cincinnati, —, —.

Henry M. Ziegler, Esq., City Treasurer, Cincinnati, Ohio. This is to certify that there is due to the trustees of the Cincinnati Southern Railway from the Cincinnati, New Orleans and Texas Pacific Railway Co. the sum of —, being the balance of the quarterly installment for rent due for the quarter ending April 12, 1893, under the lease of said railway to said company. You are hereby authorized to receive the said sum, to be kept and reserved for the payment of interest on and providing a sinking fund for the final redemption of the bonds issued under and by virtue of the act of the general assembly of Ohio, passed May 4, 1869, entitled "An act relating to cities of the first class having a population exceeding one hundred and fifty thousand inhabitants."

By order of the board.

E. A. Ferguson, President.

Office of the City Treasurer of the City of Cincinnati.

Cincinnati, July 7th, 1893.

Received of the Cincinnati, New Orleans and Texas Pacific Railway Company the sum of —, for the purpose stated in the above certificate.

H. M. Ziegler, City Treasurer.

Since the receiver has operated the railroad, in no instance has the quarterly installment been paid in full at the time it was due under the lease. Payments have been generally made on account, and the balance of the installment has been paid and receipted for

at or near the expiration of the period of 90 days after the time the rent became payable. This is shown by the table above given. Receipts on account have always been given for partial payments, and receipts for balance when the installment without interest has been paid. Never, until October 10, 1896, during the 15 years since the beginning of the lease, has the board of Southern Railway trustees made any claim that interest has been due on installments paid at any time within the 90-days period. Upon that date for the first time the claim was made by the board in a letter of its president to the receiver. Since that time the receiver has paid the installments of rent after they were due, without paying any interest thereon, having received the usual certificates and receipts. The question has now again arisen on the form of the certificate and receipt to be given for the balance of the installment due April 12, 1897, and which the receiver is ready to pay on or before July 12, 1897.

Harmon, Colston, Goldsmith & Hoodly, for receiver.

Fred Hertenstein, for city of Cincinnati.

W. T. Porter, E. A. Ferguson, and J. R. Layler, for trustees.

TAFT, Circuit Judge (after stating the facts as above). The question now made at the bar was mooted by the sinking fund trustees nearly 15 years ago. Since that time no installment of rent has been paid at the time fixed in the lease for payment, and yet no one on behalf of the city has ever until now attempted to exact from the lessee company or its receiver the payment of one cent of interest for the delay. Receipts have been given, which, in effect, were receipts in full, whenever the installment without interest has been tendered within the 90-days period, and, as if to emphasize the meaning of the receipts for the balance of the installment, the receipts for partial payments sometimes made have contained an express reservation of the right to forfeit the lease for a failure to pay the balance due, while this was significantly omitted from the receipts for the balance of the installment. If interest was due upon the installments of rent thus delayed in their payment, it is very clear that the obligation arose, not by express agreement between the parties, but as damages for delay. An unbroken line of authorities establishes that, where interest is payable as damages, the reception of the principal without the interest after default is a conclusive waiver of the claim for interest. *Cutter v. Mayor, etc.*, 92 N. Y. 166; *Hamilton v. Van Rensselaer*, 43 N. Y. 244; *Society v. Wells*, 68 Me. 572; *Cordage Co. v. Brewer*, 48 Me. 481; *Canfield v. School Dist.*, 19 Conn. 529; *King v. Phillips*, 95 N. C. 245; *Childs v. Insurance Co.*, 56 Vt. 609; *Abbott v. Wilmot*, 22 Vt. 437; *Perley, Interest* (1893) p. 140. It therefore follows that, even if the lessee company was bound to pay interest on delayed installments, the receipt of the principal without the interest was a waiver of the same. If interest was due, then the city has suffered a loss of \$121,000 by the failure to exact interest, or to reserve a right to the same when the installments were received. If interest was due, it was the duty of the Southern Railway trustees to collect it, or to protect the city's

right to it. They did not do so. If interest was necessarily due, their failure to collect it was a dereliction of duty on their part, which it would seem might subject them to liability to the city on their official bonds. I cannot suppose that the trustees would deliberately contend for a construction of the lease which might involve this consequence, and I cannot, therefore, regard their action in demanding interest on deferred installments after 15 years of acquiescence in the payment of such deferred installments without interest as well considered. I should be loath to reach a conclusion in this case which might justify a claim of personal liability against them. I am very clear that no such personal liability exists. The trustees were the representatives of the city in the execution of its duty under the lease, and there was necessarily vested in them some discretion in determining how rigidly the lease should be construed in favor of the city and against the lessee company in all cases where any doubt existed. It was, of course, for the interest of the city to encourage the lessee to meet its liabilities under a somewhat burdensome lease by not insisting upon a too harsh construction of its terms. The course which the trustees took in construing the lease as not compelling the payment by the lessee of interest on delayed installments during the 90-days period was in the proper exercise of a discretion vested in them, and I cannot hold it to have been otherwise, even at their own instance. It is possible that, had the question arisen and been litigated within a year or two after the execution of the lease, the construction would have been that interest was due, after the dates fixed for payment in the contract of lease, upon delayed installments of rent (section 3181, Rev. St. Ohio), though it might have been argued with some force that, in the absence of an express provision for the payment of interest on the defaulted installment in the clause of re-entry in which the right to apportion the succeeding rent was expressly reserved, the tender of the installment in full without interest at any time during the 90 days succeeding the default would have prevented the right of re-entry and forfeiture from accruing. If so, it would seem that the only amount due during the 90 days, and until its expiration, would be the installment of rent without interest. It has in time past been made the subject of dispute whether interest does run on rent in arrears. At common law no distress was allowed for interest on rent. *Lansing v. Rattoone*, 6 Johns. 43; *Dennison v. Lee*, 6 Gill & J. 383. The theory of the courts first seemed to be that the rent itself was a kind of interest, and that the interest on rent in arrears would be of the nature of compound interest, and so not permissible. *Perley*, Interest, 129; *Burnham v. Best*, 10 B. Mon. 229; *Cooke v. Wise*, 3 Hen. & M. 463. The general rule now, however, is that interest does accrue on rent in arrears from the time it is payable in money. *Williams v. Sherman*, 7 Wend. 109; *People v. Dudley*, 58 N. Y. 323. In *Dennison v. Lee*, 6 Gill & J. 383, the lessor reserved a right of re-entry in a certain time after the default in the payment of rent, and the re-entry clause expressly stipulated for interest on the defaulted rent. Interest was allowed on the installment of rent due in that case, and it was intimated that it would have been allowed even though no such express provision had been in the clause of re-entry.

In some of the early cases with respect to interest on rent in arrears, it was said that the question of the recovery of interest was within the discretion of the court or jury to whom the issue of the amount of recovery was submitted. *Graham v. Woodson*, 2 Call, 249; *Skipwith v. Clinch*, Id. 253; *Dow v. Adam's Adm'r*, 5 Munf. 21. It seems to me sufficiently to appear from what has been said that the question of the liability of the lessee company to pay interest on the installment during the 90 days was in some doubt. It is well settled that, where the construction of a contract is doubtful, courts may use the actual construction put thereon by the conduct of the parties under the contract as a controlling circumstance to determine the construction which should be put upon the contract in enforcing the rights of the parties. *Topliff v. Topliff*, 122 U. S. 121, 7 Sup. Ct. 1057; *Chicago v. Sheldon*, 9 Wall. 50; *St. Louis Gaslight Co. v. City of St. Louis*, 46 Mo. 121; *Jackson v. Perrine*, 35 N. J. Law, 137; *Stone v. Clark*, 1 Metc. (Mass.) 378. Of course, if the lease here in suit expressly provided for the payment of interest on deferred installments, conduct of the parties could not change the certain meaning of such a provision; but, where the obligation to pay interest can arise only by implication or legal inference, it seems clear to me that the implication or inference can be successfully rebutted by the uniform and constant conduct of the parties under the lease wholly at variance with such a liability on the part of the lessee.

It has been suggested that the action of the trustees of the Southern Railway in acquiescing in the claim of the lessee company that no interest was due for defaults in the installments during the 90-days period cannot affect the question of the lessee's liability for interest, because the trustees had no right or power thus to bind the city to a particular construction. To this it may be said that the conduct of the trustees is not the only significant evidence of the acquiescence of the city of Cincinnati in the claim of the lessee company. The action of the sinking fund trustees in passing a resolution that the claim was unfounded, instead of showing that there was no acquiescence on the part of that branch of the city government, only emphasizes the acquiescence of that board in the act of the Southern Railway trustees. It was entirely within the power of the board of sinking fund trustees, and of the members thereof as citizens and taxpayers of the city, to institute litigation, through the city solicitor or otherwise, to compel the trustees of the Southern Railway to insist upon a different construction of the lease with reference to the payment of interest. They did not do so, but contented themselves with a resolution spread upon their minutes protesting against such a construction of the lease in order to avoid any official responsibility for it. They could not thus shift their responsibility as taxpayers and citizens and as a board charged with providing funds to meet the city's obligations in such a way as to prevent the city itself from being bound by the action of the trustees of the Southern Railway. It also clearly appears that the city council, the governing body of the city, was fully advised at the time of the construction that the trustees of the Southern Railway were putting upon the lease, and the city solicitor might have been called upon by that board to go into

court to compel the trustees of the railroad to enforce the payment of interest. He might have done so of his own motion. Any other taxpayer, advised, as all of his class must have been, of that which was being done on behalf of the city in the enforcement and construction of the lease, might have brought into litigation, and settled thereby, the question of the obligation of the lessee company to pay interest on delayed installments. No such action was taken. Municipal corporations, acting in their proprietary capacity, especially when engaged in business enterprises for profit, like that of owning and leasing a railroad, cannot, any more than private individuals, avoid inferences from their inaction and silence as to their acquiescence in and ratification of the acts and omissions of their agents after so long a period of time as 15 years, when the acts and omissions complained of have been constantly recurring four times a year, and have been well known to the public at large. I hold, therefore, that by the construction put upon this lease by the parties to it as shown by 15 years of operation thereunder there is no obligation upon the lessee company to pay interest upon installments of rent within the 90 days after said installments become due, and before the right of re-entry and forfeiture under the lease accrues, and that an order must be made requiring the trustees of the Cincinnati Railway to accept from the receiver in future the installments of rent due under the lease, and to receipt therefor in full of said installments if paid in full at any time within the period of 90 days from the day fixed for payment in said lease.

JEWETT et al. v. YARDLEY.

(Circuit Court, E. D. Pennsylvania. April 6, 1897.)

BANKS—INSOLVENCY—TRUST DEPOSIT.

Where a depositor in a bank obtains from it two drafts upon another bank, paying therefor by checks against his deposit, the relation between the bank and the depositor with respect to such drafts remains that of debtor and creditor, and is not changed to a fiduciary relation, entitling the depositor, upon the bank becoming insolvent before the drafts are paid, to have the assets in the hands of its receiver applied by preference to the payment of such drafts in full.

This was a case stated, filed by agreement of the parties, to be of the same force and effect as if the facts set out had been found by the court in an equity proceeding.

From the case stated it appeared that on May 5 and 6, 1891, the plaintiffs, who were depositors with the Spring Garden National Bank, purchased from it two drafts, one for \$1,092.98 and the other for \$1,049.69, drawn upon the Hanover National Bank of New York, in favor of Swift & Co. of Chicago; that plaintiffs paid for these drafts by checks drawn against moneys previously deposited by them with the Spring Garden Bank; that the drafts were sent by plaintiffs to Swift & Co. at Chicago, and were by the latter's agent, the Metropolitan National Bank of Chicago, presented for payment to the Hanover National Bank on May 11, 1891. The Spring Garden National Bank failed on May 8, 1891. Payment of these drafts was refused by the Hanover National Bank, it having previously appropriated, on May 8, 1891, the funds of the Spring Garden National Bank in its hands to the payment of the debt due from that bank to itself. At all times from the time of the making of the draft to

the time of its failure, the Spring Garden National Bank had in its hands more than the amount of the drafts in cash, and more than that amount on deposit to plaintiffs' credit; and this amount of cash was turned over to the receiver. Subsequent to the failure of the bank, upon suit by the receiver against the plaintiffs, the latter claimed and were allowed, on a trial by jury, a set-off which included the amount of these two drafts.

Joseph Leedom, for complainant.

Read & Pettit, for defendant.

DALLAS, Circuit Judge. There are neither pleadings nor proofs in this case, but a "case stated" has been agreed upon and filed, which counsel have desired me to deal with as if the facts therein stated had been set forth in a bill of complaint, and the bill had been demurred to. The questions involved have been fully argued, and I perceive no reason for declining to decide the case in compliance with the joint request of counsel, without regarding the manner of its presentation.

It is not necessary to consider all the points which have been made and discussed, for, in my opinion, the fundamental proposition of the plaintiffs, upon which their supposed right to relief in equity absolutely depends, cannot be sustained. The plaintiffs, being depositors in the Spring Garden National Bank, "purchased" of the said bank two drafts on the Hanover Bank in New York, and paid therefor by their checks upon the Spring Garden National Bank, to meet which their then deposit account was more than sufficient. This transaction did not create a trust. The Spring Garden Bank was simply the debtor of the plaintiffs for the money which had been deposited by the latter, and, when that bank issued the drafts on the Hanover Bank, it assumed no fiduciary relation to the plaintiffs, but merely gave them orders upon the Hanover Bank for payment of indebtedness of the Spring Garden Bank. The drafts proved to be worthless, and, consequently, the Spring Garden Bank remained debtor to the plaintiffs for the money represented by them; but it was not converted into a trustee of the price which had been paid for purchase of the drafts.

I have read the opinion of Judge Butler in the case of Massey v. Fisher, 62 Fed. 958, to which the plaintiffs' counsel has referred. The facts of that case plainly distinguish it from this one.

Let a decree for defendant be prepared, and, upon notice, be submitted.

COMER et al. v. POLK COUNTY et al.

(Circuit Court of Appeals, Fifth Circuit. June 21, 1897.)

No. 589.

TAXATION—RAILROADS—LIABILITY OF FORMER RECEIVERS.

Taxes against a railroad cannot be collected from receivers who had the control and management of the property during the years for which such taxes were assessed, as a part of the system owned by the company for which they are receivers, but whose connection with the road has ceased, except in an equitable proceeding, and upon proof that they have assets of such railroad in their hands, or have diverted its revenues.

McCormick, Circuit Judge, dissenting.

Appeal from the Circuit Court of the United States for the Northern District of Georgia.

The county of Polk and the city of Cedartown, municipal corporations of the state of Georgia, filed petitions of intervention in the suit of the Central Trust Company of New York against the Savannah & Western Railroad Company, pending in the circuit court of the United States for the Northern district of Georgia, by which it was sought to compel Hugh M. Comer and R. J. Lowry, as receivers of the Savannah & Western Railroad Company, to pay the taxes due the said interveners by the Chattanooga, Rome & Columbus Railroad Company for the years 1891, 1892, and 1893. It appears from the record that on the 1st day of May, 1891, the Chattanooga, Rome & Columbus Railroad, together with its branches, and the franchises and the real and personal property of the company, was sold, transferred, and conveyed by its officials to the Savannah & Western Railroad Company, both being corporations existing under the laws of the state of Georgia. The sale was made subject to the lien of a deed of trust which had been previously executed by the Chattanooga, Rome & Columbus Railroad Company to the Central Trust Company of New York to secure the payment of 2,240 bonds of the denomination of \$1,000 each, aggregating \$2,240,000. Pursuant to the terms of the sale, the Savannah & Western Railroad Company took possession of the Chattanooga, Rome & Columbus Railroad, and operated it until receivers were subsequently appointed. It further appears that the Central Railroad & Banking Company of Georgia owned all the stock of the Savannah & Western Railroad Company. On the 4th of March, 1892, the Central Railroad & Banking Company was placed in the hands of a temporary receiver, under what is designated as the "Rowena Clark Bill." On March 28th following, the Clark bill was amended by making the Savannah & Western Railroad Company a party defendant, and H. M. Comer and the directors of the Central Railroad Company were made permanent receivers of the entire property of the Central Railroad Company, including the Savannah & Western and the Chattanooga, Rome & Columbus Railroads. On July 4, 1892, the Central Railroad Company filed a bill against the Farmers' Loan & Trust Company et al., including by name the Savannah & Western Railroad Company, and describing it as the owner of the Chattanooga, Rome & Columbus Railroad. Under the bill last mentioned H. M. Comer was appointed sole receiver, and operated the property until May 5, 1893, when he and Lowry were appointed receivers under the bill filed by the Central Trust Company of New York against the Savannah & Western Railroad Company, which prayed foreclosure against the Chattanooga, Rome & Columbus Railroad as a part of the Savannah & Western property. Comer & Lowry, as joint receivers, operated the road until February 1, 1894. From the date last mentioned the Chattanooga, Rome & Columbus Railroad has been managed and operated by E. E. Jones, who was appointed receiver thereof under a bill of foreclosure filed against that company by the Central Trust Company of New York. It is conceded as a fact, though not shown by the evidence, that the Savannah & Western Railroad exclusive of the Chattanooga, Rome & Columbus Railroad has been sold by order of the court under a decree of foreclosure which required the purchasers to take the said property subject to such claims as should be adjudged by the court superior to the lien on the bonds. The Chattanooga, Rome & Columbus road is still in the hands of Receiver Jones, and there is now pending in the suit of the Central Trust Company of New York against that company petitions of intervention in behalf of the appellees to collect the taxes sought to be recovered in this proceeding. Among other grounds for recovery against the Savannah & Western Railroad Company, the appellees allege the following in their intervening petitions: "Petitioner shows that all the taxes claimed in this intervention are due to petitioner either as taxes of the Savannah & Western Railroad Company, or as taxes owing by the receivers of said Savannah & Western Railroad Company, by reason of the fact that it held possession of said properties, and enjoyed the revenues of the same, during the years in which said taxes accrued." The receivers, Comer and Lowry, demurred to the interventions of the appellees, and the demurrers were overruled by the court. They then filed answers, in which they set up, among other defenses, the following: "Respondents admit, as set forth in said petition, that said executions issued by said comptroller general of the state of Georgia are

valid and subsisting liens, superior to all other liens, on the property of the Chattanooga, Rome & Columbus Railroad Company, and respondents aver that said Chattanooga, Rome & Columbus Railroad Company, or its receiver, is in law solely bound and liable to pay off and discharge said tax executions as between said intervening petitioner and said Chattanooga, Rome & Columbus Railroad Company. * * * Respondents further set forth and show that they, as receivers of the Savannah & Western Railroad Company, are not now, and never have been, indebted in any sum whatever to the Chattanooga, Rome & Columbus Railroad Company or its receiver; and that at no time was the Savannah & Western Railroad Company, before or since it went into the hands of receivers, indebted to said Chattanooga, Rome & Columbus Railroad Company or its receiver. And respondents further aver that at no time have they ever had any funds or moneys in their hands belonging to the Chattanooga, Rome & Columbus Railroad Company, and upon which the fi. fas. issued in favor of said intervening petitioner, and against said Chattanooga, Rome & Columbus Railroad Company, were a lien for taxes." The pleadings upon the intervention were referred to the master, who, without taking evidence other than the agreed statement of facts, the substance of which is hereinbefore fully recited, reported in favor of the interveners for the taxes due for the years 1892 and 1893. The reason assigned by the master for his conclusion will be found in the following extract from his report: "I think that this is an equitable proceeding, and, furthermore, that there was no evidence introduced to show that when the road was turned over by Comer and Lowry, that they turned over the assets from the gross earnings of the road to Jones, or that there was any accounting between the receivers at all; and my belief is that these taxes ought to be paid by Comer and Lowry as receivers. If this is wrong, it is easy, as a matter of accounting, for said receivers to show it, and have the fi. fas. fixed as a lien on the property in the hands of the present receiver." Exceptions to the report filed by the receivers were overruled, and the report was confirmed. From the confirmatory order the receivers have prosecuted their appeal to this court.

Marion Erwin, for appellants.

Fulton Colville, for appellees.

Before PARDEE and McCORMICK, Circuit Judges, and MAXEY, District Judge.

MAXEY, District Judge, after stating the case, delivered the opinion of the court.

We think the circuit court erred in confirming the master's report, and ordering the receivers of the Savannah & Western Railroad Company to pay the taxes for the collection of which fi. fas. had been regularly issued by the comptroller general of Georgia in favor of the appellees against the property of the Chattanooga, Rome & Columbus Railroad Company. It is alleged in the intervening petition of the appellees, and conceded by counsel for the appellants, that the taxes included in the fi. fas. operated as a lien upon all the property of the Chattanooga, Rome & Columbus Railroad Company superior to all other liens. At the time, however, when the interventions were filed, the appellants had no voice in the management and operation of that road. Their connection with it ceased on the 1st day of February, 1894, when E. E. Jones was appointed receiver of the property under the bill filed by the Central Trust Company of New York against the Chattanooga, Rome & Columbus Railroad Company. But it is contended by the appellees, and their petitions of intervention are framed upon that theory, that the taxes assessed against the Chattanooga, Rome & Columbus Railroad constituted an equitable charge against the Savannah &

Western Railroad Company by reason of the fact that the latter was in possession of the property of the former, and enjoyed its revenue, during the years in which the taxes accrued. It may be that during the time the appellants, as receivers, were in possession of and operating the Chattanooga, Rome & Columbus Railroad property as a part of the Savannah & Western Railroad system, the taxes theretofore due on the Chattanooga, Rome & Columbus property were properly chargeable against the property and assets in their hands; this, however, not as a debt or obligation assumed by the receivers, but as an obligation carrying a first lien on the Chattanooga, Rome & Columbus property itself. In other words, it was a debt of the property, and not of the receivers. After the severance, however, of the connection of the receivers with the Chattanooga, Rome & Columbus property by the appointment of a separate receiver for that property in an entirely distinct suit, the appellants could only be chargeable with the payment of such taxes, if at all, upon proof showing that they had assets belonging to the Chattanooga, Rome & Columbus Company, or that they had diverted the revenues derived from its operation to the improvement and betterment of the Savannah & Western Railroad, or had paid the same to the holders of its bonds. In such case equity would require restoration to the extent of the funds diverted. But, if there was no diversion, there could be no restoration. Upon this point the allegations of the intervening petitions are denied by the answer of the appellants, and there is no proof tending to show the state of accounts between the respective receivers, or to elucidate the transactions between the parties. The duty of making the necessary proof devolved upon the appellees. If there was a diversion of funds by the appellants, it could have been easily shown, and the question should not have been left to mere speculation and presumption. The taxes as disclosed upon the face of the *fi. fas.* are clearly a charge and superior lien upon the property of the Chattanooga, Rome & Columbus Railroad Company, and may be paid out of assets in the hands of Receiver Jones, or from the proceeds of the sale of the property, as the trial court may determine. It follows from what we have said that the order of the circuit court should be reversed, and the intervening petitions dismissed, and it is so ordered.

McCORMICK, Circuit Judge, dissents.

AMERICAN TRUST & SAVINGS BANK v. FARMERS' LOAN & TRUST CO.

(Circuit Court of Appeals, Seventh Circuit. July 17, 1897.)

No. 384.

INJUNCTION—APPEAL FROM INTERLOCUTORY ORDER.

No appeal lies from an order denying a motion to restrain plaintiff from prosecuting a suit to foreclose a mortgage pending the determination of a cross bill, the cross bill, as filed, containing no prayer for an injunction, and an effort made to amend the prayer being "manifestly pretentious," in view of the fact that the prayer was not germane to the bill, and that there

was no conceivable necessity for an injunction, as there could not be a final decree on the principal bill until the merits of the cross bill had been determined.

Appeal from the Circuit Court of the United States for the Northern District of Illinois.

This appeal, it is contended, is from an interlocutory order denying a motion for an injunction. The Farmers' Loan & Trust Company, the appellee, and the American Trust & Savings Bank, the appellant, were made co-trustees of a mortgage or trust deed executed by the Lake Street Elevated Railroad Company. On January 30, 1896, the appellee filed its bill in the court below to foreclose the mortgage, making defendants thereto the mortgagor the Union Elevated Railroad Company, the Northwestern Elevated Railroad Company, and the West Chicago Street-Railroad Company. By an amended bill, filed March 16, 1896, the appellant was made a party defendant. On the same day that this suit was commenced, but half an hour later, the mortgagor, the Lake Street Elevated Railroad Company, filed in the superior court of Cook county, Ill., its bill against the appellee and the appellant herein, and the Northwestern Trust Company, whereby it sought the removal of the appellee as trustee, and an injunction against bringing or prosecuting any suit to foreclose the mortgage. The steps taken for the removal of that cause to the court below and the proceedings had in that court and in this court on appeal are shown in our opinion in *Lake St. El. R. Co. v. Farmers' L. & T. Co.*, 46 U. S. App. 630, 23 C. C. A. 448, 77 Fed. 769. Notwithstanding the rulings of the circuit court refusing to remand the case, and dissolving the temporary injunction issued by the superior court, the latter court continued to assert jurisdiction, and on June 4, 1896, entered a final decree, whereby, in accordance with the prayer of the bill, the appellee was ordered removed from its position as trustee, and enjoined from further acting in that capacity, and from prosecuting any bill to foreclose the mortgage. Before that decree was rendered the appellant had answered to the merits in this suit, and, in order to avail itself of the decree as new matter, on December 28, 1896, it filed in the cause, by leave of court, a cross bill in the nature of a plea puis darrein continuance, setting up the decree as a bar to the further prosecution of the bill herein. The prayer of this cross bill was, in substance, that the decree of the superior court be declared to be a bar to further proceedings, that the amended bill herein be forthwith ordered to be dismissed, and that other proper relief be granted. An injunction was not asked. The appellee answered the cross bill, setting up the proceedings for the removal of the cause, and alleging, among other things, that after the refusal of the circuit court to remand the cause the case was forced to an immediate hearing in the state court, and that from the decree rendered by that court an appeal had been taken and was pending. Thereafter, on January 4, 1897, the appellant asked leave, which was denied, to amend its cross bill by inserting a prayer "that the said Farmers' Loan & Trust Company, its attorneys and agents, may be enjoined and restrained, until final determination of this cross bill, from further prosecuting or maintaining the bill of complaint herein as amended, and that upon final decree herein such injunction may be made perpetual." On the same day it filed its replication to the answer of the appellee to the cross bill, and moved the court in writing for an order restraining the appellee "from prosecuting the amended bill of complaint herein, pending the determination of the cross bill of complaint herein of said the American Trust & Savings Bank, trustee." From the order of the court denying this motion the appeal is prosecuted.

Thomas A. Moran and Levy Mayer, for appellant.

William Burry, John J. Herrick, and Horace H. Martin, for appellee.

Before WOODS, JENKINS, and SHOWALTER, Circuit Judges.

WOODS, Circuit Judge, after making the foregoing statement, delivered the opinion of the court.

The questions arising out of the conflicting assertions of jurisdiction by the national and state courts, which have been argued at great

length, we do not find it necessary, or within our rightful power, to decide. While under the rule of equity pleading it was proper, and perhaps necessary, that the appellant, in order to avail itself of the decree of the superior court as a bar, if it be a bar, to the further prosecution of the suit to foreclose, should set it up by a cross bill (Story, Eq. Pl. § 393), the pleading, it is conceded, was in the nature of a plea puis darrein continuance; and, having been pleaded in bar, if it did not, like a plea puis at law, constitute a waiver of other pleas or answers, it was necessary that it should be disposed of together with or in the same manner as the answer theretofore filed, before a final decree in the case could be entered. Until the merits of the cross bill as an alleged bar to the prosecution had been determined there could not properly be a final decree upon the principal bill, any more than there could be such a decree without disposing of an answer in bar. There was, therefore, no conceivable necessity for an injunction against proceeding to a decree in the main case or on the principal bill. In fact this cross bill made no new, subordinate, or collateral case, which could be carried to a separate conclusion, for the obtaining of which it might be important that there should be a suspension or stay of proceedings on the original bill. It is, of course, conceded, as in *Smith v. Iron Works*, 165 U. S. 518, 17 Sup. Ct. 407, the supreme court has decided, that the right of appeal from interlocutory orders granting or refusing injunctions, conferred by the acts of March 3, 1891 and February 18, 1895, is to be interpreted liberally, but there is no necessity for going, and there could be no propriety in going, the length necessary to sustain this appeal. The cross bill, as filed, contained no prayer for an injunction, and the effort made to amend the prayer would seem to have been an afterthought, not germane to the bill, and as "manifestly pretentious" as the like prayer which was condemned by this court in *Safe-Deposit Co. v. Dickson*, 24 C. C. A. 60, 78 Fed. 205. The appeal is therefore dismissed.

NATIONAL HARROW CO. v. HENCH et al.

(Circuit Court, E. D. Pennsylvania. April 26, 1897.)

1. COSTS—APPEAL FROM TAXATION.

Whether an appeal lies from the order of the circuit court dismissing exceptions to the clerk's taxation of costs,—quære? Appeal allowed in order to save expense, without prejudice to the right of appellees to move to dismiss in the circuit court of appeals; the main cause having also been appealed to that court.

2. APPEAL—SURETY ON BOND FOR COSTS.

The appellee having objected to the surety tendered on a bond for security for costs upon an appeal from an order dismissing exceptions to the taxation of costs, and the appellant having stated that it was ready to furnish a bond satisfactory to the court, the court required another bond, with a different surety, to be submitted to it for approval; 48 hours' notice to be given appellee's counsel.

3. SAME.

Where a surety on a bond for costs upon appeal has been approved for about one month, it is too late for appellee to move for the withdrawal of the approval.

This was a petition for allowance of an appeal from the order of the court dismissing exceptions to the clerk's taxation of costs. Motion for the withdrawal of the approval of surety upon appellant's bond.

The motion for the withdrawal of the approval of the surety was supported by an affidavit setting out that the surety was a foreign corporation, organized under the laws of the state of Maryland, without assets in Pennsylvania; that the bond approved did not provide for execution in the event of default; that the president of the appellant, the principal in the bond, is one of the firm who are agents and attorneys for the surety at Utica, N. Y.; that the alleged certificate of the attorney general attached to the appointment of Herman Hoopes as local agent for the surety provides only that the surety is "granted authority to do business under" the act of congress of August 13, 1894 (2 Supp. Rev. St. U. S. p. 237), and is not a proper certificate, but only a printed circular; that the bond was not properly executed by the surety; and that the surety was also surety on a prior bond given by complainants in the same cause for costs, and that, when costs became due, secured by the bond, the surety failed to pay, and the appellee was compelled to bring suit upon the bond. This bond had been approved March 26, 1897, and the motion was not filed until April 19, 1897.

Risley, Robinson & Love, for complainant.
Strawbridge & Taylor, for defendants.

DALLAS, Circuit Judge (after stating the facts as above). 1. The petition of the plaintiff, praying allowance of appeal from the order of this court of April 10, 1897, dismissing the exceptions to the clerk's taxation of costs, has been argued by the counsel of the respective parties, and fully considered. I have great doubt as to whether an appeal lies from such an order, but think that this doubt should not induce a refusal to allow it. My present action will not prejudice any motion which the defendants may make for dismissal in the court of appeals; but, if the present application were denied, the plaintiff would be compelled to resort to a proceeding involving expense and inconvenience to correct my judgment, if erroneous. Upon compliance by the plaintiff with the requirements of law, its appeal will be allowed.

2. In view of the opposition of counsel for defendants, and of the statement in the affidavit of the president of the corporation plaintiff that the latter "is ready to furnish a bond satisfactory to the court," the surety named in the bond submitted will not be accepted upon the appeal above referred to, but another bond, with different surety, may be submitted at chambers, upon 48 hours' notice to defendants' counsel.

3. Appellee's motion for order withdrawing court's approval of bond for costs on appeal allowed March 26, 1897, has also been argued and considered. The surety was approved about one month ago, and I do not think that the facts now disclosed show that the protection of the defendants require that approval to be withdrawn. Therefore this motion is denied.

MICHIGAN STONE & SUPPLY CO. et al. v. HARRIS et al.

(Circuit Court of Appeals, Sixth Circuit. July 6, 1897.)

No. 501.

1. CONTRACT FOR SALE OF BONDS—MUTUALITY.

A contract for the sale of municipal bonds, to be delivered and paid for in the future, is not invalid for want of mutuality because of a provision that before acceptance of the bonds the seller shall furnish the buyer with a certified transcript of proceedings evidencing legality of issue to the satisfaction of the buyer's counsel, as such provision requires the buyer to submit the evidence to his counsel, and the counsel to pass thereon in good faith, and not capriciously.

2. SAME—SELLER'S RIGHT TO RESCIND.

A refusal to accept and pay for such bonds until all the stipulated evidence of their legality is furnished, where such evidence is obtainable, is not a repudiation of the contract on the part of the buyers, authorizing the sellers to rescind it.

In Error to the Circuit Court of the United States for Eastern District of Michigan.

John C. Donnelly, for plaintiffs in error.

Horace S. Oakley, for defendants in error.

Before TAFT and LURTON, Circuit Judges, and SEVERENS, District Judge.

LURTON, Circuit Judge. This is an action at law for breach of a contract for the purchase and sale of certain negotiable bonds. The memorandum of sale was in the following words and figures:

"Detroit, Michigan, October 3, 1893.

"Messrs. N. W. Harris & Co., Bankers, Chicago, Ills.—Gentlemen: We hereby sell and agree to deliver to you \$100,000 boulevard improvement bonds, issued by the city of Detroit, Michigan, to be dated November 1, 1893, to bear interest at the rate of 4 per cent. per annum, payable semiannually in gold coin, and due and payable in 30 days from the date of bonds. You agreeing to pay us for same par, less a commission of 2 per cent., or, in other words, 98 cents on the dollar for same. We to furnish you with certified transcript of proceedings evidencing legality of issue to the satisfaction of your attorneys prior to the delivery of same. You agreeing to take up and pay for said bonds upon their delivery to you in such amounts and at such times after November 1, 1893, as we may receive same from the city: provided, however, that we deliver all of said bonds between November 1, 1893, and February 1, 1894. This contract is made with you subject to our bid for said bonds made by us this day to the city of Detroit being accepted, it being understood that, if the city does not accept our bid for the above bonds, this contract is null and void. It is further understood that, in case we succeed in obtaining these said bonds in payment for our work, or by direct bid to the city, at any future time, we will deliver same to you on the same terms and conditions.

"Yours, truly,

Michigan Stone & Supply Company,

"By Gus F. Smith, President.

"Henry Collins.

"Accepted: N. W. Harris & Co., by M. A. Devitt, Agent."

The Michigan Stone & Supply Company was awarded the bonds for which it had bid, and thus placed in position to carry out its contract with N. W. Harris & Co. By agreement between the parties, the amount agreed to be sold to Harris & Co. was reduced to

\$70,000. November 21, 1893, Harris & Co. notified the contracting seller that their counsel had approved the bonds as legally issued, and that they were ready and willing to receive same. Delivery was, however, refused upon the ground that on a prior day these bonds had been tendered and refused, and therefore resold to another purchaser. There was a verdict and judgment for defendants in error.

The first objection is that the contract was void for want of mutuality. It is said that there was no consideration for the promise of the plaintiff in error to sell the bonds at the price named in the memorandum, inasmuch as defendants in error were under no obligation to receive them. This, it is said, leaves the engagement of the proposed sellers wholly unilateral, and unenforceable as an executory contract. In support of this position plaintiffs in error cite and rely upon a class of cases involving sales subject to the absolute right of the purchaser before final acceptance to be satisfied with the article tendered him. Of this class are the cases of *McCarren v. McNulty*, 7 Gray, 139; *Brown v. Foster*, 113 Mass. 137; *Gibson v. Cranage*, 39 Mich. 49; *Machine Co. v. Smith*, 50 Mich. 565, 15 N. W. 906. In the case last cited a distinction is pointed out between contracts subject to the satisfaction of one of the parties, where the matter of satisfaction is one of individual taste, sentiment, or feelings, and where satisfaction must depend upon matters equally within the discernment and observation of others. In the first class the courts rarely permit the will of the party declaring himself dissatisfied to be questioned, while in the other some reasonable test must have been given, and good faith exercised, unless the contract is so clear as to leave no doubt that rejection might be rested upon no reason other than the will of the party himself. To the latter class of cases belong such cases as *Manufacturing Co. v. Brush*, 43 Vt. 528, and *Daggett v. Johnson*, 49 Vt. 345, in both of which were involved contracts for the sale of machinery subject to the satisfaction of the buyer therewith. In each case it was held that the buyer had no right to act capriciously, but must fairly test and act honestly in ascertaining whether the article would give satisfaction. The objection that a contract is unilateral does not make it a nude pact, provided it rests upon a consideration. In the case of *Railway Co. v. Witham*, L. R. 9 C. P. 16-19, a like objection was urged to the enforcement of a contract. The facts were that Witham made a proposal in writing to sell to the railroad company such supplies as they should order within a year at prices specified. This was accepted, and some orders given and filled. Subsequently orders were refused, and for such refusal an action for a breach of contract was brought. The defense was that the contract was void for want of mutuality, the railway company being under no obligation to give any orders. The action was sustained, Keating, J., saying, among other things:

"If before the order was given the defendant had given notice to the company that he would not perform the agreement, it might be that he would have been justified in so doing. But here the company had given the order, and had consequently done something which amounted to a consideration for the defendant's

promise. I see no ground for doubting that the verdict for the plaintiffs ought to stand."

Brett, J., said:

"This action is brought for the defendant's refusal to deliver goods ordered by the company, and the objection to the plaintiffs' right to recover is that the contract is unilateral. I do not, however, understand what objection that is to a contract. Many contracts are obnoxious to the same complaint. If I say to another, 'If you will go to York, I will give you 1,001,' that is in a certain sense a unilateral contract. He has not promised to go to York. But, if he goes, it cannot be doubted that he will be entitled to receive the 1,001. His going to York at my request is a sufficient consideration for my promise. So, if one says to another, 'If you will give me an order for iron, or other goods, I will supply it at a given price,' if the order is given, there is a complete contract, which the seller is bound to perform. There is in such a case ample consideration for the promise. So here, the company having given the defendant an order at his request, his acceptance of the order would bind him. If any authority could have been found to sustain Mr. Seymour's contention, I should have considered that a rule ought to be granted. But none has been cited. *Burton v. Railway Co.* [9 Exch. 507] is not at all to the purpose. This is matter of every day's practice, and I think it would be wrong to countenance the notion that a man who tenders for the supply of goods in this way is not bound to deliver them when an order is given. I agree that this judgment does not decide the question whether the defendant might have absolved himself from the further performance of the contract by giving notice."

The subject-matter of this contract was negotiable bonds to be issued for street improvements to be made under a contract between the city and the plaintiffs in error. They had not been issued when this agreement was entered into. It was a most reasonable and prudent thing for proposing purchasers to stipulate for some security against the invalidity of such bonds before being required to receive and pay for them. To this end the agreement provided that the sellers should furnish the buyers with a "certified transcript of proceedings evidencing the legality of issue to the satisfaction of the buyers prior to delivery of same." The plain meaning of this was: (1) That plaintiffs in error were to furnish certified copies of the proceedings under which these bonds were issued. (2) Defendants in error were to fairly and honestly submit this record, when furnished, to the judgment of counsel selected by them. (3) The counsel thus selected must not capriciously and arbitrarily reject the bonds, but, on the record, honestly and fairly give his judgment as to their legality. Waiving for the moment the question of the right of either party to withdraw from this agreement before anything had been done, no such right was exercised until the execution of this agreement had been begun. The sellers caused a "transcript of the proceedings" under which the bonds had been issued to be prepared, and forwarded same to the buyers. The buyers employed counsel, a gentleman particularly skilled in the matter of the validity of municipal bonds, and submitted this evidence to him, and procured his opinion. This opinion pointed out four objections, and called for certain other evidences by which these objections might be removed. This opinion, together with a demand for evidence covering the objections of counsel, was submitted to the sellers. The latter, through their agent, Mr. Carleton, more than once agreed to supply the missing evidence. Three of the objections were re-

moved by the additional matter supplied, and evidence covering the fourth and final objection promised. Just at this point most inexcusable difficulties were encountered. The fourth objection of counsel was in these words:

"It should appear that the resolutions passed by council on April 4, 1893, and April 13, 1893, were approved by the mayor of the city, as required by the 1887 amendment of the city charter (chapter 7, § 13). The form of the bond is sufficient."

It subsequently appeared that the mayor had approved these resolutions, and evidence of this fact was the only matter required to complete the evidence of the valid issue of these bonds. This had not been furnished when, on November 14, 1893, Harris & Co. were tendered the bonds, and the sale declared off, because they would not then accept and pay for same. Manifestly, the expense incurred by the buyers in endeavoring to carry out their part of this agreement furnished a good consideration, and supports their demand for damages for a breach of the agreement on the part of the proposed sellers. But this agreement was not unilateral. That objection is founded upon the assumption that the defendants in error had an absolute and unqualified right to refuse to take the bonds; that, no matter how capricious and arbitrary their refusal, they had the right to refuse with or without reason. This is a total misconception of the plain intent of the parties as manifested by the whole tenor of the language employed. The buyers undertook, by their acceptance of this contract of sale, to employ counsel learned in the law, and submit to him the evidences furnished by the sellers bearing on the question of the validity of these bonds. The contract to take and pay for the bonds was suspended until such an opinion was procured. But when the validity of the bonds had been determined the obligation to receive and pay for them became absolute. They could not willfully refuse to submit the matter to a competent attorney, nor could the attorney decide capriciously, nor render judgment arbitrarily. The matter was not one touching the taste, feelings, or sentiments of the buyer; neither was such language employed as would justify the court in saying that the absolute and unqualified right of rejection was reserved to the buyer. The question of the validity of the bonds was to be settled by the opinion of a third person, whose judgment was to be a legal opinion based upon the law and facts touching these bonds. Neither party would be concluded by an opinion rendered arbitrarily, and without the honest intent of deciding fairly and rationally. The contract seems to us to come fairly within the principle applicable to contracts under which settlements between parties are made dependent upon the certificate of some third person. The rule in such cases is that, "in the absence of fraud, or such gross misconduct as would necessarily imply bad faith, or the failure to exercise an honest judgment," the action of such third person should conclude both parties. *Kihlberg v. U. S.*, 97 U. S. 398; *Railroad Co. v. March*, 114 U. S. 549, 5 Sup. Ct. 1035; *Railroad Co. v. Price*, 138 U. S. 185, 11 Sup. Ct. 290; *Mundy v. Railroad Co.*, 14 C. C. A. 583, 67 Fed. 633. In the case of

Folliard v. Wallace, 2 Johns. 395, the opinion was by Kent, C. J. The action was one of covenant. Land had been sold and conveyed upon a consideration payable three months after the vendee "should be well satisfied that they held the said 600 acres of land undisputed by any person whatsoever." The plea was that the defendants "were not satisfied that the said land can be held undisputed by any person whatsoever," and a claim in favor of certain third persons was said to exist. The replication set up that the claim said to be outstanding had been decided under an arbitration some time previous. Kent, C. J., rendered the opinion of the court, and, among other things, said:

"He was to pay three months after being well satisfied, etc., and the award of the Onondaga commissioners ought to have satisfied him, until some lawful title appeared to controvert the one held under that decision. * * * Nor will it do for the defendant to say he was not satisfied with his title, without showing some lawful incumbrance or claim existing against it. A simple allegation of dissatisfaction, without some good reason assigned for it, might be a mere pretext, and cannot be regarded. If the defendant were left at liberty to judge for himself when he was satisfied, it would totally destroy the obligation, and the agreement would be absolutely void. But here was a real obligation contracted, and the true and sound principle is laid down in Pothier (*Traite' des Obligations*, No. 48) that, if A. promises to give something to B. in case he should judge it reasonable, it is not left to A.'s choice to give it or not, since he is obliged to do so in case it be reasonable. The law in this case will determine for the defendant when he ought to be satisfied; and until he shows some lawful claim or title to countervail that which he derived from the plaintiff, and which has been confirmed by the award of the commissioners, the intendment of law is that his title is complete, and he is, consequently, bound to pay. The first plea of the defendant is, therefore, bad."

Touching the failure of the plaintiffs in error to produce a certificate showing that the mayor had approved this bond resolution, the court below said:

"I instruct you, gentlemen, that whether or not the charter of the city of Detroit required the mayor to approve this resolution in question is immaterial, for the reason that the production of that approval, or of evidence of that approval, has been made the subject-matter of the contract of October 3d. The one party required it and the other party had agreed to furnish it, so it becomes immaterial whether it was necessary to the validity of the bonds or not."

Counsel have sought, by an exception to this language, and by an exception based on the refusal of the court to give their second request in charge to the jury, to start the question that the validity of these bonds did not depend upon the signing of these resolutions by the mayor. The charge refused was in these words:

"If the jury find that the plaintiffs were not acting in good faith in their demands for further information at the time the tender of November 14, 1893, was made, and that said demands were made for the purpose of delay, and not with the intention of getting legitimate information, then defendants would be justified in refusing to carry out the contract of October 3d, made with plaintiffs."

There was not the slightest evidence to indicate that the agent of defendants in error was not acting in good faith in endeavoring to get evidence that the mayor had approved this resolution. Learned counsel had expressed the opinion that such approval was necessary to the validity of the issue, and no reason has been advanced contrary to that opinion. But, aside from the soundness of this view

of counsel, the fact was that evidence of the character called for actually existed. That evidence was demanded, and plaintiffs in error were bound to furnish it. This they did not do, and neither then nor on the trial did they offer any reason for failing to produce it. The question of the effect of the failure of the mayor to sign this resolution lay behind the question of the effect of the refusal of plaintiffs in error to furnish evidence of an existing fact which they were bound to produce because it constituted one of the facts in the history of this bond issue. What the court said was, in substance and meaning, this:

"You will not consider whether these bonds might not have been valid although the mayor failed to approve the resolutions of the city council authorizing their issue. That question could only arise if it should be shown that the resolution was not approved. The fact that he did approve this resolution constituted one of the facts in the proceedings authorizing these bonds, and evidence of this fact the defendants had obligated themselves to produce."

Thus understood, there was no error, and both assignments of error are bad.

Error is assigned upon so much of the charge of the court as is contained in the following language:

"Now, if Mr. Fudge, as I have stated to you, rested his declension of the tender,—for that he declined to receive the bonds is not questioned,—if he rested it on the illegality of the issue, because of the misrecital of the date, the bonds containing the date, I believe, April 5th, when it should have been April 4th, if he put his objection to the receipt of the bonds on that point, and declined to receive them because of that error, then it is for you to say whether or not Mr. Fudge acted in good faith in that matter, regarding the transaction at an end. If he understood from what occurred there, the defendants, the Michigan Stone & Supply Company being represented by its president, Mr. Smith, that Fudge's declaration in behalf of the plaintiffs was absolute he would not receive the bonds, it is for you to say whether they were not justified in regarding themselves released from that contract. If Mr. Fudge insisted on that condition, and made that absolute objection to the bonds, as I have said to you, the defendants might regard themselves as at liberty to dispose of the bonds otherwise."

This presents the most difficult question in the case. The variance referred to was wholly immaterial, and Mr. Wood, attorney for Harris & Co., had passed it over, both by failing to specify any such objection and by assenting to the form of the bond. If, therefore, these bonds were rejected for this misrecital, plaintiffs in error were justified in treating the contract as rescinded, and in making a sale to another purchaser. The question as to whether Mr. Fudge, who was the agent for defendants in error, acted in good faith in rejecting the bonds for this reason alone, was a question wholly immaterial. It is no answer to a suit for a breach of contract that it was broken in good faith. But did this language, when read in connection with other parts of the charge, mislead the jury? There was a sharp conflict of evidence as to the reason given by Mr. Fudge for rejecting the tender of these bonds made to him on November 14, 1893. His testimony was that he declined to then accept the bonds because the evidence bearing on their legality had not been furnished. His letter of authority plainly stated that all of the objections made by Mr. Wood had been met by additional

papers furnished, except the fourth and last, which related alone to the approval by the mayor of the bond resolutions of the city council. Evidence of this fact he was instructed to procure, and, if the facts were such as to remove this objection, he was authorized to arrange for the payment of the price. These instructions, he says, he either read or stated to the parties. The agents of plaintiffs in error denied that he either read or stated his instructions, and affirmed that he put his rejection alone upon the ground that the bonds were illegal because of an alleged misrecital of the date of the resolutions under which they were executed. This issue of fact went to the jury, and has been found in favor of defendants in error, unless they were misled by the paragraph of the charge under consideration. But the court did not tell the jury that a bad objection made in good faith would save to the plaintiffs the right to have it ignored, nor anything of a like character. The learned trial judge had doubtless in mind the request made by counsel for defendants below touching the question of good faith of Fudge in making demands for further evidence at the time of the tender made to him, as presented in their second request, heretofore set out. The theory of the plaintiffs in error was that Mr. Fudge had waived the nonproduction of the missing evidence of approval by the mayor by placing his objection upon a totally different ground, a ground wholly immaterial, and theretofore waived by an acceptance of the formal parts of the bond. This theory was put to the jury by the court fully and clearly in the following language:

"The plaintiffs, as I have said to you, had the right to stand upon their agreement, and to require as an indispensable condition of their obligation to take up these bonds and pay the sum due—\$68,600, I believe—that the papers should be satisfactory to Mr. Wood. Did they stand upon it? If they did stand upon it, and if you believe from the evidence that Mr. Fudge came there as the authorized agent of the plaintiffs, and waived that condition, and for no other reason than that stated by defendants refused to accept the bonds, if he declined to take them, saying they were not a legal issue, or for any other reason absolutely declined to take the bonds, that would have been, or that was, if that was so, a breach of contract on his part, which would be a breach of the contract on the part of the plaintiffs to take those bonds according to this obligation. The plaintiffs, as I have said, might have stood upon the original condition. If they did so stand, and if Mr. Fudge did not decline to take the bonds for that reason, but as he states, and if you believe states truthfully, if, as he states, he demanded the papers called for by Mr. Wood's opinion, and made the production and the furnishing of those papers the condition on which he was ready to pay the money, he had a right to stand upon that in the interest of the plaintiffs, and until that time, or until they were produced, the defendants had no right to rescind the contract. They had obligated themselves that these papers should be produced which would be satisfactory to the plaintiffs' attorney, who was Mr. Wood in this case, who had the matter immediately in charge. And they had a right to insist that such papers should be produced before the defendants became entitled to declare or require the immediate payment of the bonds. In other words, by that contract, unless its condition was waived, as I have said, by Mr. Fudge's action here, the plaintiffs had a right to say, 'You have not produced the papers which you have agreed to produce and have made the condition precedent to our payment of this money.' And, if that were so, then the defendants were wrong in selling these bonds. They were wrong in disposing of them before they had furnished the papers they had agreed to furnish. I will say, in that connection Mr. Fudge testified, 'I don't know that I have got his exact words, but I think I have the substance of them as I followed it, that he did not reject the tender because of any

mistake in the date of the resolution, but because of the failure to furnish the papers required by the contract, the mayor's approval,' etc. And his exact language, as I have it in my notes, and that your own memories will correct: 'I don't know that these bonds are a legal issue, inasmuch as I have not been furnished with the papers establishing their legality.' That, in substance, is what Mr. Fudge says he there stated in answer to the tender made to him."

This covered the whole ground. If the fact was as stated by Fudge, then the tender made before the production of the evidence of approval by the mayor was premature, and defendants in error did not repudiate their contract by refusing the tender then made. If, however, the facts were as contended by the defendants below, then the court plainly said, "That was, if that was so, a breach of contract on his part, which would be a breach of the contract on the part of the plaintiffs to take the bonds according to this obligation." But all possible doubt as to the misleading character of the language complained of is removed by the concluding language of the court in the same connection, which was that: "If Mr. Fudge insisted upon that condition, and made that absolute objection to the bonds, as I have said to you, the defendants might regard themselves as at liberty to dispose of the bonds otherwise. It is for you to say what did occur at that interview."

In view of the whole charge, we think the inadvertent language used by the court was cured, and that no possible harm could have resulted therefrom. We are strongly impressed with the rightness of this judgment, and are, therefore, the more inclined to the view we have taken as to the harmlessness of the observation of the court touching Fudge's good faith.

Other errors have been assigned. They are without merit. Their detailed consideration would be of no value to the profession, and no comfort to plaintiffs in error. Let the judgment be affirmed.

OMAHA NAT. BANK v. MUTUAL BEN. LIFE INS. CO.

(Circuit Court, D. New Jersey. June 16, 1897.)

1. LIFE INSURANCE—APPLICATION OF RESERVE ON LAPSE OF POLICY—INDEBTEDNESS.

Where the holder of a life policy has signed certificates of loan for 30 per cent. of the annual premiums paid by him, and the policy provides for the application by the company, in case of forfeiture for nonpayment of premium, of the net reserve, "less indebtedness to the company on the policy," to the purchase of extended insurance on the life of the assured, the company may deduct the amount of such loan certificates from the net reserve, and apply only the residue to the purchase of such insurance.

2. SAME—OPTION TO PAY INDEBTEDNESS.

Where a life policy provides that, in case of lapse for nonpayment of premiums, the company shall apply the net reserve, less any indebtedness of the assured, as a single premium in the purchase of extended insurance, or, if the assured shall so elect within three months, in the purchase of a paid-up policy, and also that in such case the indebtedness, if any, may be paid in cash, in which case the entire net reserve shall be so applied, the payment of such indebtedness must be made within the three months, or the company will be authorized to deduct it from the net reserve, and apply only the re-

malander to the purchase of term insurance, and cannot be compelled to extend such insurance on a subsequent tender of payment.

In pursuance of a stipulation in writing waiving a jury, this cause was tried by the court without the intervention of a jury on the 20th day of April, 1897. And now, this 16th day of June, 1897, upon due consideration the court finds the following stated facts:

(1) This is an action by the Omaha National Bank, as assignee of Frank C. Johnson, to recover \$20,000, the amount insured by the defendant under its two policies, numbered respectively 165,039 and 165,040, each dated January 15, 1891, and providing that in consideration of the payment of the annual premium of \$359.40 on each November 11th during the continuance of the policy the defendant insures said Johnson's life in the sum of \$10,000 under each policy, payable to Johnson, his executors, administrators, or assigns, at his death, and also providing that, in case the premiums were not paid when due, the policies should cease and determine, subject to the provisions of the company's nonforfeiture system as indorsed thereon with the accompanying table.

(2) The nonforfeiture provisions indorsed on each of the policies provided that:

"When, after two full annual premiums shall have been paid on this policy, it shall cease or become void solely by the nonpayment of any premium when due, its entire net reserve by the American Experience Mortality and Interest at four per cent. yearly, less any indebtedness to the company on this policy, shall be applied by the company as a single premium at the company's rates published and in force at this date, either—First, to the purchase of nonparticipating term insurance for the full amount insured by this policy; or, second, upon the written application by the owner of this policy, and the surrender thereof to the company at Newark, within three months from such nonpayment of premium, to the purchase of a nonparticipating paid-up policy, payable at the time this policy would be payable if continued in force."

There was also the following indorsement:

"The following table shows the amount that the company agrees to loan (being one-half of the reserve) upon a satisfactory assignment of the policy as collateral security; also the additional time for which the insurance will be continued in full force after lapse by nonpayment of premium, or the value of the policy in paid-up insurance upon surrender within three months from date of lapse. The figures given are based upon the assumption that the premiums (less current dividends) have been fully paid in cash. If there be any indebtedness upon the policy, the values as stated in the table would have to be reduced proportionally upon the principles stated in the policy. The indebtedness, if any, may be paid off in cash, in which case the figures in the table will apply."

The table showed that after three premiums had been paid the company would loan \$250 on the policy, or, in case of lapse of policy, the extended insurance purchasable would be for 3 years and 258 days, and the paid-up policy would be for \$1,030.

(3) The insured, Johnson, settled three annual premiums on each policy according to the company's 30 per cent. premium loan plan, namely, by paying at the outset 70 per cent. of the premium in cash, and signing, with respect to the policies, respectively, certificates of loan for the balance, of one of which certificates the following is a copy, the other being identical with it except as to the distinguishing number of the policy:

Certificate of Loan.

Newark, N. J., Jan. 15th, 1891.

Premium Payable Nov. 11th.

Certificate of Loan on Policy No. 165,039.

This certifies that the Mutual Benefit Life Insurance Company has loaned on policy No. 165,039 one hundred and seven $\frac{82}{100}$ dollars, being thirty per cent. on the first annual premium, which, with any additional loan, shall be a lien on the policy until paid; legal interest on the same to be paid annually out of the dividend, if any, otherwise to be paid in cash; the amount of the existing loan to be indorsed hereon, and also stated on the renewal receipt.

Frank C. Johnson.

At the settlement of the annual premiums on the 11th of November, 1891, in the case of each policy, the amount of the then existing premium loan, namely, \$145.21, was indorsed on the certificate of loan, and also entered on the margin of the renewal receipt which was then issued to the insured; and this was again done at the settlement of the annual premiums on the 11th of November, 1892, the amount of the premium loan then remaining outstanding being \$182.74 on each policy.

(4) In the case of each of the policies there was a total failure to pay or settle the premium which became due on the 11th day of November, 1893, and thereupon the policies, by their terms, ceased and determined.

(5) The reserve on each policy at the time of the lapse amounted to \$508.36. The indebtedness on each for premium loan as above mentioned amounted to \$182.74, which, with interest for one year, \$10.96, amounted to \$193.70. The net reserve, less said indebtedness on each policy at the time of lapse, was, therefore, \$314.66,—the purchase price of term insurance for 2 years and 104 days.

(6) The insured, Johnson, did not apply for the benefit of the second alternative of the nonforfeiture provisions of the policies, and after the expiration of the three months therein provided, namely, on February 27, 1894, the defendant (the insurance company) prepared, and, in accordance with its practice in like cases, executed, under the hand of its president, its usual certificates in such cases, numbered respectively 200,738 and 200,739, one for each policy, reciting that the original policy had lapsed by nonpayment of premium on November 11, 1893, and certifying that the net reserve thereon at the time of lapse, viz. \$508.36, less the outstanding premium loan and accrued interest, amounting to \$193.70, leaving \$314.66, had been applied to the purchase of term insurance for the said sum of \$10,000; that the term of said insurance would be 2 years and 104 days from and after the 11th day of November, 1893; and also certifying the terms and conditions of such term insurance as indorsed on the policies. And the company at the same time, in accordance with its practice in such cases, made on its books of account appropriate entries showing that these certificates of term insurance for 2 years and 104 days, expiring February 23, 1896, had been substituted for, and stood as liabilities in lieu of, the original policies. The premium loan account was at the same time credited with the amount therefore due on these policies, and the difference between the reserve and loan on each policy was at the same time credited to the policy

account as new premium; and thereafter the premium loans were no longer carried as assets of the company, nor the original policies as liabilities, but the certificates of term insurance were thereafter the only liabilities appearing on the company's books on account of their relations with Frank C. Johnson.

(7) On October 14, 1895, Johnson assigned these policies to the plaintiff bank, which on the same day sent the assignments and copies to the defendant, and the defendant, on October 17th, indorsed on the original assignments an acknowledgment of their receipt, and forwarded them to the plaintiff, with a letter stating that the term insurance which had been substituted for these policies expired on February 23, 1896.

(8) On February 18, 1896, which was five days before the extended insurance would expire, the plaintiff tendered to the defendant the amount of each premium loan, with interest, claiming its right to pay the indebtedness at that time, and secure a further extension of the insurance. This tender the defendant declined, denying the plaintiff's claim to a further extension of the insurance.

(9) Frank C. Johnson died September 28, 1896.

E. Q. Keasby and Artemus H. Holmes, for plaintiff.

William S. Dodd, John O. H. Pitney, and E. V. Lindabury, for defendant.

Upon these facts the court determines the law of the case to be as expressed in the following opinion:

ACHESON, Circuit Judge. 1. It is contended on behalf of the plaintiff that there was no "indebtedness to the company on this policy" to be deducted from its net reserve within the meaning of the nonforfeiture provisions, and therefore that the extended insurance was for the full term of 3 years and 258 days from November 11, 1893, the date of the lapse, which would carry the term insurance beyond the date of the death of the insured. The plaintiff insists that the "indebtedness" mentioned and provided for in the nonforfeiture provisions is indebtedness for loans made in cash by the company to the policy holder upon an assignment of the policy as collateral, and does not apply to a transaction represented by the certificate of loan, which, it is urged, is simply a credit of 30 per cent. of the premium payment, not enforceable as a debt, but which is to be liquidated, acquitted, and recouped as therein provided, and not otherwise. But I am not able to perceive any sound reason for thus construing the nonforfeiture provisions of the policy. No distinction is therein made between cash loans and premium loans. The language used is, "Any indebtedness to the company on this policy." This is comprehensive enough to embrace the transaction evidenced by the certificate of loan. While it may be that in the settlement of an annual premium the portion thereof represented by the certificate of loan does not actually pass back and forth between the insured and the company, yet the transaction in substance is a loan of money. The certificate designates it a "loan," the amount bears "interest," and it is made a lien on the policy until "paid." No doubt the company's main reliance is up-

on this lien because of its effectiveness, but personal liability is not expressly or necessarily excluded. A loan imports an obligation to pay back. I do not see why an action could not be maintained on the certificate of loan after demand. Debt lies whenever a sum certain is due, without regard to the way in which the obligation was incurred, or by what it is evidenced. *Stockwell v. U. S.*, 13 Wall. 531. But whether or not the premium loan imposes a personal liability upon the insured, it is an "indebtedness to the company on the policy," within the fair meaning of the nonforfeiture provisions. The authorities relied on do not, I think, sustain the contrary view. It is the net reserve, less all indebtedness on the policy, including the outstanding premium loan, that is to be invested in the new form of insurance, whether under the first or second alternative clause. This does exact justice to both parties to the contract. But if, in case of the purchase of term insurance, the premium loan is not deducted, and the insured should outlive the purchased term, then the company's lien would be gone; and the premium loan left unpaid. A construction of the contract which might lead to such a result is not to be accepted. I am of the opinion that the premium loan on each of the policies in suit outstanding at the time of the lapse was an indebtedness to the company on the policy within the meaning of the nonforfeiture provisions.

2. It is, however, further contended on behalf of the plaintiff that, if there was an indebtedness to the company on the policies for premium loans at the date of the lapse, the plaintiff had a right to pay off that indebtedness on February 18, 1896, and that the tender of payment then made operated to extend the term of insurance until July 27, 1897. This argument is based upon the statement on the back of the policy immediately preceding the table, which, among other things, shows the additional time for which the insurance will be continued in full force after lapse by nonpayment of premium, viz.:

"The figures given are based upon the assumption that the premiums (less current dividends) have been fully paid in cash. If there be any indebtedness upon the policy, the values as stated in the table would have to be reduced proportionally upon the principles stated in the policy. The indebtedness, if any, may be paid off in cash, in which case the figures in the table will apply."

Now, treating this statement as part of the contract of insurance, it must be read in connection with the body of the policy and the nonforfeiture provisions indorsed thereon, and when so read no such effect as is here claimed can reasonably be given to the statement. This clause has relation to the time of the lapse, when the original policy ceases and determines, and new insurance is to be substituted agreeably to the nonforfeiture provisions. Those provisions give to the policy holder upon such lapse the benefit of the net reserve then appertaining to his policy after deducting therefrom the indebtedness to the company on the policy. The net reserve, less said indebtedness, the company must apply to the purchase of term insurance; or, at the option of the insured, if signified within three months after lapse, to the purchase of a paid-up policy. The explanatory clause in connection with the table states: "The indebtedness, if any, may be paid off in cash, in which case the figures in the table

will apply." But when may the indebtedness be paid off to secure the application of the figures in the table? Certainly, it must be within the three months after lapse, during which the insured has the option to demand a paid-up policy instead of term insurance. Clearly, the net reserve, less the indebtedness, must be invested either in term insurance or in a paid-up policy, during or at the expiration of three months from the lapse. Upon the expiration of that period the rights of the parties are definitely fixed. This construction of the contract harmonizes all its provisions, is reasonable, and is perfectly just both to the insured and the company.

I do not regard it as a matter of any moment that the certificates of loan were not surrendered, nor the certificates of extended insurance delivered to Johnson. In this there was no departure by the company from its usual course of business. Johnson retained possession of his policies, and did not apply for the other papers, which he could have had for the asking. I am of the opinion that the term insurance to which Frank C. Johnson was entitled under the policies in suit expired on the 23d day of February, 1896. Accordingly, upon the facts and law of the case as above stated, the court finds in favor of the defendant.

KNOWLES LOOM WORKS v. RYLE.

(Circuit Court, E. D. Pennsylvania. May 13, 1897.)

PARTIES—INTERVENTION.

Holders of bonds secured by a mortgage, to the lien whereof certain machinery is subject, are not entitled to intervene as parties defendant, in an action of replevin for the machinery, where the defendant has elected to give a claim property bond to the marshal, and to retain the machinery, as their interest cannot be affected by the decision.

J. Martin Rommell, for plaintiff.

John S. Hoffman, for petitioners.

DALLAS, Circuit Judge. This is a suit at law,—an action of replevin for the alleged wrongful detention of certain machinery. The Lehigh Valley National Bank and others have filed a petition for leave to intervene as parties defendant. Their supposed right of intervention is based upon the allegation that they are holders, to a considerable amount, of bonds secured by a certain mortgage, to the lien whereof it is averred the said machinery is subject. The mortgage trustee has, upon request, declined to intervene. The petitioners admit that they believe the defendant to be the owner of this machinery, and that he has given a claim property bond (against their objection) to the marshal; but still they assert that, "for the protection of their interest in the premises," they should be permitted to become parties. It is not requisite to consider every objection which might be opposed to this proceeding. A single and I think an obvious one is fatal to it. The defendant had an unquestionable right to give a claim property bond, notwithstanding the protest of the petitioners. He has exercised that right; and, "clearly, after the prop-

erty is retained by the defendant on the claim of ownership, and security given to the sheriff [or marshal], there is no remedy at law by which the plaintiff in replevin can repossess himself of it." *Fisher v. Whoollery*, 25 Pa. St. 199. Therefore, no interest of the petitioners will be in any way affected by the decision of this case. Whatever right or interest they may have to or in the property in question will be quite as valid and just as available, after the entry of any judgment which can be rendered herein, as it would have been if this action had not been brought. The petition for leave to intervene is dismissed.

UNITED STATES v. ROGERS et al.

(Circuit Court of Appeals, Ninth Circuit. July 1, 1897.)

No. 343.

PUBLIC LANDS—RECEIVER OF PUBLIC MONEYS—LIABILITY OF SURETIES.

The sureties in the bond of a receiver of public moneys at a land office are not liable for moneys received by him as proceeds of the sale of Indian lands made under the act of congress of September 1, 1888, as such moneys are at all times, in equity, the moneys of the Indians, and not public moneys.

In Error to the Circuit Court of the United States for the District of Idaho.

James H. Forney, U. S. Atty.

Charles A. Wilson, for defendants in error.

Before GILBERT and ROSS, Circuit Judges, and HAWLEY, District Judge.

ROSS, Circuit Judge. The plaintiff in error, as plaintiff in the court below, sued the defendants as sureties upon the official bond of one William H. Danilson, given as receiver of public moneys at the United States land office at Blackfoot, Idaho, pursuant to the laws of the United States. The penal sum of the bond is \$15,000, and its condition is that, if Danilson "shall faithfully execute and discharge his duties as receiver aforesaid, and faithfully disburse all public moneys, and honestly account, without fraud or delay, for the same, and for all public funds or property which shall or may come into his hands, then the said obligation to be void, and of no effect; otherwise to remain in full force and virtue." The amount sued for is \$270, and, according to the agreed statement of facts, it constituted a portion of the proceeds of the sale of certain Indian lands, made under and by virtue of the act of congress of September 1, 1888 (25 Stat. 452), and was retained by Danilson out of those proceeds as compensation for his services rendered in the matter of the sale, pursuant to a letter of the commissioner of the general land office of date March 28, 1891, which recited that the act providing for the sale of the lands made no provision for the receipt of the proceeds, and directing the said Danilson to go to the place of sale (Pocatello,—about 25 miles distant from the land office), and to remain there during the sale of the lands, and to receive the moneys

arising therefrom; and further stating that he (Danilson) and one P. J. Anson, register of the land office at Blackfoot, should receive five dollars per day for each day engaged in the sale; and further providing that all costs, clerk hire, mileage, and other expenses incident to the sale should be charged to and paid out of the fund arising therefrom. The agreed statement of facts further shows that, pursuant to that letter of instructions, Anson remained in Pocatello, engaged in and about the sale, 23 days, and Danilson 31 days; that neither Anson nor Danilson received any pay for their services, nor mileage, nor reimbursement for any expenses in going to Pocatello, nor for their expenses while there engaged in the sale of the lands; that the expenses of each of them while so engaged was three dollars per day, and that five dollars per day each for their services in the matter of the sale of the land is a reasonable compensation, in the event any compensation is allowable by law.

The act of September 1, 1888, was an act to accept and ratify an agreement made with the Shoshone and Bannock Indians for the surrender and relinquishment to the United States of a portion of the Ft. Hall reservation, in the territory of Idaho, for the purposes of a town site, and for the grant of a right of way through the reservation to the Utah Northern Railway Company, and for other purposes. By the agreement so ratified, the Indians agreed to surrender and relinquish to the United States all their estate, right, title, and interest in and to a certain portion of the reservation, which land, so relinquished, in the event it should be found necessary, was to be surveyed by the United States, and laid off into lots and blocks as a town site, and, after due appraisement thereof, to be sold at public auction to the highest bidder, at such time, in such manner, and upon such terms and conditions as congress should direct. The funds arising from the sale of such lands, after deducting the expenses of survey, appraisement, and sale, the act declared should be "deposited in the treasury of the United States to the credit of the said Indians, and to bear interest at the rate of five per centum per annum; with power in the secretary of the interior to expend all or any part of the principal and accrued interest thereon for the benefit and support of said Indians, in such manner and at such times as he shall see fit. Or said lands so relinquished to be disposed of for the benefit of said Indians in such other manner as congress may direct."

By section 2 of the act it was provided that the secretary of the interior should cause to be surveyed and laid out into lots and blocks so much of the ceded portion of the reservation, at or near Pocatello station on the Utah Northern Railway, as should be found to be within certain described lines; and by subsequent provisions of the act the secretary of the interior was required to cause the lots and blocks to be appraised in a certain manner, and thereafter cause the same to be offered for sale at public auction at the door of the Pocatello House, Pocatello Junction, to the highest bidder for cash, and to be advertised for a certain time and in such manner as the secretary should direct, and to be "conducted by the register of the land office in the district in which said lands are situate, in accord-

ance with the instructions of the commissioner of the general land office"; the sale to continue from day to day until all the lands should be sold or offered for sale.

By section 6 it was provided:

"That the funds arising from the sale of said lands, after deducting the expenses of surveys, appraisalment, and sale, shall be deposited in the treasury of the United States to the credit of the Shoshone and Bannock tribes of Indians belonging on said reservation, and shall bear interest at the rate of five per centum per annum; and the secretary of the interior is hereby authorized and empowered to expend all or any part of the principal and accrued interest on such fund, for the benefit and support of said Indians, in such manner and at such times as he may deem expedient and proper."

Section 7 is as follows:

"That the secretary of the interior shall make all needful rules and regulations necessary to carry this act into effect; he shall determine the compensation of the surveyor for his services in laying out said lands into town lots, also the compensation of the appraisers provided for in section 4, and shall cause patents in fee simple to be issued to the purchasers of the lands sold under the provisions of this act, in the same manner as patents are issued for the public lands."

The lands thus relinquished to the United States for the purposes stated were not public lands subject to sale at the land office at which Danilson was receiver. Their relinquishment, like the cessions involved in *U. S. v. Brindle*, 110 U. S. 688, 4 Sup. Ct. 180, was made to the government in trust to survey and sell the lands, and pay the net proceeds to, or invest them for, the Indians. What was said by the supreme court in the case cited in respect to the receiver of public moneys at the Lecompton land office is equally applicable here. It was never any part of the duty of Danilson, as receiver of the public moneys at the Blackfoot land office, to sell the trust lands, or receive the payments therefor. His duties in connection with that office "were to receive and account for moneys paid for public lands; that is to say, the public moneys of the United States derived from the sales of public lands. The moneys paid for the Indian lands were trust moneys, not public moneys. They were at all times, in equity, the moneys of the Indians, subject only to the expenses incurred by the United States for surveying, managing, and selling the land." These trust moneys constituted no part of the public moneys or property for which the defendants, as sureties upon the bond of Danilson, became responsible. It results that the judgment must be, and accordingly is, affirmed.

McNEIL v. ARMSTRONG.

(Circuit Court of Appeals, Fourth Circuit. July 10, 1897.)

No. 219.

BUILDING CONTRACT—CONSTRUCTION—PERFORMANCE.

Where a contract provides that work is to be done according to certain plans and specifications, and materials furnished to be of the best, and to be to the entire satisfaction of the architect and owner, if it appears that the materials furnished were satisfactory, and the work was done according to the plans and specifications, the contractor is entitled to recover.

In Error to the Circuit Court of the United States for the District of Maryland.

The plaintiff in error, who was the defendant below, entered into a contract December 19, 1894, with A. F. Wurach, by which the latter was to furnish and set the tiles, copper work, gutters, and conductors on the roof of the house of G. M. Hutton, at Newport, R. I., in accordance with the plans and specifications of Messrs. Peabody & Stearns, architects. McNeil Bros. were the contractors for the building of the house. Wurach, whose contract was for the roof only, began work in July, 1895, and finished in December, 1895; and the defendant in error, who was the plaintiff below, is his assignee. This suit is for the balance due on that contract, so much of which as is relevant to the controversy herein is in the words following: "It is hereby agreed that the said Adam F. Wurach will fully do, perform, and furnish all the work and materials required to be done by the said McNeil Brothers under the above-named contract, plans, specifications, and details, all to be done in good and thorough manner, and all the materials provided to be of the best quality, and are to be to the entire satisfaction of Mr. Geo. M. Hutton and Messrs. Peabody & Stearns." The suit was commenced in the superior court of Baltimore city, and removed, upon the petition of the defendant, to the circuit court of the United States for the district of Maryland. The plaintiff in error offered three prayers for instructions which were refused by the court, and the assignments of error are for the refusal to grant the first and third prayers, which are as follows: "First Prayer. The defendant prays the court to rule, as matter of law, that the plaintiff is not entitled to recover in this case unless the court, sitting as a jury, shall find that the work and materials called for by the plans, specifications, and details referred to in the contract offered in evidence, of December 19, 1894, between McNeil Bros. and Adam F. Wurach, were done and furnished by said Wurach in accordance with the said plans, specifications, and details; that the said material were of the best quality; that the said work was done in a good and thorough manner, and that the said materials and the said work were to the entire satisfaction of the firm of Peabody & Stearns, architects, and of the G. M. Hutton mentioned in said contract; and that the roofs referred to in said contract and plans, specifications, and details are thoroughly tight, in the judgment of the said Peabody & Stearns." "Third Prayer. The defendant prays the court to rule, as matter of law, that if the court, sitting as a jury, shall, under the rulings of the court, find a verdict for the plaintiff, the damages which the plaintiff is entitled to recover in this case are the sum of \$300, charged for change of gutters, the sum of \$17.50, charged for lead, and such other sums the court, sitting as a jury, may find a reasonable charge for repairing the injury to the roof caused by the blowing off of the boards, as testified to, and the difference between the contract price for said roof and the cash paid the said Wurach by the defendant, less the allowances claimed by the defendant, as set out in the account offered in evidence by him, and less such other sums as the court, sitting as a jury, shall find were expended by the defendant in looking for and repairing the leak in the kitchen chimney, as testified to, and such as are necessary to make the roof mentioned in said contract of December 19, 1894, tight, and the said roof and the art fence mentioned in the evidence conform to the plans, specifications, and details referred to in said contract, with interest on said balance and all of said items, in the discretion of the court, sitting as a jury." The case was tried by the judge, a jury being waived. The items of the account are considered in detail, and the rulings and findings of the court appear in the record. The court held "that by the contract the work was required to be done in a good and workmanlike manner; that the materials were required to be of the best quality, to the satisfaction of Mr. Hutton and the architect; that the contract requires the roof to be thoroughly tight; that the roof was constructed, both as to work and materials, in accordance with the contract, plans, drawings, and specifications and subsequent agreements, with but very trifling defects as to tightness, which have been remedied by the expenditures above allowed"; and that the plaintiff was entitled to recover the sum of \$2,815.64; and a verdict for that sum was entered.

John N. Steele, for plaintiff in error.

Charles N. Armstrong (Charles Marshall on brief), for defendant in error.

Before SIMONTON, Circuit Judge, and HUGHES and BRAWLEY, District Judges.

BRAWLEY, District Judge (after stating the facts as above). We do not find any error here. The testimony shows that the work was done under the inspection of the owner and his agents, no material defects being pointed out or objections made during its progress. Such slight defects as appeared have been corrected, or allowance has been made for them. Some of the objections were of a trivial nature, others were evidently founded upon a mistake, and the owner is in possession and occupancy. The case was heard, by consent of parties, without a jury, by an uncommonly careful and conscientious judge, who finds, as matter of fact, "that the roof was constructed, both as to work and materials, in accordance with the contract, plans, drawings, and subsequent agreements."

It is contended by the plaintiff in error, and his first prayer for instruction asks the court to rule, that by the terms of the contract both materials and work were to be to the entire satisfaction of the architects and of the owner, and that the satisfaction of such architects and owner is a condition precedent to recovery. It is not necessary to consider that class of cases which holds that a simple allegation of dissatisfaction, without some good reason assigned for it, is to be considered as a mere pretext, and not to be regarded. They fall within the rule that "that which the law will say a contracting party ought in reason to be satisfied with, that the law will say he is satisfied with." Where the object of a contract is to gratify taste and personal preferences, a different rule prevails, and parties may not unreasonably be expected to be bound by the opinion honestly entertained of the person whom he undertakes to satisfy, and performance must accord with the terms of the contract. Contracts of this nature must be explicit, for it is not to be presumed that parties will undertake a work the remuneration for which depends upon the mental condition of others, which they alone can disclose. The tiles with which this roof was to be covered were to be of a peculiar and rare shade of color. It was not unreasonable that the owner and his architects should demand that they should accord with their tastes, and, however capricious and exacting their tastes might be, it was the duty of the contractor to comply with his contract to satisfy them; and this appears to have been done, for there is no allegation or proof that the materials furnished were not to the entire satisfaction of the owner and his architects. The work to be done in putting on the tiles was defined by the plans, specifications, and details prepared by the architects. This involves no question of personal tastes or preferences. The work to be done is specifically defined, and the manner in which it is done is determined by rules which leave nothing to arbitrary caprice. It is earnestly contended that the court should construe this contract according to the presumed intention of the parties, and that the work to be done, as well as the materials furnished, should be satisfactory to the owner and architects, that the same reasons apply equally to both, and the terms, being somewhat ambiguous, should

have such reasonable construction. We have already indicated the grounds upon which there might be a distinction between the requirements as to material and work, but it is sufficient to say that the contract does not so expressly provide, and, inasmuch as it was prepared by the plaintiff in error, the well-settled rule is applicable, that in case of doubt or ambiguity the words are to be taken most strongly against the party employing them, and such construction adopted as is most favorable to the other party. The finding of the court that the work was done in accordance with the contract settles the question. The judgment of the circuit court is affirmed.

WHITCOMB et al. v. HOOPER.

(Circuit Court of Appeals, Seventh Circuit. July 17, 1897.)

No. 321.

APPEARANCE—MISNOMER—TENDERING FALSE ISSUE.

Plaintiffs were sued as receivers of the Wisconsin Central Railway Company, which had no existence; but they were receivers of the Wisconsin Central Company, and also of the Wisconsin Central Railroad Company. They appeared, and answered to the merits as receivers of the latter company, alleging the misnomer. On the trial they introduced evidence showing that as receivers of such company they had no connection with the employment of plaintiff, out of which the cause of action arose. *Held*, that they had made a full appearance, and, having pleaded to the merits, and tendered a false issue, they waived all objection to the character or service of the process and jurisdiction of the court, and that the court properly permitted an amendment to the complaint, charging them as receivers of the proper company.

In Error to the Circuit Court of the United States for the Western District of Wisconsin.

This was an action for personal injury, brought by Hooper, the defendant in error, against Whitcomb and Morris, as receivers of the Wisconsin Central Railway Company,—the company being so named in the præcipe, the summons, the marshal's return of service of the summons, and in the complaint afterwards filed. The plaintiffs in error, after being served with a copy of the complaint, filed an answer entitled as if in an action against them as receivers of the Wisconsin Central Railroad Company. They admitted by their answer their appointment as receivers of the Wisconsin Central Railroad Company, as alleged in the complaint, though misnamed the Wisconsin Central Railway Company therein, and denied all other allegations of the complaint. Upon the issues so joined testimony on both sides was taken. It was shown by the defendants, and was not disputed, that on September 27, 1893, they were appointed receivers of the Wisconsin Central Company by the circuit courts of the United States for the Eastern and Western districts of Wisconsin, and on the same day, in a separate action for foreclosure, were appointed by the same courts receivers of the Wisconsin Central Railroad Company; that as receivers of the Wisconsin Central Company they were at the time of the injury in question the sole employers of the plaintiff, and of all those engaged with him in the operation of trains on the tracks where he was hurt, and that as receivers of the Wisconsin Central Railroad Company they had no interest in the work which was then being done, or in the parties employed in doing it. At the close of the testimony the defendant in error offered an affidavit, which the court declared unnecessary, and on motion, which the affidavit was designed to support, obtained leave to strike the word "Railway" from the title of the cause. That having been done, the defendants moved that the jury be directed to return a verdict in favor of the defendants as re-

ceivers of the Wisconsin Central Railroad Company. The court denied the motion, and thereupon counsel, who had conducted the trial for the receivers, appeared especially for them as receivers of the Wisconsin Central Company, and objected to the jurisdiction of the court to proceed to judgment against them in that capacity, because they had not been served with process, and had not voluntarily appeared, and because the action had not been brought in the proper district; but the objections were overruled, and the case was given to the jury without further appearance of counsel for the plaintiffs in error as receivers of the Wisconsin Central Company. Exception in proper form was saved to each ruling of which complaint is made.

Howard Morris and Thomas H. Gill, for plaintiffs in error.

T. F. Trawley and W. H. Stafford, for defendant in error.

Before WOODS, JENKINS, and SHOWALTER, Circuit Judges.

WOODS, Circuit Judge, after making the foregoing statement, delivered the opinion of the court.

The plaintiffs in error were not sued nor was judgment rendered against them as receivers of the Wisconsin Central Railroad Company. In that capacity they were not parties to the record, unless they succeeded in making themselves so by an averment in their answer, which in so far as it was designed to show that the suit was intended to be or ought to have been brought against them as receivers of that company was not true, and can hardly be deemed to have been ingenuous. Only the plaintiff and his counsel were ignorant and in confusion about the names of the different railroad companies, and whether liability should be alleged against the defendants as receivers of a company of one name or another. The defendants and their attorneys, it is evident upon the testimony which they adduced, were cognizant of the facts from the beginning; and, the action having been commenced against them as receivers of a company described by a name which had no existence, it was their plain duty to suggest in their answer the capacity in which they knew themselves to be liable, if liable at all, for the plaintiff's injury, and not to tender a false or vain issue in the name of a company as representatives of which they could not be made responsible for the injury suffered. The course pursued by them made it immaterial whether the summons was served upon one who was their agent as receivers of the Wisconsin Central Company. Their appearance to the action was a full appearance. Their answer went to the merits, and the assertion of misnomer, and the misleading suggestion of Wisconsin Central Railroad Company as the name of the company which they represented, did not make the appearance special, or an appearance in the capacity of receivers for that company only. It was an appearance for every proper purpose under the rules of practice, including, of course, any legitimate correction in the names or description of parties and a corresponding amendment of the process.

If it was desired to object to the jurisdiction of the court on the ground that the action had not been brought in the right district, or that the summons had not been served upon an agent who represented the defendants as receivers of the Wisconsin Central Company, it should have been done by a plea to the jurisdiction, or, perhaps, by a motion showing that they were liable, if at all, as receivers of the

Wisconsin Central Company, and that in that capacity they had not been served with and were not amenable to the process of the court.

There are, perhaps, other grounds upon which it might be held that the plaintiffs in error waived objection to the jurisdiction of the court over them, but they need not be considered. We rest our ruling upon the proposition that, being receivers for two companies, neither of which was correctly named in the præcipe, summons, return of service, and the complaint, they were bound, if they chose to answer to the merits, to suggest the right name, and not to tender a false issue; and that, having taken the latter course, they waived all objections to the character or service of the process, and came under the jurisdiction of the court. The judgment below is therefore affirmed.

CITY OF PHILADELPHIA v. WESTERN UNION TEL. CO.

(Circuit Court, E. D. Pennsylvania. May 18, 1897.)

1. MUNICIPAL CORPORATIONS—TAXATION OF TELEGRAPH COMPANY—UNREASONABLE FEES.

In an action by the city of Philadelphia to recover certain charges imposed by two municipal ordinances for the supervision and control of telegraph poles and wires, one of which ordinances imposed a charge of \$1 per annum for each telegraph pole maintained within the city limits, and the other of which required, in addition to this pole charge, the annual payment of \$2.50 per mile on all wires suspended above ground, it was testified, and uncontradicted, that the total cost to the city of inspecting and supervising the poles and wires by the department having charge thereof did not exceed 50 cents per pole. *Held*, that the ordinances were unreasonable and void. *City of Philadelphia v. W. U. Tel. Co.*, 40 Fed. 615, followed.

2. SAME.

The fact that various departments of the municipality besides the electrical bureau, which has direct charge of the work of supervising and inspecting the telegraph poles and wires, incidentally aid in this work, does not render the supervision and control of the telegraph poles and wires accountable for the expense of maintaining such municipal departments, where it does not appear what proportion or part of this expense is chargeable directly to such supervision.

John L. Kinsey and E. Spencer Miller, for plaintiff.
Read & Pettit, for defendant.

DALLAS, Circuit Judge. This is an action for the recovery of certain charges imposed by two ordinances of the plaintiff, which the defendant contends are invalid. Upon the trial the counsel of both parties united in suggesting that the case was for decision by the court, but each of them claimed that a verdict should be directed for his client. Thereupon the jury was instructed to find for the defendant, and, a verdict having been rendered accordingly, the plaintiff now moves for a new trial.

One of these ordinances imposed a charge of \$1 per annum for each telegraph pole maintained in the city of Philadelphia by any telegraph company, including the defendant; and the other required, in addition to this pole charge, the annual payment of \$2.50 per mile on all wires suspended above ground. The defendant conceded that,

if the amount of these charges was not unreasonably in excess of the amount needful to defray the expense to which the municipality was subjected for inspection and regulation of the appliances of the telegraph companies, the ordinances should be sustained; and to this question of reasonableness the evidence was directed. A witness, whose qualification as an expert plainly appeared and was not questioned, testified, without objection, that a liberal estimate of all the cost to the city of issuing permits, inspecting, and exercising supervision would not exceed 50 cents per pole, and that such a charge would, of itself, meet the expense of all that was actually done by the city; and hence it was argued that, to the extent of one-half of the pole charge and the whole of the charge per mile per wire, the sum imposed was excessive. The same witness presented the matter, also, in a more specific manner, by making a comparison which is very striking and cogent. He stated that for maintenance of their poles and wires, including repairs and new material when required, as well as office work, the defendant company has, for a number of years, expended only from \$2.60 to \$2.90 per mile per annum, whereas the charges imposed by these ordinances amount to about \$4.35 per mile per annum; and it is impossible to regard a charge of \$1.45 per mile more for inspection, etc., than is needed for maintenance and repair as being reasonable. The witness, to a part of whose testimony reference has been made, is, it is true, in the employment of the defendant, but his veracity was not assailed, and he was not contradicted.

The plaintiff called the chief of its electrical bureau, but he was not asked to gainsay the estimate which has been mentioned, and he did not do so, nor does his evidence appear to conflict with it. But the estimate of defendant's witness took into account only the expenses incurred by the city's electrical bureau, and the plaintiff insists that it is therefore delusive, because, as it claims, additional duties and labors were devolved, not only on that particular bureau, but also upon its councils, and upon its police and fire departments, by reason of the presence and use of the plants of the telegraph companies. Accordingly, the plaintiff offered to prove the expense involved in the transaction of the entire business of councils; but, upon its being stated that it was not proposed to show what proportion or part of this expense was chargeable to business relating to telegraph companies, the offer was rejected, on the ground that the single fact proposed to be proved was, as respects the precise issue, too vague, indefinite, and uncertain to be of any practical materiality. There was evidence that the police were directed to report, with other entirely distinct things, "leaning telegraph poles, and detached, broken, or sagging wires," and that the firemen, in extinguishing fires, were compelled to do some additional work when they encountered electric wires; but there was no attempt to show to what extent the labors of either of these departments was augmented, or how much, if at all, the expenses of maintaining them was increased in consequence, and an assumption that to provide for any such increase a charge of 25 cents per pole would be requisite could rest only upon a most extreme conjecture. There can be no doubt that it is through its electrical bureau that the city's right of inspection and regulation is mainly—almost exclusively—exercised.

Upon the facts disclosed on the trial, it then seemed to me, as it still does, that, although the city should be fairly and even liberally treated, the ordinances in question could not be upheld. There is nothing to distinguish this case from the one between the same parties which was decided by this court in 1889, and which is reported in 40 Fed. 615. That decision was based upon the fact that a charge had been imposed for five times the amount required. Here, we have a pole charge which to the extent of at least one-fourth of its amount is plainly excessive; and there is required, in addition, the payment of \$2.50 per mile of wire, for which there is no legitimate need whatever, and the sum of the charges imposed is very considerably greater than the cost of actual maintenance. Therefore, I think that unreasonableness is as clearly apparent in this case as it was in that to which I have referred; and I remain of the opinion that the judgment in the latter was properly applied and followed upon this trial. The motion for a new trial is denied.

COLLECTOR OF CUSTOMS AT NEWARK v. BALBACH SMELTING & REFINING CO.

(Circuit Court, D. New Jersey. June 24, 1897.)

CUSTOMS DUTIES—Pig LEAD—WASTAGE.

Pig and bar lead was dutiable, under paragraph 166 of the act of August 27, 1894, at one cent per pound on the gross weight of the metal imported, and not merely upon the net amount of pure lead contained therein as shown by assay.

J. Kearny Rice, U. S. Dist. Atty., for petition.

Oscar Keen, for defendant.

Paul Fuller, for Guggenheimer & Co.

KIRKPATRICK, District Judge. This matter is brought before the court by an appeal of the collector of customs at the port of Newark, in the district of New Jersey, from a decision of the board of general appraisers made March 30, 1896, concerning the rate and amount of duty charged on certain lead in pigs and bars. It appears that the merchandise was assessed for duty by the collector at the rate of one cent per pound, gross weight, under paragraph 166 of the act of congress of August 27, 1894. Against the assessment the Balbach Smelting & Refining Company duly entered their protest upon the ground that it was laid not only upon the lead contained in the merchandise, but also upon the gold and silver and copper and antimony and other substances contained therein, and they claimed that in accordance with paragraph 166 and section 21 of the act of congress of August 27, 1894, and treasury instructions (Synopsis 10,585), the duty of one cent per pound should be levied only upon the actual net amount of lead contained in the merchandise as found by assay at time of entry in warehouse. The matter coming on to be heard by the board of general appraisers, they found that the merchandise had been properly assessed, under paragraph 166, at the rate of one cent per pound, but decided that the merchandise was dutiable only upon

lead contained in the bullion, which is withdrawn in shape of pig lead, in accordance with section 21 and the treasury regulations on the subject. It will be perceived that all the parties agree that the imported metal is dutiable under paragraph 166 of the act of August 27, 1894, and therefore the only question presented for the consideration of the court is whether, under paragraph 166 and section 21 of the act of August 27, 1894, and treasury regulations (Synopsis 10,585), a duty of one cent per pound shall be assessed upon the gross weight at time of importation, or upon the quantity of refined lead which shall be obtained from the imported metal; that is to say, whether the merchandise is dutiable upon the quantity entered for warehouse, or upon the weight of refined metal at the time of its withdrawal, whether an allowance shall be made for loss or wastage incurred in the smelting or refining, no matter from what cause such loss or wastage be incurred. Section 21 of the act of August 27, 1894, provides for the smelting and refining of metals to make them readily available in the arts, in bonded smelters, and for the removal of the refined product for domestic consumption upon entry and payment of duties, subject to such regulations as the secretary of the treasury might prescribe. In this respect, section 21 of the act of August 27, 1894, is similar to section 24 of the act of October 1, 1890, and pursuant to the authority conferred by the last-named act the regulations of January 8, 1891 (Synopsis 10,585), were promulgated, and they have been continued in force as applying to section 21 of the act of August 27, 1894. Section 4 of these regulations is as follows:

"Upon the withdrawal for consumption in the United States of any refined dutiable metal set aside and considered as equivalent for the metals contained in the imported crude metals or ores smelted in such warehouse, duty will be collected on the corresponding quantity as shown by the original assay of such imported crude ores without any allowance for wastage incurred in the smelting and refining."

It is clear, because stated in express terms, that the duty shall be collected upon the crude metals, without any allowance for wastage incurred in the smelting or refining. The decision of the board of general appraisers, which holds that the duty shall be levied only upon the refined lead contained in the bullion, makes allowance for wastage, and is, therefore, contrary to the authorized regulations made by the treasury department (Synopsis 10,585). To hold that no duty attaches to the crude metal prior to its deposit in the bonded smelter, nor until it has been withdrawn therefrom as refined metal for consumption in the United States, would be to discriminate in favor of the user of the bonded smelter. Importations may be made either for immediate consumption, when the duties are payable at time of importation, or for future use, in which case they are warehoused, and a bond given at the time of importation for the duties found to be due. In each case the duty is assessed at the time of importation. In the former it is paid at once; in the latter it may, by bonding, be deferred. But, whether paid at once or deferred, the rate must be the same upon similar articles. It certainly could not have been the intention of congress to give to one importer, who stored his metals for a time, and refined them in a bonded smelter, and afterwards put them upon the

domestic market, any advantage over another, who imported the same merchandise or metals for immediate consumption, and refined them in a smelter not bonded. There can be no doubt that such would be the effect of the decision of the board of general appraisers. The owner of the bonded smelter would pay only upon the net weight of the refined product, while his competitor would be obliged to have the duty assessed against the gross weight of the imported article. I am of the opinion that the rate of duty assessed under paragraph 166 of the act of August 27, 1894, must be the same for all, and that rate the one named therein, viz. one cent per pound upon the gross weight of the imported metal. I find nothing in section 21 of the act of congress of August 27, 1894, under the regulations prescribed by the secretary of the treasury, as set out in Synopsis 10,585, which authorizes any allowance for wastage, and the consequent assessment of duty only upon the weight of the refined metal withdrawn for consumption. It follows, therefore, that the decision and assessment of the board of general appraisers in this matter must be reversed, and the duty as levied and assessed by the collector of customs at the port of Newark, N. J., affirmed.

GINDORFF et al. v. DEERING et al.

(Circuit Court, N. D. Illinois. March 1, 1897.)

1. PATENTS—PROCESS CLAIMS.

The mere manual transposition of an article which is being operated upon by a machine, so as to present another part of it to undergo a like operation with that just completed, does not, when superadded to the functions of the machine, constitute a process or method of treatment such as is contemplated by the patent law. *Locomotive Works v. Medart*, 15 Sup. Ct. 745, 158 U. S. 68, applied.

2. SAME—INVENTION—DUPLICATION OF PARTS.

An adaptation, which in a certain sense is only a duplication of parts which seems simple and obvious after it is once done, may be held to constitute patentable invention, and the need of some such device had long been recognized and vainly sought.

3. SAME—SERRATORS FOR SICKLE SECTIONS.

The Gindorff patent, No. 524,965, for a serrator for sickle sections, held valid and infringed as to the combination of claim 1, and void for want of patentability as to claims 4 and 5, which purport to cover a process.

This was a suit in equity by Matthew Gindorff against Deering & Co. for alleged infringement of a patent.

Barton & Brown, for complainants.

Banning & Banning, for defendants.

GROSSCUP, District Judge. The bill is to restrain infringement of letters patent No. 524,965, issued to Matthew Gindorff, August 21, 1894. The defendants challenge the validity of the patent, and deny infringement. The invention relates to serrators for sickle sections. The patent describes the previous art as follows:

Heretofore machines for this purpose have been constructed with a chuck adapted to hold in position a sickle section, a pair of machine-actuated ham-

mers with knife edges, being located one upon either side of the section, and adapted to repeatedly strike the beveled edges thereof while being moved step by step from one end of the edge to the other, whereby a series of parallel indentations are formed in the beveled edges of the sections, the ends of the raised portion of the edge between the indentations projecting beyond the ends of the indentations to form teeth, which constitute the cutting edge of the sickle section. The hammer starts from the base end of the edge and travels toward the point of the section, and, as the hammer would meet before the edges were completed if actuated simultaneously, it has been customary to actuate one hammer at a time, thus entirely completing one edge of the section, and then, after the hammer has been returned to its original position, the second hammer is started, and completes the other edge.

There had also been previously an arrangement of machinery whereby two chucks, each adapted to a single sickle section, were placed about three feet apart, and the hammers actuated by machinery as described above, and worked simultaneously upon the edges of these sections. The complainant relies upon the first, fourth, and fifth claims, which are as follows:

(1) In a serrator, the combination with a chuck adapted to maintain two sections in position side by side, of a serrating tool adapted to be moved along the outer edge of one of said sections, a second serrating tool adapted to be moved along the outer edge of the other section, and means for simultaneously moving said serrating tools from the bases to the tips of the respective sections, or vice versa, substantially as described.

(4) The method of serrating sickle sections, which consists in maintaining the sections in position side by side, serrating the outer edges by machine-actuated serrating tools, transposing the sections, and then serrating in a similar manner the outer edges of the transposed sections, substantially as described.

(5) The method of serrating sickle sections, which consists in maintaining the sections in position side by side, simultaneously serrating one edge of each of the sections by machine-actuated serrating tools, transposing the sections, and then simultaneously serrating in a similar manner the unserrated edges of the transposed sections.

The two last-mentioned claims are process claims. It is my opinion that under the case of *Locomotive Works v. Medart*, 158 U. S. 68, 15 Sup. Ct. 745, these claims cannot be sustained. Except for the described functions of the machine, there is nothing more stated in the patent than the fact of a manual transposition of the sickles after their outer edges have been serrated, so that the inner edges may undergo a like operation. Such transpositions, superadded to the functions of the machine, do not make the treatment a method, or process, or art such as the patent law contemplates.

The first claim is for a combination, and depends upon whether the element of the combination described as a "chuck," adapted to maintain two sections in position side by side, is novel and patentable. Its novelty is not denied. The only serious question is whether it evinces invention or merely mechanical adaptation. It is, in a certain sense, only the duplication of the old chuck, and seems very simple and obvious; but it must be remembered that the simple chuck was in use for many years, and that the need of some device whereby the two edges of the section could be serrated at the same time had been long felt and recognized. If this chuck were obvious to mere mechanical skill, why had not such skill, already called upon, supplied the need before? I fear that under these circumstances, were I to hold it mere mechanical adaptation, I would be considering

myself a wiser and better mechanic than those who for years had overlooked this method of accomplishing a desired result. This opinion is re-enforced by the fact that the defendants themselves, immediately on their attention being called to this device, recognized its value and importance, and began negotiations for its acquirement. It seemed, doubtless, to them an important improvement, long needed, but long overlooked. It is original conception, not skill, that supplies a remedy for a defect long, but hitherto vainly, looked for.

The proof satisfies me that the defendants have used the combination described in the first claim. A decree may therefore be entered in favor of the complainants upon the first claim, and dismissing the bill as to the fourth and fifth.

MONROE v. MCGREER.

(Circuit Court, S. D. Iowa, E. D. August 14, 1897.)

No. 199.

1. PATENTS—INTERPRETATION—SPECIFICATIONS AND CLAIMS.

The claims, and not the specifications, are the measure of the patentee's rights. The specifications may be consulted to explain or restrict the claims, but not to expand them.

2. SAME—WELL-BORING APPARATUS.

The Monroe patent, No. 481,636, for an improvement in well-boring apparatus, construed, and held not infringed as to its second claim.

This was a suit in equity by Daniel L. Monroe against John McGreer for alleged infringement of a patent for a well-boring apparatus. On final hearing.

John E. Craig and J. Ralph Orwig, for plaintiff.

Casey & Stewart, for defendant.

WOOLSON, District Judge. Plaintiff is the patentee and owner of letters patent No. 481,636, for improvement in well-boring apparatus, granted August 30, 1892. The charge herein against defendant is based upon infringement of the second claim of such letters. The defense interposed denies that plaintiff first invented the well-boring apparatus claimed in his letters patent; alleges that said apparatus had been in public use by sundry persons for more than two years prior to plaintiff's application for said letters, and names the said persons and places; denies that the said alleged invention covered by letters patent was an invention; denies defendant infringed said letters patent; and specific denial is also made as to particular allegations on various points contained in the bill.

Evidence has been taken and filed by both parties on the various points in issue, particularly as to the alleged prior public use, etc., of said apparatus by the persons named in the answer and amendments thereto. I do not deem it necessary to enter upon the consideration of this evidence as to prior public use, and the rights of the parties thereunder, as, in my judgment, the case must be decided on the letters patent and the evidence as to the tools or apparatus

used by defendant. Upon this last-named branch of the evidence there is no dispute. Counsel for plaintiff and defendant, in their briefs submitted, agree as to what this evidence proves. In the specifications and drawings plaintiff describes and illustrates what he therein terms "auger stems, or extension stems." The auger has, at "the outer end of its stem," an eye. The "auger stems, or extension stems,"—hereinafter the latter term will be used,—are straight rods, which have at one end an eye and at the other end a hook. The extension stem is connected with the main auger stem by means of this hook engaging in and through the eye at the outer end of the stem upon the auger. A second extension stem may be connected with the first, in the same manner, viz. by its hook engaging in and through the eye on the end of first extension stem; and this process of lengthening may be continued from extension stem to extension stem, as far as practicable. Perhaps the clearest description I can present, in the absence of the drawings, is contained in the specifications, which are here stated (dropping out the figures, which are used to more particularly specify parts designated in the drawings by figures):

"The auger ends, or extension stems, are provided at opposite ends with eyes and hooks, whereby they may be readily connected. The hooks may be turned in an inward direction, as shown in Fig. 5, or in an outward direction, as shown in Figs. 1 and 4. By either of these forms the stems may be connected with each other and with the main auger stem in a very rapid and efficient manner, and they are absolutely prevented from being uncoupled while in use, inasmuch as, in order to uncouple, they must be brought to a position nearly at right angles to each other. The preferable construction embodied in this invention, which most efficiently attains this end, is that shown in Fig. 4 of the drawings, in which the hooks comprise a right-angled portion, at right angles to the stem, and passing through the eyes, and with a straight-end portion, projecting beyond the eye, and in line with the main auger stem, and said supplemental [extension] stem, thereby securing a firm and nondetachable coupling, except by manipulating the supplemental stem, as described."

By referring to the drawings it is seen that the "Fig. 5" referred to in these specifications is a straight rod, having at one end an eye, and at the other end a hook. The form of the hook is that which would be produced had an eye been opened out by the insertion of a piece of iron therein, and pressing out thereby of the end of the eye, until the end is at a sufficient distance from the rod to become a hook instead of an eye. In the drawing the hook begins directly from and on a line with the rod, instead of being first turned back from the line of the rod, before it is turned into the round form of the eye. Except for this comparatively or quite immaterial difference, the form of the hook above described is that shown as Fig. 5 of the drawing. The proof shows that defendant did use, as a part of his well-boring apparatus, this form of an extension stem and hook, and that for such use he had no assignment, license, or other permission from or under plaintiff. Under the proof, if this extension stem and its hook (Fig. 5 of drawing) are protected by and included in the grant covered by plaintiff's letters patent, then defendant is guilty of having infringed such patent.

By referring to the specifications (the part above quoted), it will be readily noticed that the form of the hook therein described as part of Fig. 4 varies materially from that in Fig. 5. The rod stem (straight

rod) and eye are the same in both figures. The hook in Fig. 4 takes a right-angled turn from the direction of the rod stem, and pursues this new (right-angled) direction sufficiently far to enable this turn to pass through the eye with which it may be connected; then the rod (or, rather, hook) turns again at right angles, and the rod (or hook, as it is here called) proceeds, parallel with the rod stem, and also parallel with the rod stem of the eye with which it is connected, and alongside of this latter rod stem. That is, this hook does not, in its second right-angle turn, return alongside and parallel with its own rod stem, in a direction backward along such stem, but, instead, passes in a direction away from such rod stem. So that the last part of said hook presents, as to the rod of which it is a part, substantially the same position as does a bayonet to the musket or rifle on which it has been "fixed." In that part above quoted of the specifications the substantial difference in form is recognized between these two styles or forms of hooks, viz. Figs. 4 and 5. If plaintiff's rights herein are to be measured and determined by his specifications, then the "extension stem" and its hook, as used by defendant, would be included in plaintiff's patent. But the claims as stated in the letters patent, and not the specifications therein stated, are the measure of plaintiff's rights under his letters. The specifications may be consulted with a view to explaining or restricting, but can never expand, the claims made in the letters. Circuit Judge Sanborn, speaking for the circuit court of appeals for this circuit, in *Stirrat v. Manufacturing Co.*, 10 C. C. A. 216, 220, 61 Fed. 980, 984, has expressed this point with great clearness:

"The claim for a specific combination or device in a patent is a renunciation of every claim to any other combinations or devices for performing the same functions that are apparent on the face of the patent, and are not colorable evasions of the combination or device claimed. The statute requires the inventor to 'particularly point out, and distinctly claim, the part, improvement, or combination which he claims as his discovery.' Rev. St. § 4888. When, under this statute, the inventor has done this, he has thereby disclaimed and dedicated to the public all other improvements and combinations, apparent from his specifications and claims, that are not evasions of the device and combination he claims as his own. The claims of his patent limit his exclusive privileges, and his specifications may be referred to to explain and to restrict, but never to expand, them."

The second claim in plaintiff's letters patent is the only claim which defendant is charged to have infringed. This claim, so far as this suit is concerned, "limits plaintiff's exclusive privileges." Upon a careful reading it will be noticed that no claim is therein made for "a boring apparatus" in which the extension stem has a hook similar to that shown in Fig. 5 of the drawings accompanying the letters patent, and to the description of the hook in Fig. 5, as given in the above-quoted specifications; that is, of the hook which, in the specifications, is spoken of as being "turned in an inward direction," and which has been above compared to an eye forced partially open, so that the point or end of the iron is forced back from the stem until the eye assumes the general form of a hook, rather than an eye. The only form of hook named in this second claim is that which appears in the drawings accompanying the patent as No. 4, and is described

as such in the specifications. The description of this hook (No. 4), as given in the specifications, is quoted above. By comparing the language of this second claim with the description of hook No. 4 as contained in the specifications, it will be noticed that substantially the same phraseology contained in the specifications as to this hook (No. 4) is reproduced in the claim as constituting the hook "which plaintiff claims as his discovery," except that the figures used in the specifications as referring to parts of drawings exhibited are omitted from the claim. Here is the claim as to hook:

"(2) In a boring apparatus, * * * the extension stem or stems provided with outwardly or offstanding hooks adapted to detachably engage said eyes, said hooks comprising a right-angled portion at right angles to the stem and passing through said eyes, and a straight-end portion, projecting beyond the eyes, and in line with both stems, substantially as set forth."

By this claim plaintiff's rights are limited and determined. Why the claim was restricted to a description of hook "No. 4" does not appear. The file wrappers are not in evidence. Whether any claim was attempted as to hook "No. 5," and rejected at the patent office, and whether the omission of such claim was accidental or deliberate, does not appear. For this suit it suffices that no claim is made in plaintiff's letters patent for the form of hook which was used by defendant in his well-boring apparatus. The hooks used on defendant's apparatus do not fall within the description contained in the second claim of plaintiff's letters patent. Defendant, so far as shown by the proof, committed no infringement of plaintiff's letters patent. The equities herein are on this point found to be with defendant, and it becomes, therefore, immaterial whether the proof sustains the other points of defense. Let decree be entered herein dismissing the bill at plaintiff's costs, to all of which plaintiff duly excepts.

ROBBINS et al. v. ILLINOIS WATCH CO.

(Circuit Court of Appeals, Seventh Circuit. July 17, 1897.)

No. 392.

1. PATENTS—STEM-WINDING WATCHES.

The Church reissue, No. 10,631, for an improvement in stem-winding watches, covers merely the stem-winding and hands-setting train, and does not include the watch movement as a part of the combination.

2. SAME—INFRINGEMENT—SEGREGATION OF PROFITS.

Where a watchmaker used infringing hands-setting and stem-winding devices, and sold the movement as an entirety, *held*, that there could be no recovery of profits in the absence of proof to separate the profits made on these devices from those made on the rest of the movement. 78 Fed. 124, affirmed.

3. SAME—EVIDENCE OF PROFITS.

In a suit against watchmakers for infringement by the use of certain devices forming part of a watch movement, evidence of the cost to a different manufacturer of making similar movements is incompetent. 78 Fed. 124, affirmed.

Appeal from the Circuit Court of the United States for the Northern District of Illinois.

This was a suit in equity by Royal E. Robbins and Thomas M. Avery against the Illinois Watch Company for alleged infringement of reissue patent No. 10,631, to Duane H. Church. The cause was heard below on exceptions to the master's report in respect to profits. The exceptions were sustained by the circuit court, and a decree for nominal damages and profits entered. 78 Fed. 124. From this decree the complainants have appealed.

Lysander Hill and George S. Prindle, for appellants.

L. L. Bond, A. H. Adams, C. E. Pickard, and J. L. Jackson, for appellee.

Before WOODS and JENKINS, Circuit Judges.

WOODS, Circuit Judge. For the opinion of the circuit court see 78 Fed. 124. On the first appeal in this case the questions were of the validity and infringement of reissued letters patent No. 10,631, granted to Duane H. Church. *Watch Co. v. Robbins*, 9 U. S. App. 55, 136, 3 C. C. A. 42, and 52 Fed. 215. The questions now presented arise upon the report of the master, who found that the respondent, the Illinois Watch Company, upon a manufacture and sale of 12,886 infringing watch movements, had realized profits to the amount of \$25,337.58. This conclusion was reached upon the erroneous theory that this court had decided that the claim of the Church patent is substantially for a combination of the material parts of the entire machine (meaning the entire watch movement), and, by necessary consequence, that the complainants were entitled to the entire profits realized. In the first paragraph of its opinion this court quoted from the opinion of the supreme court in the case of the Corn Planter Patent, 23 Wall. 181, 218, a passage which, in respect to the claim of that patent, contains the expression, "It is substantially for a combination of the material parts of the entire machine." But for the present contention of the appellants we should have deemed it beyond dispute that as applied to the Church patent the quotation is to be interpreted as if it read in this wise: "It is substantially for a combination of the material parts of the entire winding and hands-setting train." Nothing could be plainer than that Church's claims are for such a train as an improvement in stem winding and setting watches, and for nothing more. The different parts which make up the train are described in the specification, and it was with reference thereto that we said: "It is right, we think, to construe the claims of the patent in question as embracing the devices shown in the specification, each claim being regarded as including such devices and combination as are necessary to meet the requirements of the general terms in which it is expressed." The claims not only do not require, no one of them is so expressed as to permit, the inclusion of the watch movement as a part of the combination. The error of the master in this respect was fundamental, and, in the absence of affirmative proof that the profits reported were attributable solely to the use of Church's invention, would alone have been fatal to his conclusion. There was no such proof, and, besides, the evidence on which it was found that profits had been made from any source was incompetent.

It consisted of proof of the cost of making similar movements by the Elgin Watch Company. That cost the master deducted from the prices at which the Illinois Watch Company sold its manufactures of the same character, and the remainder he treated as profit. This was in violation of the familiar rule of evidence declared in *Manufacturing Co. v. Adams*, 151 U. S. 139, 14 Sup. Ct. 295, referred to in the report. Moreover, the evidence was not made competent by the proof offered on behalf of the defense to show the actual difference in certain particulars of the cost of manufacture by the two companies. Notwithstanding that proof there remained essential uncertainties in other respects. "Nothing is more common," said the supreme court in the case cited, "than for one manufacturing concern to make profits where another, with equal advantages, operates at a loss." See, also, *Coupe v. Royer*, 155 U. S. 565, 15 Sup. Ct. 199; *Belknap v. Schild*, 161 U. S. 10, 16 Sup. Ct. 443. If, therefore, it were true, as contended, that under the circumstances the appellants were entitled to recover all profits made by the appellee, as in *Elizabeth v. Pavement Co.*, 97 U. S. 126, and other cases cited, the proposition is unavailing to the appellants because of the want of competent evidence that profits were realized. It cannot be denied that by the decree of the circuit court the wrongdoer was permitted to go free, and the appellant was left without remedy for an established wrong; but the burden of proof of the profits sought to be recovered was upon the appellant, and, competent evidence not having been adduced, a different decree was impossible. The adjudication of the costs was largely discretionary, and being unable to give the appellant relief upon the main issue we cannot review the action of the court in that particular. The decree below is affirmed.

ROGERS et al. v. FITCH et al.

(Circuit Court of Appeals, Second Circuit. July 21, 1897.)

PATENTS—ANTICIPATION—BED MATTRESSES.

The Fulton patent, No. 322,366, for a spring mattress, having a rabbeted circumference, so that the flange thus formed may rest upon the rails or sides and ends of the bed frame, while the lower part is suspended between and below the rails, is void in view of the Elston patent, No. 271,062. 77 Fed. 885, reversed.

Appeal from the Circuit Court of the United States for the Southern District of New York.

This is an appeal from an interlocutory decree of the circuit court, Southern district of New York, which held that defendants had infringed complainants' patent, and ordered an injunction and accounting. The patent in question is No. 322,366, issued to Samuel Fulton, July 14, 1886 (upon application filed May 12, 1884), for an improvement in mattresses. The first claim only was alleged to be infringed.

Fredk. Betts and Robt. G. Monroe, for appellants.
Jas. A. Whitney, for appellees.

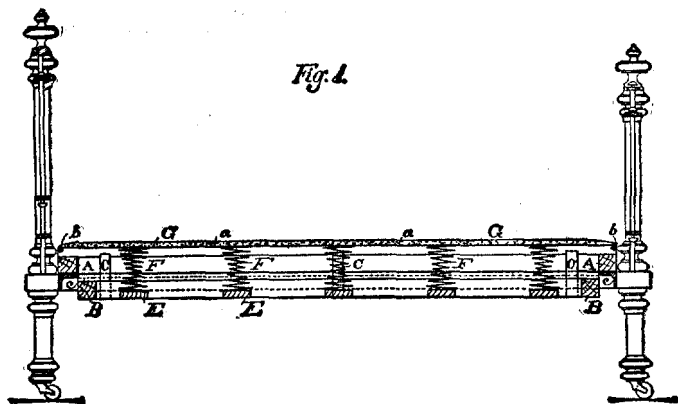
Before WALLACE, LACOMBE, and SHIPMAN, Circuit Judges.

LACOMBE, Circuit Judge. Spring mattresses are necessarily made of a depth sufficient to admit of the play of the springs vertically between their base and the stuffed superstructure which they support. The old-fashioned wooden bedstead is constructed with side boards or frames which are of considerable depth, and the cross slats between those side boards may be located, if desired, near the bottom of the side boards, so that when the deep spring mattress (or "spring," as it is commonly called in art) is placed upon the slats it will not project so far above the bed frame as to be unsightly or inconvenient. The brass or iron bedstead, however, is not constructed with deep side frames, and a spring could not be rested upon cross slats between the side frames of such a bedstead without projecting too far above the bed frame. The patentee's conception was to make the spring with a rabbeted circumference at an appropriate height above the base of the springs, so that the flange thus formed may rest upon the rails or sides and ends of the bed frame, while the lower portion is suspended between and below the rails. The specification sets forth that:

"The object of this invention is to provide a mattress which, when placed in position upon a bedstead or equivalent support, will maintain all the advantages incident to the usual or normal thickness of the mattress itself, without the undesirable height incident to the use of mattresses of ordinary construction. This object I accomplish by means of my said invention, which comprises a mattress having a rabbeted circumference so formed and arranged that when the mattress is placed in position upon a bedstead the lower portion thereof will sink within or below the rails of the bedstead, thereby permitting only a small portion of the thickness of the mattress to extend above the rails, so that by this means no material additional height is given to the bed by the placing of the mattress upon the bedstead, and the bed, considered as a whole, is made much more compact than if the mattress were placed bodily upon the rails, with its whole thickness extended above the same."

Referring to the drawings, the patentee proceeds:

"A is the upper circumferential frame of the mattress, made of wood or other suitable material. B is the lower circumferential frame thereof, of less diameter and width. This lower frame is connected with the upper by iron hangers, C, attached to the frames, respectively, by screws or other suitable means, in such



manner that the lower frame is suspended from the upper. Attached to the lower frame, B, are cross-bars, E, which support spiral springs, F, the upper ends of which are connected by any suitable lacing or other means ordinarily used for connecting the tops of springs and spring beds, and have placed above them the usual top, G, composed of any suitable fabric or fabrics, and with or without a topping or filling of hair or other material. * * * The width and length of the frame, B, bears such relations to the dimensions of the frame, A, that when the mattress is applied to the bedstead the frame, A, will rest upon the rails thereof with the frame, B; that is to say, the lower part of the mattress depressed between the said rails, and extending, when desired, below said rails. It is, of course, to be understood that, so far as concerns the principal feature of my invention, I do not limit myself to the precise construction of the parts therein shown, or the precise means of connecting said parts together; the essence of my invention consisting in a mattress circumferentially rabbeted in such manner that, while its upper portion may be supported by the bedstead, its lower and depressed part will be suspended from its upper portion, and situated below the level of the top of the frame of the bed. It will be observed that the mattress constructed to be placed upon the bedstead, as aforesaid, has as its most characteristic feature the deep rabbet around its circumference, so that a circumferential shoulder, a, is formed above for resting upon the rails, c, of the bedstead, while the lower portion, b, is suspended between and below the rails."

The bedstead shown in the patent is the ordinary iron or brass bedstead, it not being necessary, as complainants' expert testifies, to devise a bedstead with novel features for the use of such a mattress as the patent describes. The claims are:

"(1) As a new article of manufacture, a mattress for bedstead, the circumference of which is rabbeted, to enable it to be supported at its upper part by the rails of the bedstead, with its lower part suspended between said rails; all substantially as and for the purpose herein set forth. (2) The combination of the upper frame, A, the lower frame, B, of smaller dimensions, suspensory hangers, C, bars, E, and springs, F, the frames, B and A, being arranged in relation to each other to provide a circumferential rabbet, f, to the mattress, and to enable the lower part of the mattress to be suspended from the upper; all substantially as and for the purpose herein set forth."

The examiner decided that there was "nothing patentable in the claims in this case, in view of the following references: Elston, 246,378, Aug. 30, 1881, and Hale, 271,062, Jan. 23, 1883." The patent to Elston is for an improvement in railroad car seats. It shows a lower frame, supporting slats, on which the springs rest, and which drops below the level of the stationary frame of the car seat, whereby the patentee is "enabled to use springs of eight inches, more or less, in height, in addition to the ordinary three and a half inch springs." The drawings show clearly what Elston calls his "drop frame," and they show that this frame is shorter and narrower, and that it rests below the upper frame, which is supported all around (at the ends as well as the sides) upon the side and end rails of the stationary car-seat frame. A circumferential rabbet is thus formed, or, in the language of the patent in suit, "a circumferential shoulder is formed above for resting upon the rails" of the stationary car-seat frame; and the "drop-down frame" is held between and below the said rails. From the decision rejecting the patent, Fulton appealed to the board of examiners in chief. After citing the two references, the board held:

"Neither shows a mattress, but spring seats for railroad chairs. These seats show the rebate and spring, but applicant makes no claim to these per se, but

to a mattress for bedsteads. To permit of the use of such a mattress, a bedstead with novel features had to be devised, set forth in the second claim. They belong together as inventions, and support each other as to patentability. The bedstead would have no particular advantage with its two frames, A and B, and hangers, C, and bars, E, separate from the mattress, and the mattress would have no advantage from its rebate without the bedstead. Yet both could be used independently. The invention is not anticipated, and the decision is reversed."

—And patent issued accordingly.

This is a most extraordinary decision. It was not necessary to devise "a bedstead with novel features" to permit the use of such a mattress; nor did Fulton assert in his specification that he had devised any bedstead; nor did he claim any bedstead, in combination or otherwise, in his second claim; nor did he ever refer to any bedstead in such claim. Moreover, the "two frames, A and B, and hangers, C, and bars, E," which the examiners in chief say belong to the bedstead, are really parts of the mattress, and so described in the patent. In view of the fact that the examiners in chief seem not to have had the remotest conception of what the specification showed, or of what Fulton claimed, the presumption in this case of patentability arising from the allowance of the application by the patent office is of no practical value.

Complainants seek to eliminate the Elston patent from the case by the suggestion that the workmen who make mattresses for beds do not make seats for railroad cars. That circumstance, however, is immaterial when an old contrivance is applied in an old way to an analogous subject, without any novelty in the mode of applying such old contrivance to the new purpose. *Pennsylvania R. Co. v. Locomotive E. S. T. Co.*, 110 U. S. 497, 498, 4 Sup. Ct. 220; *Aron v. Railway Co.*, 132 U. S. 89, 10 Sup. Ct. 24; *Briggs v. Ice Co.*, 8 C. C. A. 483, 60 Fed. 87.

Complainants, in rebuttal, also undertook to prove that Fulton's invention was complete before the date of Elston's patent, which, it will be remembered, was August 30, 1881. Of course, the burden of proof on this branch of the case rested upon the complainants. *Clark Thread Co. v. Willimantic Linen Co.*, 140 U. S. 492, 11 Sup. Ct. 846. The witnesses called were George Smith and Louis Weber, who were examined on November 30, 1896. Smith testifies that he went into the employ of Charles P. Rogers, for whom Fulton was superintendent, on May 6, 1881; that "about five weeks afterwards" Fulton, in his presence, told Fred Weber he would like to get a frame out that would have a rabbet on it; that a frame was produced in a little over a week which was not exactly what Fulton wanted; that it was taken apart, and another one made, which contained the rabbeted edge around the mattress. He fixes the date when this mattress was completed as "somewhere about the middle of August, 1881" (which would antedate Elston by barely two weeks); that he did not know what became of this mattress, but that they did not make any others like it until November, 1882. This evidence as to dates is given wholly from his unaided memory, with no reference to any records, or to any collateral circumstance except his going into Rogers' employment; and he was not quite 18 years old when the events took place, which he thus undertakes, 15 years afterwards,

to locate within 2 weeks. The other witness, Louis Weber, who is a brother of the Fred Weber referred to by Smith, testified that when "he came into the factory at nine o'clock on the morning of August 20, 1881, he saw his brother (now deceased) and Fulton looking at the spring bed" which had the rabbeted edge of the patent. He never saw it again, nor any like it, until they began to manufacture them for sale, which he thinks was in 1884,—two years later than the date given by Smith. The witness Weber seems to have been ill on several occasions, so that he had to leave the factory for brief periods, but is unable to fix the dates of any such departures or returns, other than the one referred to, nor was he able to say whether he was first employed by Rogers on the first or on the second Tuesday in November, 1879. Without any book, record, or document of any kind, however, he asserts that he saw the mattress on August 20, 1881, and says he fixes the date because it was the year of President Garfield's assassination, and he "came back on that day after being sick." "I attended a tea-party," says the witness, "on the 19th of August, and came home on the 6 o'clock train that evening. That is how I remember it." Such evidence as this is not calculated to inspire confidence in the accuracy of the witnesses' recollection as to the dates of transactions 15 years old. The inventor, Fulton, died before the rebuttal testimony was taken; but it is most suggestive that when he was examined in complainants' behalf on the prima facie case his attention was called to the Elston patent, and he was asked if it anticipated his patent, to which he replied with an elaborate statement of structural differences, but with no suggestion of the pertinent fact that he had perfected his own invention on August 20, 1881,—prior to the granting of the Elston patent. We should be inclined to hold that complainants have not sustained the burden of proving that Fulton's mattress antedated the Elston patent, but really it is not necessary to include the latter patent within the prior art. The patent to T. R. Jones for a spring-bed bottom, April 3, 1877, shows a mattress in which the upper frame projects at the head and foot beyond the lower frame, the object being to accommodate the rows of springs placed on the end slats of the lower frame. But, whatever the object was, the Jones mattress was capable of use in the same way as Fulton's; only, instead of being suspended on all four sides, it would be suspended at the head and foot only, the lower frame being bolted through uprights to the upper frame, so that the cross slats of the lower frame would sufficiently support the springs without the aid of any slats in the bedstead. There was no necessity for thus suspending a mattress so long as the old wooden bedsteads with deep side boards were in use; but, as soon as the introduction of iron and brass bedsteads made it necessary to sink the lower frame of the mattress below the plane of the bedstead, it certainly needed no more than the mere ordinary skill of the mechanic, with the Jones mattress before him, to support it by hanging it from the ends, or from the sides of the bedstead, or from all four sides at once. That there have been extensive sales of these suspended mattresses is not particularly suggestive. As the sale of brass bedsteads increases, the sale of mattresses adapted for use

with them will naturally increase too. The decree of the circuit court is reversed, with costs, and cause remitted, with instructions to dismiss the bill.

THE MARION S. HARRISS.

WINSMORE v. THE MARION S. HARRISS.

MAIR et al. v. SAME.

FLICK v. SAME.

HARRISS et al. v. SAME.

(District Court, E. D. Pennsylvania. June 11, 1897.)

1. MARITIME LIENS—SUPPLIES—FOREIGN PORT.

Necessary supplies furnished to a vessel which has not obtained registry in any port, at a port other than that which is the residence of her owner, are supplies furnished at a foreign port, for which a lien lies against the vessel in admiralty, when furnished upon the credit of the vessel, and not upon the credit of the owner.

2. SAME.

Where, in order for temporary purposes to obtain registry for a vessel in a port at which advances had been made to her, her true owner conveys a nominal interest in her to a member of the firm which made the advances, and where such advances were made upon the credit of the vessel at a port other than the port of residence of her true owner, a lien lies against the vessel for such advances. They are not to be regarded as advances made at the home port.

On December 13, 1895, libels for wages were filed against the Marion S. Harriss, under which she was ordered to be sold. The other libels above mentioned were subsequently filed. Upon the sale and the payment of the proceeds in the registry of the court for distribution, the whole matter was referred to Henry Flanders, Esq., as commissioner. From his report the following facts appear:

The Marion S. Harriss was originally a Norwegian vessel. She was abandoned at sea and towed into Wilmington, N. C., where she was sold at auction on January 15, 1894, to S. W. Skinner, a shipwright of that port. After the sale her shipping documents were returned to Norway. Skinner sold her in October, 1894, to Philip P. Gardner of Philadelphia, Pa. At that time the vessel was being repaired at Skinner's yard. On January 16, 1895, a special act of congress was passed, authorizing the registry of the vessel as a vessel of the United States. She was so registered by Skinner on March 11, 1895. On March 12, 1895, he executed a bill of sale of her to Gardner. Gardner gave back to Skinner a mortgage upon the vessel to secure three notes aggregating \$2,750, part of the purchase money. On March 13, 1895, Gardner executed a bill of sale of one thirty-second of the vessel to W. N. Harriss of Wilmington, N. C. This bill of sale was made in order to obtain registry for the vessel temporarily in Harriss' name at Wilmington, N. C. The vessel was accordingly so registered. No interest in the vessel actually passed to Harriss. On June 29, 1895, he executed a bill of sale of his nominal interest back to Gardner.

Thomas Winsmore, a merchant of Philadelphia, furnished certain supplies to the vessel. The greater part of these supplies were delivered at Wilmington before the vessel had obtained any registry, on the order of Gardner. The remainder were furnished at Philadelphia after she had obtained a registry at Wilmington. The supplies furnished at Wilmington were furnished upon an express agreement that they should be a lien against the vessel. Winsmore's libel was for these two items of supplies and for insurance effected by Wins-

more upon his interest in the vessel. The claim for the supplies furnished at Wilmington was allowed by the commissioner upon the authority of *The Kalorama*, 10 Wall. 204. The claim for the supplies furnished at Philadelphia was allowed on the ground that they were furnished at other than the home port of the vessel. The claim for insurance was disallowed.

John Mair & Son of Philadelphia furnished sails to the vessel for the most part at Wilmington after the passage of the act of congress above mentioned, but before registry had been actually obtained by the vessel. The remainder were furnished at Philadelphia after registry at Wilmington. All were furnished upon the credit of the vessel. The libel was filed to recover these two items and also for insurance. The first two items of claim were allowed, and the claim for insurance rejected by the commissioner as in *Winsmore's* case.

George Flick of Philadelphia furnished certain metal work for the vessel in November, 1894, while she was at Wilmington, upon Gardner's order. His libel was for these supplies and was allowed.

George Harriss, Son & Co., of Wilmington, N. C., a firm of which W. N. Harriss was a member, made certain advances at Wilmington upon the credit of the vessel after W. N. Harris had reconveyed his interest in the vessel to Gardner, but before any change had been made in the registry of the vessel. Their libel was for these advances and for insurance. The commissioner rejected their entire claim. He held that they had no lien upon the vessel because when the advances were made she was at her home port and it was not shown that under the local law of North Carolina they had any lien for such advances.

Exceptions were filed by Skinner as mortgagee to the allowance of the claims of *Winsmore*, Mair and Flick; by Harriss for the disallowance of their claim; and by *Winsmore* and Mair for the disallowance of their claim for insurance. The latter exceptions are not considered in the opinion of the court and appear not to have been pressed at the argument.

Curtis Tilton, for *Winsmore*, Mair, and Flick.

Alfred Driver, for Harriss.

Thomas Evans, for mortgagee.

BUTLER, District Judge (after stating the facts as above). The exceptions of Mr. Skinner, the mortgagee, must be dismissed, for the reasons stated by the learned commissioner.

The exceptions of George Harriss, Son & Co. must be sustained. In view of the proofs I cannot distinguish the claim of the exceptors from those allowed. W. N. Harriss never had any interest in the vessel. His assertion that he had, and his acts in pursuance of it, would estop him, and doubtless his firm, from asserting the contrary, —against others who were thus misled. The parties here were not misled. Again, he reconveyed his paper title to the owner, Gardner, before the supplies in question were furnished. The failure to record this conveyance seems unimportant.

The only question is, had Harriss an interest, when the supplies were furnished? and of this there is no room for doubt. No question of estoppel is involved. No one contests the right of Harris, Son & Co. to a lien except the mortgagee; and he does so only on the general ground that the vessel is not liable to admiralty liens.

The home port of the vessel was Philadelphia, where Gardner resided; but in view of the facts this is unimportant. *The Sarah J. Weed*, 2 Low. 555 [Fed. Cas. No. 12,350]; *The Vigilancia*, 58 Fed. 700; *The Agnes Barton*, 26 Fed. 542; *The Huron*, 29 Fed. 183; *The Union Express*, Brown, Adm. 537 [Fed. Cas. No. 14,364]; *The Chelmsford*, 34 Fed. 399; *The Hiram R. Dixon*, 33 Fed. 297. Again, the supplies

of each claimant here were furnished in pursuance of an express agreement for a lien on the vessel.

A decree may be prepared accordingly.

THE ALBANY.

McCULLOUGH et al. v. THE ALBANY.

(Circuit Court of Appeals, Second Circuit. July 21, 1897.)

1. ADMIRALTY APPEALS—WEIGHT OF EVIDENCE—COLLISION—FINDINGS BELOW.

When the district judge has rejected the positive testimony of witnesses who were in the best position to know the facts, and has accepted the testimony of others whose opportunities of knowledge were not so good, on the expressed ground that the rejected testimony does not harmonize with some theory as to the movements of the vessels, or with the inherent probabilities of the case, there is no reason why the appellate court may not review the testimony unembarrassed by the findings below.

2. SAME—COLLISION BETWEEN FERRYBOATS—EVIDENCE.

The ferryboat S. left Chambers street, New York, for Pavonia ferry, Jersey City; going up the river a little eastward of the higher ferryboat, H., which hid her lights from vessels to the westward. The ferryboat A., coming down from Weehawken, and bound for Franklin street, New York, was at the same time obscured from the S. by the H. The A. turned in under the stern of H. to make her slip, and then came in view of the S., when it was too late for either to avoid collision. *Held*, on conflicting evidence, that the S. maintained her course up the river, and did not also turn in under the H.'s stern, as contended by the A., and that she was not, therefore, guilty of any contributory fault. 74 Fed. 314, reversed.

Appeal from the District Court of the United States for the Southern District of New York.

This is an appeal from a decree of the district court, Southern district of New York, apportioning the damages in an action arising out of a collision between the libelants' ferryboat Susquehanna and the claimant's ferryboat Albany. The district judge held both vessels in fault, but only the libelants appealed. 74 Fed. 314.

Wilcox, Adams & Green, for appellants.

Ashbel Green (Herbert E. Kinney, of counsel), for appellee.

Before WALLACE, LACOMBE, and SHIPMAN, Circuit Judges.

LACOMBE, Circuit Judge. About 9:45 p. m. of February 20, 1895, the Susquehanna left the foot of Chambers street, New York, on a trip to the Pavonia ferry, Jersey City. She ran out from her slip, and, under a port wheel, turned upstream somewhat east of the middle of the river. At about the same time the Hamburg, a double-decked ferryboat of the Hoboken Ferry Company, left her slip at the foot of Barclay street, which is below Chambers street, also ran out, and swung up the river, bound for the foot of Newark street, Hoboken. By the time they had steadied on their respective courses, both boats were heading about up the river,—the Hamburg a little more towards the Jersey shore. The Susquehanna was to the eastward of the Hamburg about a length to a length and a half, her bow lapping

on the Hamburg's starboard quarter. The Hamburg was the faster boat, and as they proceeded up the river she gradually drew ahead, until she left the Susquehanna entirely astern. Meanwhile the Pennsylvania tug Harsimus, with a car float in tow, was proceeding directly across the river from pier 29, North River, to Harsimus Cove, next to the abattoir in Jersey City, which is some 500 feet south of the lower slip of the Pavonia ferry. About 9:30 o'clock the West Shore ferryboat Albany left Weehawken, N. J., bound for Franklin street, New York. The distance is about $4\frac{1}{2}$ miles, and she hugged the Jersey shore pretty well all the way, to get the benefit of the tide, which, her pilot says, was slack in mid river, but running ebb along shore. As she reached a point nearly opposite the Pavonia ferry the ferryboat Delaware ran out of the slip, bound for Chambers street, New York, and the Albany slowed down and headed for her own slip at the foot of Franklin street, New York. A line drawn across the river at Franklin street would be about halfway between the two Erie terminal slips. In other words, by the time she was opposite Franklin street an Erie ferryboat would have made only about half the northing necessary to bring her from Chambers street to Pavonia. While the fleet was in this position the colored lights of the Albany and the Susquehanna were obscured from the view of each other by the high double deck of the Hamburg, and the Albany, on a crossing course, was drawing nearer to the other two vessels, which were crossing her bows; the Hamburg showing her red light, and the Susquehanna presenting her red light, temporarily obscured from the Albany by the superstructure of the Hamburg. Proceeding thus, the situation so changed that, as the district court finds, "when off Franklin street, and probably about one-third of the way across the river, * * * [the Hamburg] drew away from between the Susquehanna and the Albany, so that the red lights of each became suddenly visible to the other a few hundred feet apart. Each ferryboat at once ported her helm, and very soon each reversed her engine, but they came in collision before the progress of either was stopped." The details of navigation subsequent to the time when the Hamburg moved out of the line of sight need not be rehearsed, for the district court has found that "the collision did not arise from anything that can be called a legal fault after the vessels were aware of each other's near presence." The faults for which both vessels were condemned are thus stated in the opinion:

(1) "The primary fault was in proceeding so near to another high vessel as to be concealed from the view of others likely to be approaching, so as to leave no sufficient time for any effective maneuvers after the proximity of the other vessels is known." (2) "Each boat, I find, was swinging under the stern of the Hamburg in order to go to her slip. * * * There was not the least need of navigating or rounding so near to the Hamburg. * * * She [the Susquehanna] had no right voluntarily and unnecessarily to hide her side lights behind the Hamburg, and then draw under her stern without giving any such timely notice by lights and signals as is required," etc.

As above expressed, the first of those faults might be held to arise whenever a vessel navigating in a crowded harbor, on a fixed course, as in the case of a ferryboat, is temporarily "blanketed" by some faster craft overtaking her. The affirmance in the circuit court in the

cause of *The Seacaucus* (reported in district court; 34 Fed. 68), which was referred to on the argument, was upon the ground of an abrupt sheer around the stern of the intervening boat by the *Hawley*, and the failure to keep a proper lookout by the *Seacaucus*. We are not prepared to hold that the mere fact that a faster vessel has temporarily obstructed the view from and towards another vessel is sufficient to charge that vessel with fault, when its lookouts have been vigilant, and it attempts no change of course until after the intervening vessel has moved so far ahead as to cease to be an obstruction to the view of other vessels. So long as neither vessel of the two which have been temporarily hidden by a third draws or swings or crosses under her stern without giving opportunity for timely notice to and from whatever craft may be found beyond the removed obstruction, it is difficult to see how either of them is guilty of a fault tending to bring about collision. There may be cases where one vessel voluntarily places herself so close to another one, and unnecessarily continues in her place of concealment so long, as to warrant a finding that her navigation is imprudent, but the facts in proof here do not warrant such a finding. The district court, however, as appears from the citation *supra*, held that each boat was in fault for swinging under the stern of the *Hamburg* so quickly as to prevent the giving or receiving of timely notice to and from whatever vessel the *Hamburg* had previously obscured. That the *Albany* committed this fault is undisputed here, since she has not appealed; and, even if she had appealed, the evidence abundantly shows that she did swing in close under the *Hamburg's* stern, passing within 100 feet of that vessel. The only question to be considered is whether the *Susquehanna* also swung to port as the *Hamburg* cleared her. Objection is taken to any consideration of this question on the ground that the evidence below was conflicting, that the district judge heard and saw the witnesses, and that his finding of fact thereon will not be disturbed. This general rule, however, is not without exceptions. The *Gypsum Prince*, 14 C. C. A. 573, 67 Fed. 612. When the district court has rejected the positive testimony of witnesses who were in the best position to know exactly what the truth was as to some disputed fact, and has accepted the testimony of others whose opportunity to know the truth was manifestly not as good, and does this on the expressed ground that the testimony rejected does not harmonize with some theory as to the movements of the vessels or with the inherent probabilities of the case, there is no reason why the appellate court should not review the testimony unembarrassed by the finding as to such fact. The "personal equation" of the witnesses is of no assistance in determining what are or are not the probabilities of the case.

In this case, as in that of *The Gypsum Prince*, *supra*, the testimony of those on the *Susquehanna*, including her pilot and wheelsman, is direct and positive that she did not swing to port, but continued heading "up the river," as the *Hamburg* drew ahead, intending to continue on that course until above their slip, and then to turn in and make it. They testify that they thus continued until they saw the *Albany*, and the subsequent navigation of both vessels need not be described, since we concur with the district court in the conclu-

sion that there was no "legal fault after the vessels were aware of each other's presence." So far as the pilot and wheelsman are concerned, they knew better than any one else whether or not the wheel was kept amidships, or revolved to port or starboard. Their knowledge is not derived from observation of the changing or unchanging of the relative positions of surrounding objects, but is direct and positive; for, if the wheel moved, they, and they only, moved it. If, then, it be found that the Susquehanna did swing to port under the Hamburg's stern, there is no excuse for their testimony on any theory of careless observation, or imperfect inferences, or miscalculation of distance or time. Such a finding as to the Susquehanna's navigation is a finding that her pilot and wheelsman testified falsely when they must have known the truth. We have most carefully examined the testimony of these two witnesses. It is clear and apparently straightforward, both on direct and cross-examination, and presents no inconsistencies. We do not find that it conflicts with the proof as to the place of collision, or the course of the Hamburg. The pilot's estimate that, when he swung into the course outside of the Chambers street slip, he was about a quarter of the way across the river, was an estimate, merely, and he says that later on both vessels were near the middle of the river. Nor does he undertake to give his course with absolute accuracy: It was not a compass course. He "kept moving his wheel first one way and then the other, just to keep straight up,—to keep it steady." And, although his impression was that he was heading a little more towards New York than towards Jersey, it is apparent from his whole testimony that this is not a very positive impression. What he is sure of, and reiterates whenever asked, is that he kept on "heading about straight up the river." We find nothing in the evidence of the pilot or the wheelsman, considered by itself, calculated to discredit its general accuracy. In nearly every particular it is corroborated by the testimony of the disinterested witnesses, most of whom come from the Hamburg. One disinterested witness only contradicts the evidence from the Susquehanna in several particulars, and testifies that she did sheer under the stern of the Hamburg. This is the pilot of the Harsimus. His testimony is confused, involved, and so full of contradictions that it is entitled to but little weight. He says the whistle of the Susquehanna was blown when the Hamburg was crossing the bow of his float, and about 400 feet away; that it was not blown till after the Susquehanna crossed under the stern of the Hamburg (so that collision must have taken place beyond the Hamburg's wake); and that the collision took place within 200 feet of the bow of his float, which was off pier 29, and five blocks further up the river than all the other witnesses from both sides make it. Elsewhere he says that the Hamburg was "on the starboard side of the Albany"; "that the Hamburg was between the Albany and the New York shore,—that is, he would be to the right of the Albany." We find in the story of this witness nothing to discredit the testimony of the pilot and wheelsman of the Susquehanna. The witnesses from the Albany, including her pilot and wheelsman, testify that the Susquehanna changed her course to the

westward. They admit that they changed their own course to the eastward, and headed for their slip at Franklin street, intending to proceed there when the Hamburg left the course open to them. Their knowledge as to their own change of course is positive. What they assert as to the change of course of the Susquehanna is an inference from observations. Their story is that they first saw the Susquehanna's red light about one or two points on their port bow; that she was then "above them in the river" (that is, further north than they were); and that she (the Susquehanna) then turned around and came down the river, into collision with them, showing both lights. To do this, the Susquehanna, for no suggested or conceivable reason, must have changed her course so as to head for the slip of the Pennsylvania ferry on the Jersey shore,—a slip which lies further down the river than the one from which she started. This story is so wildly improbable that we are inclined to give it no weight. The district judge evidently discredited the testimony from the Susquehanna mainly because it seemed to him improbable. "It is not probable," says the opinion, "that the Susquehanna was heading nearly straight up the river, or had come up on that heading. * * * Moreover, the Susquehanna was so nearly opposite the Pavonia ferry that it is the highest degree unlikely that on the first of the ebb she would not have been previously crossing towards her slip * * * if the Hamburg did not prevent her. I have no doubt that her probable course was the true one, and that she was in fact delayed somewhat in heading to the westward by the Hamburg, which was in her way." The evidence is most positive—part of it from disinterested witnesses and wholly uncontradicted—that the Erie ferryboats, in making their Jersey slip on an ebb tide, "generally head up the river until they get above the slip," in order to give room to turn when above the slip, so as to meet the effect of the tide and come into the slip head on. It would seem to be not only probable, but most likely, that the Susquehanna would pursue the usual course when navigating in such a tide. The pilot of the Harsimus testified that the tide was still flood, and that when he stopped his tug and tow they drifted a little up stream. But all the other witnesses testified that it was the beginning of the ebb,—slack, perhaps, in mid river, but running ebb along the piers; the very situation in which the Erie boats usually navigated as her witnesses say the Susquehanna did on this occasion. The pleadings of both sides aver that it was ebb. The Albany, as before stated, had been hugging the Jersey shore on her way down expressly to get the advantage of the ebb. Had the Susquehanna turned so as to cross the river in the direction of her slip before she had got above it, she would have had to work her way in, angling against the tide, and no witness suggests that such is usual or convenient navigation. Moreover, we are not satisfied that the Susquehanna was "nearly opposite the Pavonia ferry" when the Albany came in sight. The pilot of the Harsimus puts the collision within 200 feet of the bow of his float, but, even on his own statement, that point would be 500 feet or more below the Pavonia ferry. All the other witnesses, however, without exception, put the place of collision much further

down stream about opposite Franklin street or the street above it. Certainly it would be unusual navigation, on an ebb tide, to lay a direct course from that point to the Pavonia slip. We agree with the district judge that "her probable course was the true one," but believe that her probable course was the one usually followed in such a condition of the tide.

Another suggestive fact most strongly corroborates the testimony of the pilot of the *Susquehanna*. As the *Hamburg* and the *Susquehanna* proceeded up the river, they had the *Harsimus* crossing their course on the starboard hand. It was their duty, therefore, to avoid her, and the *Harsimus'* duty to keep on. They might have avoided her by slacking up, sheering to starboard, and going astern of her. They might, also, with the *Harsimus'* assent, have crossed her bows; but, if they wished to adopt the latter course, it was most imperatively their duty to signal such intention to the *Harsimus* by a two-blast whistle, and obtain her assent to such maneuver. To undertake to cross in front of the *Harsimus* without giving such signal would have been reckless negligence. The *Hamburg*, wishing to cross the *Harsimus'* bows, gave a two-blast signal, which was assented to, but the *Susquehanna* gave no signal whatever to the *Harsimus*. This circumstance supports the evidence of the *Susquehanna's* pilot that he did not wish to attempt to cross the tug's bows, as he might thus "get crowded to Jersey," and that he ported his wheel a little to go under the tug's stern. We find nothing in the angle of collision which conflicts with the *Susquehanna's* story. The *Albany* undoubtedly ported after the *Susquehanna* came in view, and the consequent swing to starboard would tend to bring the boats together on nearly opposite courses. The decree of the district court is reversed, with costs, and the cause remitted to the district court, with directions to decree for damages against the *Albany* alone.

THE JOHN GREGORY.

BRADLEY TRANSP. CO. et al. v. CREECH et al.

(Circuit Court of Appeals, Sixth Circuit. July 6, 1896.)

No. 378.

COLLISION—TUGS RACING FOR TOW.

The tug *G.*, whose master had received a dispatch engaging her to tow a schooner into the harbor of Cleveland, Ohio, collided with and sunk the tug *F.*, which engaged in a race with her for the tow, the *F.'s* master being ignorant of the *G.'s* previous employment. *Held*, on conflicting evidence (there being two disinterested witnesses in favor of the *G.*), and considering the existence of a motive on the part of the *F.*, which did not exist in the case of the *G.*, that the *F.* willfully attempted to crowd the *G.* off her course, and was, therefore, solely in fault.

Appeal from the District Court of the United States, for the Eastern Division of the Northern District of Ohio.

Harvey D. Goulder, for appellants.
John G. White, for appellees.

Before TAFT and LURTON, Circuit Judges, and SAGE, District Judge.

LURTON, Circuit Judge. A collision occurred in September, 1888, between two tugs, off the port of Cleveland, Ohio, in which the tug Forrest City, belonging to appellants, was sunk, and became a total loss. The colliding tug was the Gregory, and was owned by appellees. The district court, on all the evidence, dismissed the libel of appellants. From this decree the owners of the Forrest City have appealed.

These tugs were rivals in business, and the collision occurred in a race between them to secure the job of towing the schooner Constitution, which was approaching the port of Cleveland from what is known as the "Pelee Passage," between Pelee island and Point Pelee on the Canadian shore. The story, as testified to by the master of the Forrest City, is substantially this: The Forrest City went out from the harbor of Cleveland between 10 and 12 o'clock the night before the morning of the collision, and lay during the night at a point from 7 to 10 miles to the north and west of the Cleveland pier, and about W. N. W. from the pier, and in about the line of vessels approaching Cleveland from Point Pelee. When he first saw the Constitution, the latter was W. N. W. about 10 miles from the Forrest City, and coming towards Cleveland. The Forrest City was at once started towards her with the object of securing her as a tow. Shortly after she was started, her master says that he observed the Gregory northward and eastward of his own position, and distant about seven or eight miles. He thinks that at that moment the Forrest City was a little nearer the approaching schooner than the Gregory. He says that the Gregory was then heading more towards the Forrest City than she was for the schooner, and that she continued on that course "until she lapped right under our stern." He distinctly and positively testifies that his own course was pointing directly for the schooner, and that up to the time that the Gregory lapped under the stern of the Forrest City he did not alter his course a particle. He proceeds by saying that "the Gregory came right close under our stern,—within 50 feet, I should think,—and lapped alongside of us on our port side." He further says, when asked how the Gregory got on his port side, that she did so "by running under our stern; our suction, I suppose, drew him up." "The Gregory was a little smarter boat than we were, and he was catching us a little bit." The tugs being thus abreast, they continued to run side by side for a distance of four or five miles, both steering directly for the Constitution, the tugs being so close as "to rub together." The master of the Forrest City then says that after this side by side position had continued for a time he endeavored to separate, as his boat had been newly painted, and he did not wish her to be marked up by rubbing, and for this purpose gave his engineer a signal to stop, and then to back, and that, after he gave these signals, like signals were at once given on the Gregory, and that so soon as the Gregory gave the back signals he gave a signal to stop. "That," says he, "brought us back

with the pilot-house doors about abreast of each other. Then I gave a signal to go ahead, and he gave a signal to go ahead, and we went along. As soon as I started, he started. He put his wheel to starboard, and I put my wheel to port. We both went off in that direction, and got away from one another. He went ahead in this direction [indicating], crossed over here, and rounded to the schooner. The suction of his vessel drew the bow of my boat underneath his stern, and his wheel struck the bluff of my bow. I cannot say how he had his wheel at that time." The wheel of the Gregory inflicted such injury to the bow of the Forrest City in the maneuver described by the master of the latter as that in a short time she was discovered to be filling. Three of the crew of the Forrest City substantially confirm the story of the collision as detailed by her master, Capt. Dwyer.

According to the usual course of such controversies, a very different account of the matter is given by those upon the deck of the other tug. That account, as detailed by Capt. Moffett of the Gregory, is substantially this: The owners of the Gregory while that tug was at the pier at Cleveland received a telegram from the owners of the Constitution notifying them that the schooner had passed Detroit bound for Cleveland. The Gregory was at once started, and steered straight off from the piers about N. W. by west about four miles, when the sails of the schooner loomed up, whereupon the course of the Gregory was altered so as to steer straight for her bow. The Gregory's master says he first saw the Forrest City about a mile or one mile and a half from Rocky river, and about two miles from the shore, and distant five or six miles from the Gregory. This was after the Gregory's course had been changed so as to steer for the Constitution. He says the Forrest City was then lying still, and so continued "until we got pretty well up to her. Then she started right off between us and the schooner, cutting across my bow and the schooner's bow also. He was heading, it looked to me, about half between us and the vessel." Capt. Moffett's examination then proceeds as follows:

"Q. Did you near each other? A. Yes, sir. He was running in this direction, and I was running this way [indicating]. Q. When you got near, were there any signals interchanged? A. Bells? Q. Yes, bells or whistles? A. Well, I blew a blast of my whistle. When I blew it the whistle rope broke. Q. Where was his boat at that time? A. About 400 or 500 feet from me on the port bow. Q. Heading how? A. On the port bow. Q. Did you get any answer? A. No, sir. Q. Did the Forrest City do anything in the way of checking? A. No, sir; she kept right on going. Q. Then what did you do? A. I seen we were going to hit them, and I checked my boat down to let them cross my bow. Q. How close to your bows? A. I could almost jump on her. Q. Then what occurred? A. Well, I was steering right along my course. He put his wheel starboard, and came up alongside of me. Q. What do you mean by alongside? Close alongside? A. Yes, sir; right up; got in our suction, and sheered off towards me. I couldn't say how he put his wheel, but anyway she came up alongside of me. Q. Show us how she crossed your bows. A. [Indicating.] The boats were going like that. Q. And you have said that while on the course I am marking, when she crossed your bow she crossed how close? A. I checked my boat down, and she just got across my bow. If I hadn't checked down we would have hit him. Q. Then you say he came alongside? A. Yes, sir. Q. By the Court: Show me that movement. A. [Indicating.] When he was in this position, I checked my boat down. If I hadn't,

we would probably have hit him. As soon as he got across my bow, I was steering a straight course for the schooner. Whether he got in my suction, or whether he put his wheel to starboard, I couldn't say. Anyway he came up alongside of us. Q. You run alongside for how long? A. A mile and a half. Q. What occurred while you were running alongside of each other? A. We were running along there for about a mile and a half chafing each other all up. I said to myself: 'I got a dispatch from Capt. Kerr. If he gets there first he won't get the toll.' So I stopped. Q. You stopped, captain? A. Stopped. Q. What then? A. When I stopped, he stopped, and backed his boat up. Q. Then what? A. I started ahead again. Q. Then what did he do? A. Well, I got almost by him—got away up here [indicating]. I was going ahead with starboard wheel in order to get away, and the boats got about in that position [indicating]. Q. They separated in the manner that you have indicated? A. Yes, sir; this boat might have been a little bit further ahead. Q. Then what occurred? A. Well, when I got up there in that position [indicating], I started ahead, and he started ahead. His boat came in here [indicating] so as to hit us on the starboard quarter here like this. Q. Came together in the manner indicated by the third position in which you have placed the vessels? A. Yes, sir. Q. What was the effect of that? A. Well, it knocked my wheel out of my hand when he hit it. My steward was standing right abreast of the pilot-house door, and I told him to come and help me put the wheel over. Q. Well, what occurred? A. I put my wheel hard a-starboard and I held it there. Q. What was the effect on the boats? A. Well, both boats were rolled up. I was rolled to port and he to starboard. Q. How much was you rolled over? A. So the water was way up on top of the decks, going over the top of the scuppers into the firehold. Q. What did you do then? A. This man that was helping me hold it lost his hold, and fell out of the pilot-house. When he let go it jerked it from me, and I let go. Q. What was the effect? A. When I let go the boat let up. The Forrest City, as soon as I let go, he shoved me off like that [indicating] round to the northward, and he went toward shore. Q. Turned you round so you had it more to northward and he to land? A. Yes, sir. Q. Did the striking leave any marks on your boat? A. Yes, sir; it broke our fender streak. A. I felt the wheel hit something, but I couldn't say what it was. Q. When you parted in the manner you have described, what occurred next? A. When we parted? Q. Yes. A. Well, I should judge that his wheel was like that [indicating], and that is how I got away from him. I stopped my boat when I let go the wheel. As soon as I got clear, I rang a bell to go ahead again. Q. By the Court: After he struck you on the starboard, did it cross back of you? A. Yes, sir. He got off in that position [indicating] from me. Then the vessel was off in here. I put my wheel round to starboard. He didn't turn his clear around. When I got back that way [indicating], he was a little ahead. I rang a signal to the engineer, and he let her wide open. We had a mile and a half to run to the boat. We put a line on her, and Captain Kerr said to me, 'Come aboard.' I said, 'Come on, Fell, let's go aboard the vessel,' and him and I both went aboard the vessel."

The important points of this evidence are confirmed by three of the crew of the Gregory and by two disinterested witnesses on board her as guests of her master. The conflict upon matters of import between the witnesses for the contending tugs relates chiefly to the course steered by them, respectively, which led to their running side by side in this most dangerous and reckless race for the approaching schooner, and also to the efforts made by each to separate and draw out of the contest. The master of each tug testifies that when the approaching schooner was sighted the course of his tug was laid directly for the schooner, and that course maintained. So the master of each testifies that, after this race had continued for a time, he endeavored more than once to pull off, and checked and backed for that purpose, but was prevented by like movements of the other tug, which prevented a separation, and led to their going

forward abreast until the final maneuver, which resulted in the bow of the Forrest City being cut by the wheel of the Gregory. Which story is this court to credit? The conflict is irreconcilable. These tugs started for the Constitution from points well off to the right and left of the course of the schooner prolonged. Each claims to have steered for the schooner, and to have adhered to that course. It is clear that if this was true that their lines would not have converged until very close to the schooner, yet the fact is, their courses crossed several miles before reaching the tow. Who is at fault for this? If this fact can be ascertained, it will go far to settle the responsibility for the reckless race which ensued. The Gregory had no motive leading her to cross the course of the Forrest City. The tow was secured by the dispatch from the owners of the schooner which the master of the Gregory had in his pocket when he started from the pier. The usual rule that the tug first reaching an approaching vessel should have the tow did not apply to the Gregory, for her master had every reason for believing that, being in sight, he would get the tow, though the Forrest City first reached her. The master of the Forrest City, on the other hand, knowing nothing of the telegram to the Gregory, had reason to suppose if he could first get to the Constitution he would secure the job of towing her, and thus had a motive to engage in such tactics as would crowd the Gregory off her course. The Gregory was at the time the faster boat, probably due to the fact that when the Forrest City started she did not have a full head of steam. If, therefore, she could get alongside of the Gregory, and within the influence of her suction, the slower tug would take the speed of the faster, through the force of the suction in the leading tug. It was also desirable to approach the Constitution on the starboard or landward side. The position from which the Gregory started in relation to the schooner and the Forrest City, gave her this advantage. It was, therefore, advantageous for the Forrest City to get on the lake or northward side of the Gregory. These considerations combine to give the Forrest City a motive for departing from her course, and crossing the course of the Gregory, which she might do without increasing the distance to the schooner. Finding the master of the Forrest City with a motive for departing from a direct course to the schooner which the master of the Gregory did not have, we are justified, on a balanced state of evidence, in settling a question of credibility or doubtful fact by throwing into the scale the motive which might lead one to do that which his antagonist had no known object in doing. These circumstances find some support in the fact that two of the witnesses from the deck of the Gregory were disinterested. The court is not inattentive to the fact that all on board a vessel are liable to participate in the feeling and opinions entertained by those composing her company where the contest is with another and colliding vessel. Yet the fact remains that these two witnesses were comparatively disinterested, and therefore more likely to see clearly and speak honestly than witnesses who were actors in the drama. But another reason exists for concluding that the Forrest City was the aggressor, and that she departed from her proper course and

willfully crossed the bow of the Gregory, in the fact that the district judge, who saw and heard the witnesses, reached this conclusion. That court not only had the advantage of seeing and hearing the witnesses, but the advantage arising from diagrams indicating the course and position of these tugs at different times which were made and used by the witnesses below. Such evidence is of peculiar importance in understanding the evidence of witnesses to such a transaction as that under consideration, and has been omitted from this record. These considerations lead us to assent to the conclusion that the Forrest City deliberately and willfully departed from her course, and, though signaled by the Gregory to keep her course, so altered it as to cross the bow of the Gregory in such dangerous proximity as, but for the checking of the Gregory, would have resulted in a collision at that moment. Up to this point we must conclude that the Forrest City was alone guilty of a fault in navigation. That for a time the Gregory willfully held a place abreast or about abreast of the Forrest City, and so close that for one or more miles the tugs were rubbing against each other, we have no doubt. But the same considerations which led us to accept the evidence of the master of the Gregory upon the first and most important point of conflict leads us to believe him when he says he made more than one effort to separate, and was hindered by the dropping back and simultaneous stopping, backing, and going ahead of the Forrest City. We can well see how the master of the Gregory might refuse for a time to be crowded off his course, and finally conclude that, as he would get the schooner though the Forrest City should reach her first, he would desist from so dangerous and reckless a course of conduct, and withdraw from the race. Being the aggressor throughout, the Forrest City was rightly adjudged to bear her own loss.

The final catastrophe was the direct result of the effort of the Forrest City to crowd the Gregory over and out of her course. The latter was listed over so much as to alarm her master, and induce him to let his wheel go, so as to head away from the Forrest City, and thus separate. Either the steering of the Forrest City was such when this was done, or the effect of the Gregory's suction was such, that the bow of the Forrest City hit the Gregory's starboard quarter a blow which broke the fender streak of the latter and placed the bluff of her bow in such position as to be struck by the Gregory's wheel, inflicting the injury which caused her loss. The fault of the Forrest City in departing from her course, and in aggressively endeavoring to crowd the Gregory off her course, justly merits that she should bear her own loss. The judgment of the district court will be affirmed.

MONROE et al. v. WILLIAMSON et al.

(Circuit Court, W. D. Arkansas. August 7, 1897.)

REMOVAL OF CAUSES—PROCEDURE—FAILURE OF STATE COURT TO ACT ON PETITION.

Where a petition and bond for removal of a cause to the United States circuit court are duly and in apt time filed in the proper clerk's office of a state court in vacation, and afterwards on a day of the term of that court, and when court was open, and the presiding judge on the bench, and a petition is presented to him as at chambers for an injunction and receiver in the same case, whereupon counsel for the defendants, who had filed the petition and bond for removal to the United States circuit court, informed and advised the judge that the petition and bond had been filed, and offered to produce same, that the court and opposing counsel might inspect them, and insisted that the court could not proceed further with the cause, and thereupon, at the suggestion of opposing counsel, proceeded to state the facts contained in the petition, and to name the surety on the removal bond, which facts were accepted by the court and opposing counsel as true, and the fact conceded that the petition showed on its face a cause removable under the statute, and the bond sufficient and in proper form: *Held* that, upon such facts being brought to the attention of the court in the manner stated, the jurisdiction of the state court eo instanti ceased, and the jurisdiction of the United States circuit court immediately attached, notwithstanding the state court made no order, and took no action relating to the removal; and the petitioner had a right to procure and file a copy of the record in the United States circuit court, upon filing which the United States circuit court could proceed with the case as if it had been originally brought in that court.

Hill & Brizzolara, for plaintiffs.

Ira D. Oglesby, for defendants.

ROGERS, District Judge. Alexander Monroe and S. N. Lee, on the 14th of June, 1897, filed a complaint in equity in the circuit court of Crawford county, Ark., against John D. Williamson and William B. Strang, Jr., and caused process to issue, returnable to the next November term of that court, which process was on the following day duly served on both the defendants. The object of the bill was to dissolve and settle a partnership between all the parties to the suit, and incidentally for an injunction and a receiver to take charge of a large fund in one of the banks at Ft. Smith, Ark., in the adjoining circuit, and to collect other assets of the firm, to be disposed of under the order of the court. On the 17th of July—three days after the bill was filed—plaintiffs filed a petition with the judge of that circuit at Paris, in Logan county, in that circuit, asking the appointment of a receiver and a restraining order. Prior to the filing of the bill in the Crawford circuit court, a bill in equity had been filed in this court, and an injunction granted, and receiver appointed, who had qualified, and taken possession of the moneys in the Ft. Smith bank. Plaintiffs' petition for receiver alleged that this, the circuit court of the United States for the Western district of Arkansas, was without jurisdiction of the cause, and alleged that plaintiffs had given notice that they would, on the 19th of July, appear specially in this court, and move to quash the service of process, and discharge the receiver; and alleged that it was important that a receiver be appointed to take charge of the moneys in the hands of the

receiver appointed by this court, when he was discharged, as well as other assets which said receiver had not reduced to his possession. On the 17th of July, while the petition for a receiver was being heard at Paris, in Logan county, Ark., before the judge of that circuit at chambers, the judge received a telegram that on the bill of one of the defendants, filed in the state circuit court in the adjoining circuit, the judge of that circuit had appointed a receiver, whereupon the hearing was adjourned to July 20, 1897, at Van Buren, in Crawford county. The Crawford circuit court had been adjourned to that day. On July 19th the counsel for the defendants, in the case in the Crawford circuit court, filed the petition and bond of the defendants for the removal of that case into this court. No question is made as to the form or sufficiency of the bond, or the form or facts stated in the petition, except as stated hereafter. On the 20th of July the plaintiffs and the defendants appeared by their respective counsel, and the petition for the receiver was heard. The judge made the following order:

"Come plaintiffs by their attorneys, Hill & Brizzolara, and defendants, by their attorney, Ira D. Oglesby, and the judge hearing a continuance of the application for receiver herein doth, after hearing argument of counsel, refuse to appoint a receiver, and refuse to continue further this application, and dismisses said application without prejudice to any future application which may be made.

"7/20/1897.

J. H. Evans, Judge 15 Judicial Circuit."

On the 29th of July, 1897, the defendants' counsel caused to be filed in this court a transcript of the record of the Crawford circuit court, and two days thereafter the plaintiffs filed their motion in this court to remand the cause to the Crawford circuit court for the following reasons: (1) That the petitions for removals are insufficient, and fail to show removable grounds. (2) That the petition and bond have not been presented to the Crawford circuit court, and have not in any way been acted on by said court. That the petitions and bonds have been filed before the clerk of said court in vacation, and at the request of counsel for the defendants the clerk of that court has made a transcript of the papers in his office in the above-styled cause, and sent the same to this court. The said case and petitions and bonds have been filed with the clerk, and not acted upon by him other than to make out a transcript at request of defendants' counsel, and the next term of Crawford circuit court will convene on the third Monday in November. (3) That the case is not removable to this court, it being a case which was not originally cognizable in this court, and cannot be removed here for that reason.

In support of the motion plaintiffs filed the affidavits of Joseph M. Hill and J. H. Evans, which affidavits are in words and figures as follows, respectively, to wit:

"I, Jos. M. Hill, do upon oath state: I am one of the attorneys for the plaintiffs in this action. I was present before Judge Evans in Van Buren on the 20th of July, 1897, when we had an application for receiver pending before him. The hearing of said application had been continued from Paris, Ark., where it begun on the 17th, to Van Buren, by the judge, he informing us at Paris that he was to go to Van Buren on the 20th for the purpose of closing the June term of court there, signing the records, etc. I understood that the business of the court at Van Buren was completed, and formal matters only were to be

concluded there, and the hearing there was before him as at chambers. Mr. Oglesby had previously filed the petitions with the clerk, the court not being in session when they were filed. The argument was upon the application for the appointment of a receiver, and I asked a continuance of the application. Mr. Oglesby resisted it upon two grounds: First, that Judge Bryant had appointed a receiver in a case between these parties; and, secondly, that his application for removal had, eo instanti, taken jurisdiction from the Crawford circuit court. The petition for removal was not before us and not before the judge, Mr. Oglesby having had it sent to him at Fort Smith; but he stated the substance of it. I did not understand that Mr. Oglesby asked the judge or the court to then remove the case, but argued that the filing of the petition and bond of themselves removed the case. Judge Evans indicated that, if he thought the case was removable at that time, that he would then docket it, as he was holding a day of that court, and act upon it, but, as he understood the matter, it would come up before him at the November term of the court, and he would then act upon it; and that the only matter before him was the application for receiver and my motion to continue the hearing of that; and he denied the continuance, and declined to grant the receiver. I understood that Mr. Oglesby acquiesced in that procedure, and did not claim or insist in any way that the court should act upon it; his argument being that the filing of the petition and bond divested the court of further jurisdiction; and Judge Evans, not considering that that question would come before him till November, took no action in the matter whatever, and the petition was not there, and was not presented to the judge or to the court. This is my understanding, exactly, of the way the matter was disposed of before Judge Evans. There was no court in session at Van Buren on the 17th or 19th of July, and the case has not been docketed upon the court records of the June term, and was not entered upon the judge's docket, and merely remains with the clerk as other cases returnable to November term."

"I am the presiding judge of the circuit court for Crawford county, Arkansas, and was such judge on the 17th and 20th days of July, 1897. On the first-named day, to wit, July 17th, 1897, at the court house in Paris, Logan county, Arkansas, at chambers, I heard the application of the plaintiffs in *Monroe & Lee v. Williamson and Strang, Jr.*, pending in the Crawford circuit court, for the appointment of a receiver in said cause. The hearing was to begin at noon, but immediately after noon I was advised by Col. Oglesby, attorney for defendants, that he was not ready, as he had some papers to prepare. Some time between two and three o'clock of that day both Mr. Hill, for plaintiffs, and Mr. Oglesby, for defendants, appeared before me on said application. Mr. Oglesby insisting on a postponement of a hearing of the application, and Mr. Hill resisting it. During the argument I was advised that bond and petition for the removal of the cause to the federal court at Fort Smith had been filed by defendants with the clerk of the circuit court at Van Buren, Crawford county, at 3 p. m. on that day. I was also advised by Mr. Oglesby that he had just received information that Judge Bryant, at Fort Smith, at 3 p. m. on that day, had made an order appointing a receiver in the cause pending in the Sebastian circuit court for the Fort Smith district between some or all the same parties, Mr. Oglesby remarking that he supposed that ended the matter then before me. Mr. Oglesby also, before this last information, filed with me, as judge, petition and bond for removal of cause to the U. S. court at Fort Smith, Arkansas. Upon the consideration of all the matters presented to me, I concluded to grant Judge Oglesby's request for a postponement of the hearing of the application for a receiver, and announced that I would adjourn the hearing to the court house at Van Buren, Arkansas, and resume it there on the morning of July 20th, 1897, as I was compelled to be there, and hold a day of the Crawford circuit court; and thereupon I did so adjourn the hearing until the time and place named above. On July 20th, at 7:30 a. m., I convened the Crawford circuit court, pursuant to the order of adjournment of said court made on July 2nd, 1897. Just about 8 o'clock, or a little after, while court was in session, and while I was on the bench as judge thereof, Mr. Hill and Mr. Oglesby appeared. As I was not engaged in the trial of any matter in court at the time, I announced that I was ready to proceed with the hearing of the application for receiver in the *Monroe, Lee, Strang, Jr.*, etc., case. Mr. Hill thereupon asked a continuance of the hearing until he could make application for a

writ of prohibition from the supreme court against Judge Bryant. Mr. Oglesby objected to the continuance of the hearing, but asked that the application for receiver be disposed of then by me. I stated that the papers left with me by them on Saturday, and among them the petition and bond for removal filed by Mr. Oglesby with me, would be in on the evening's mail, as I had so ordered, having left home and forgotten them. One of the points of objection to a continuance made by Judge Oglesby was that a petition and bond for removal had been filed, and the court and judge were without authority to do anything except make an order of removal. Mr. Hill insisted that no proper petition for removal had been filed, and the powers and duties of the judge and of the state court upon filing petition and bond for removal were discussed by both Mr. Hill and Mr. Oglesby as weighing in favor of or against the application of Mr. Hill for a postponement of the hearing of the application for a receiver. No other matter except this application for postponement of the hearing for appointment of receiver was before me in this cause at Van Buren. I was not asked to make any order in regard to the transfer, and did not refuse or decline such request. Mr. Oglesby insisted that the filing of bond and petition *eo instanti* operated as a removal, and that the federal court was the tribunal to determine the right or wrong of the transfer. Mr. Hill insisted that in cases like this the state court and judge were not *eo instanti* ousted of jurisdiction, and contended that this petition did not state a cause for transfer. I, during this discussion, asked for the bond and petition filed with the clerk, and was furnished with the bond, but was advised that the petition was in Judge Oglesby's office. Mr. Oglesby stated that he could give its substance, which he proceeded to do, which statement was treated by me and Mr. Hill as correct. Mr. Oglesby, in stating the contents of the petition, showed that all the parties were nonresidents of the state of Arkansas, none of them residing in the Western district of this state, but were residents elsewhere. I did not understand Mr. Oglesby to contend that the U. S. court had jurisdiction of a cause on the ground of diverse citizenship stated by him in the petition, but that it did have jurisdiction to enforce a lien upon a fund in a case of diverse citizenship such as was stated in the petition whose contents had been repeated to me, but that no personal judgment could be obtained. Mr. Hill contended that the suit in Crawford circuit court was not to enforce a lien upon any fund, and that no cause of removal was shown. All this discussion occurred on the proposition of Mr. Oglesby that the filing of petition and bond for removal *eo instanti* operated as a removal of the cause, and in considering whether or not I should further postpone the hearing of the application for appointment of a receiver in the cause. I was not asked or desired to make any order of removal. What I was asked to do on one side was to continue the hearing, and on the other to refuse to continue. By Mr. Oglesby it was insisted I had no power to continue or to do anything, when the petition for removal and bond were filed, except to order a transfer of the cause; that I had the power to do that, but that it was not necessary that I should order the cause transferred, because *eo instanti* the cause was transferred upon filing petition and bond. Mr. Hill contended that I had the power to pass on the petition; that the judge could act even when the court was prohibited from acting; and, finally, that this was not a case for transfer, for the reason that it was not a suit to enforce a lien, nor was it a case where one of the parties was a nonresident of the state and defendants, or one of them, a resident of the Western district of Arkansas, and that in this case the cause was not *eo instanti* removed by filing petition and bond. After this logomachy had ceased, I said, in substance: The federal tribunal is the proper court to pass upon the right of transfer when a transfer is asked in a petition setting forth a cause transferable upon the face thereof; that upon filing bond and a petition making *prima facie* a case for transfer that the duty of the state court was to order the cause transferred, and leave the determination of the right of transfer to the federal tribunal, which would remand if improperly sent to it; that in this case it was not necessary that I should determine whether the case was one for transfer or not, as that was for the court, and not the judge; that if it was asked, and I was satisfied that a *prima facie* cause for transfer was shown, as the court was open, I could order the cause docketed and transferred; that when this case came on at the November term of court, if still in court, I would pass on the petition to transfer, if desired; that sitting as judge I was considering the question of the postponement of application for receiver and giving my reasons therefor

I refused the application of Mr. Hill to postpone, and denied the application for receiver. Mr. Hill prepared, at Mr. Oglesby's suggestion, the order in pencil, which I signed, and gave to the clerk to be put with and attached to the other papers in the case when they should come in on the mail in the afternoon, as I had ordered done from my home, since I had forgotten to carry them with me. I made no order on the docket and none on the record in this cause. I was sitting at chambers in this case pursuant to the order of adjournment at Paris on the 17th of July. The reason I did not indorse my order on the petition for appointment of receiver was because I had forgotten to bring the petition from my home at Paris. These proceedings were had before me sitting at chambers in the circuit court room at Van Buren, while the Crawford circuit court was regularly open for the transaction of any business that might come before it; and I was at the time present in the court room as the presiding judge of the court, and the clerk and sheriff of the court were present discharging their functions as officers of the Crawford circuit court. I did not deny, or refuse, or decline, or fail to act upon the application for removal of the cause. I did not consider the application except as I have said. I was not asked to pass upon it, and did not decline, fail, or refuse to do so as either court or judge."

And the defendants filed the counter affidavits of Ira D. Oglesby and W. P. Sadler, which are in words and figures as follows, respectively, to wit:

"This day personally appeared before me, clerk of the circuit court of the United States for the Western district of Arkansas, Ira D. Oglesby, who, being duly sworn, on oath states: That he is now, and was from the time plaintiffs brought suit in this court, attorney for J. D. Williamson and W. B. Strang, Jr.; that on the 17th day of July, 1897, he filed with the clerk of the circuit court of Crawford county, in which court this cause was then pending, petition, affidavit, and bond for the removal of this cause to this court. Believing that the petition and affidavit for such removal was defective, he filed, on the 19th day of July, 1897, additional and amended petition, properly verified, together with proper bond, for the removal of the said cause to the said U. S. circuit court for the Western district of Arkansas, which affidavit and amended petition and bond is set out in the transcript filed in this court on pages ——. Affiant further states that on the 17th day of July, 1897, plaintiffs in this cause made application before the judge of the circuit court of Crawford county for the appointment of a receiver, which application was by the said judge postponed until the 20th day of July, 1897. Affiant further states that on the 20th day of July, 1897, the circuit court of Crawford county being then in session, the Hon. Jephtha Evans, judge thereof, presiding, this affiant, as attorney for the defendants, in open court called the attention of the court to the fact that he had filed proper petition, affidavit, and bond for the removal of this cause to the U. S. circuit court aforesaid. At this time the said court was open, and the said judge on the bench, presiding. At that time, the petition aforesaid not being with the papers, it having been, after being filed, sent by the clerk of the court to affiant's office, and by him inadvertently left at said office, he stated to the court and counsel for plaintiffs that if either wished to see the petition before the cause proceeded further he would send at once and get it, to which Jos. M. Hill, attorney for plaintiffs, in open court, and before the said judge, stated, in substance, that it would be unnecessary, that affiant could state the facts set forth in the petition. Thereupon affiant stated that the petition was duly sworn to by him as attorney for defendants, and that it recited that the principal amount in controversy between plaintiffs and defendants, exclusive of interest and costs, exceeded the sum of \$2,000; that both the plaintiffs were at the commencement of the suit, and still were, citizens and residents of the state of Kansas,—one residing in Lawrence, Kansas, and the other sometimes at Kansas City, Mo., and sometimes at Lawrence, Kansas,—and that both were nonresidents then and at the commencement of the suit of the state of Arkansas; and that both of the defendants were at the commencement of the suit, and still were, nonresidents of Arkansas, and that the said J. D. Williamson was at the commencement of the suit, and still was, a citizen and resident of the state of New York, and the defendant W. B.

Strang, Jr., was at the commencement of the suit, and still was, a citizen of New York, but residing in the state of Georgia; that petition asked for the removal of the cause to the U. S. circuit court for the Western district of Arkansas, and tendered proper bond. Thereupon the said Jos. M. Hill, attorney for plaintiffs, stated to the court that it would be unnecessary to send for the petition, in which the court acquiesced. The said Hill then stated to the court that the petition presented proper cause for removal if it was a cause that was removable under the United States statutes, but denied that the cause was removable. Thereupon he asked the court to continue the application for a receiver, which was then pending, until some future time, in order to obtain a writ of prohibition from the supreme court of the state of Arkansas. Affiant, as attorney for defendants, stated to the court that he had presented and filed a sufficient petition and bond for the removal of the cause to the said United States court, which petition is shown on page — of the record hereto, being the same to which the court's and counsel's attention had been called, and the one which the counsel for plaintiffs admitted presented good ground for removal, if it was a removable cause. But the said counsel, Jos. M. Hill, argued before the court that, since both the plaintiffs and the defendants were nonresidents of the state of Arkansas, and since the plaintiffs could not have sued the defendants in the U. S. circuit court for the Western district of Arkansas, that the petition did not present a removable cause, and that the court should hear his application for a continuance of the motion and petition for a receiver. Affiant argued before the said judge, who was then on the bench, and court being in open session, that the cause was removable, notwithstanding neither the plaintiffs nor defendants resided in the Western district of Arkansas, and that the only action the court could take was to transfer the said cause to the said U. S. circuit court, and asked that such transfer be made. After much discussion pro and con between affiant and said attorney, Jos. M. Hill, the said judge stated substantially as follows: That as the Crawford county circuit court was then in session, that he could and would make an order removing the cause, if he thought it was a cause removable under the statutes, but declined to make such order at that time, notwithstanding affiant urged upon him that all the court could do was to either grant the order or refuse it. Neither the court nor counsel for plaintiffs made any point upon the fact that the petition for removal had been, after being filed, sent to affiant's office, and in response to the question of affiant as to whether or not they desired postponement of the matter until he could send and get petition, said that it was unnecessary, that affiant could state the contents of the petition, which would be accepted by the court and counsel for plaintiffs as a correct statement of its contents, the same as if petition was there. The said court having declined to enter an order transferring the said cause, and the said court having adjourned after affiant had presented the petition and bond aforesaid, and after asking for transfer of the said cause, affiant, as attorney for defendants, procured certified transcript of the record of said cause, and had the same filed in this court on July 29th, 1897, which record is herewith presented, and the cause asked to be docketed upon the docket of this court that further proceedings may be had in accordance with law."

"Before me, clerk of circuit court of Crawford county, this day came W. P. Sadler, who on oath states that he is now, and has been since July 1, 1897, and prior thereto, deputy circuit clerk of Crawford county, Ark.; that the regular June term of said court began on June 21, 1897, and continued in daily session until July 2, 1897, when it adjourned to July 20, 1897; that on the morning of July 20, 1897, the said court was duly opened by the sheriff of said county, present and presiding Hon. Jephtha Evans, judge thereof; that affiant was in the court room while the said court was in session, and while Judge Evans was presiding, and heard the discussion between Ira D. Oglesby, attorney for defendants, and J. M. Hill, attorney for plaintiffs, in above cause; that he does not remember all that was said or took place, but remembers that Ira D. Oglesby, attorney for the defendants, stated to the court that the defendants had filed a proper petition and bond for the removal of this cause to the U. S. circuit court at Fort Smith, Ark., and that the jurisdiction of this court ceased with the filing of this petition, except to make an order transferring the said cause to

said court; and that, if the court refused to make such order, he would file a certified copy of the transcript in said U. S. court, and have the cause proceeded with there. Jos. M. Hill, for plaintiffs, contended that the court could consider the question as to whether it was or not a removable cause, but whether or not he contended that it was such a cause as could not be removed I do not remember. All of this took place in open court, and while Judge Evans, the judge of said court, was presiding. The said judge made no order refusing the petition to remove, and afterwards made the order shown in the transcript in this cause, page 18."

The following facts deducible from the affidavits in support of the motion are not in dispute: (1) When the petition for the appointment of a receiver was heard at Van Buren on the application of the plaintiffs, on the 20th of July, 1897, the Crawford circuit court was in session. (2) The judge treated the hearing as at chambers. (3) That during the discussion of the petition for receiver, the judge, on a day that he was holding the Crawford circuit court, was advised by defendants' counsel of the filing of the petition and bond for removal in that court on the previous day, and of the contents thereof, and that it was insisted by defendants' counsel that his application for removal had eo instanti taken jurisdiction from the Crawford circuit court. (4) That the judge, in disposing of the matter, indicated that, if he thought the case was removable at that time, he would then docket it, as he was holding a day of that court, and act upon it; but, as he understood the matter, it would come up before him at the November term of the court, and he would then act upon it. The above facts appear in the affidavit of plaintiffs' attorney, and are corroborated by the official statement and affidavit of Judge Evans.

The following facts are deducible from the affidavits opposing the motion, and not disputed: (1) That on the 20th of July, 1897, the circuit court of Crawford county, being then in session, Judge Evans, the judge of that circuit, presiding, Ira D. Oglesby, as attorney for the defendants, in open court, called the attention of the judge to the fact that he had filed a petition, affidavit, and bond for the removal of this cause to the circuit court of the United States for the Western district of Arkansas; that the judge was informed that the petition was not in court, but at his office, and that, if he or opposing counsel desired to see the petition before the cause proceeded further, he would send at once and get them; that plaintiffs' counsel stated it was not necessary, that defendants' counsel could state what facts were set forth in the petition, which was done, and this was acquiesced in by them. The facts stated by plaintiffs' counsel appear in his affidavit, *supra*. (2) That after the facts stated in the last paragraph occurred, the Crawford circuit court adjourned, and defendants' counsel then procured and filed a transcript of the case in this court.

The petition of removal shows that the matter in dispute exceeds \$2,000, exclusive of interest and costs; that the plaintiffs were, when the suit commenced, citizens of the state of Kansas, said plaintiff Monroe residing at Kansas City, Mo., or Lawrence, Kan., and said Lee at Lawrence, Kan.; that defendant Williamson was, at the commencement of the suit, and still is, a citizen of the state of New York, and of no other state, and residing in the city of New York, in said state; that W. B. Strang, Jr., was, at the commencement of the

suit, and still is, a citizen of New York City, now residing in the state of Georgia; and that neither of them are now, or were when the suit was brought, residents of the state of Arkansas; that the petitioner desired to remove the suit before the trial thereof into the next circuit court of the United States for the Western district of Arkansas; that the petition recited good and sufficient bond was offered, properly conditioned as the law directs. The prayer of the petition was that surety and bond be accepted; that the suit be removed into the said United States court pursuant to the statutes, and that no further proceedings be had in the Crawford circuit court. On the motion to remand, plaintiffs' counsel submitted and argued two contentions: (1) That this court could not acquire jurisdiction of this case until the petition and bond for removal had been presented to the Crawford circuit court; that this had not been done, and therefore the case should be remanded. (2) That the case was not removable, because, all parties to the suit being nonresidents of the state of Arkansas, the defendants could not have been sued originally in this court, and therefore the case could not be removed here. No other questions were argued, and no others will be considered.

1. Was it necessary, in order to effect a removal from the state court to this court, that the defendants should present the petition and bond to the state court; and, if so, was that done on the 20th of July? In *Shedd v. Fuller*, 36 Fed. 609, Judge Gresham held that presenting the petition and bond for removal to a clerk of the state court was insufficient to effect a removal. In that case it was admitted that the petition and bond were not presented to the state court; that a party desiring to remove a cause from a state court to a United States court must file his petition and bond in such suit in the state court, when it shall be the duty of that court, if the petition and bond be sufficient to satisfy the statute, to accept both, and proceed no further in the case. While it is clear that the right of removal does not depend upon the action or nonaction of the state court, it is equally clear that the state court cannot be deprived of its right to decide for itself upon the sufficiency of the petition and bond. The presentation of a proper petition and bond to the state court for its action is a jurisdictional prerequisite,—citing *Stone v. South Carolina*, 117 U. S. 430, 6 Sup. Ct. 799. This opinion by Judge Gresham, at circuit, was an oral opinion, and I do not think the case cited supports the point decided. In *Stone v. South Carolina* the court say:

"A state court is not bound to surrender its jurisdiction of a suit on a petition for removal until a case has been made which, on its face, shows the petitioner has a right to the transfer. *Yulee v. Vose*, 99 U. S. 539; *Meyer v. Construction Co.*, 100 U. S. 457."

Continuing, the court say:

"It is undoubtedly true, as was said in *Steamship Co. v. Tugman*, 106 U. S. 118, 1 Sup. Ct. 58, that upon the filing of the petition and bond, the suit being removable under the statute, the jurisdiction of the state court absolutely ceases, and that of the circuit court of the United States immediately attaches; but still, as the right of removal is statutory, before a party can avail himself of it he must show upon the record that his is a case which comes within the provisions of the statute. As was said in *Insurance Co. v. Pechner*, 95 U. S. 183: 'His petition for removal, when filed, becomes a part of the record in the cause. It should

state facts which, when taken in connection with such as already appear, entitle him to the transfer. If he fails in this, he has not, in law, shown to the court that it cannot proceed further with the suit. Having once acquired jurisdiction, the court may proceed until it has been judicially informed that its power over the cause has been suspended.' The mere filing of a petition for the removal of a suit which is not removable does not work a transfer. To accomplish this, the suit must be one that may be removed, and the petition must show a right in the petitioner to demand the removal. This being made to appear on the record, and the necessary security having been given, the power of the state court in the case ends, and that of the circuit court begins."

In *Stone v. South Carolina*, the question at bar was not presented at all, for in that case it appears in the opinion of the court that "Stone presented to the court a petition for the removal of the suit," etc., and the language of the petition is quoted in the opinion. How it was presented does not appear. The question at issue in that case was whether the petition stated facts showing a right of removal.

Roberts v. Railway Co., 45 Fed. 433, is a case where the party seeking the removal filed the petition and bond therefor with the clerk, and a certified copy immediately made and given the defendant and filed. Judge Nelson says in the opinion "that the court never had its attention called to the petition," and condemns the practice on the authority of *Shedd v. Fuller*, *supra*. *Williams v. Association*, 47 Fed. 533, is a case where the petition and bond were presented to a judge when his court was not in session. He declined to act because the bond was defective, and because there was no court on that day. The petitioner then filed the petition and bond in the clerk's office in apt time. On that state of facts the court held that it was not sufficient to present the petition and bond, when no court was in session, to a judge of the state sitting in his office, and subsequently file the paper presented in the clerk's office. This case is made to rest on *Shedd v. Fuller*, *Stone v. South Carolina*, *supra*, and *Crehore v. Railway Co.*, 131 U. S. 240, 9 Sup. Ct. 692. *Crehore v. Railway Co.* does not support the point decided in that case. All it decides is "that a fatal defect in the allegation of diverse citizenship in a petition for the removal of a cause from a state court for that reason cannot be corrected in the circuit court of the United States." The court say, in the opinion, that:

"The effect of filing the required petition and bond in a removable case is, as said in *Railroad Co. v. Mississippi*, 102 U. S. 135, that the state court is thereafter without jurisdiction to proceed further in the suit; or, in *Railroad Co. v. Koontz*, 104 U. S. 5, its rightful jurisdiction comes to an end; or, in *Steamship Co. v. Tugman*, 106 U. S. 118, 1 Sup. Ct. 58, upon filing, therefore, of the petition and the bond,—the suit being removable under the statute,—the jurisdiction of the state court absolutely ceased, and that of the circuit court of the United States immediately attached."

These are all the cases cited by plaintiffs' counsel to support his contention on the first proposition.

In *Railroad Co. v. Koontz*, 104 U. S. 14, the court say:

"The provision of the act of 1875 is, in this respect, substantially the same as that of the twelfth section of the judiciary act of 1789, and requires the state court, when the petition and a sufficient bond are presented, to proceed no further with the suit; and the circuit court, when the record is entered there, to deal with the cause as if it had been originally commenced in that court. The jurisdiction is changed when the removal is demanded in proper form, and a case of

removal made. Proceedings in the circuit court may begin when the copy is entered. * * * The state court must stop when the petition and security are presented, and the circuit court go on when the record is entered there, which is, in effect, docketing the cause. * * * The right to remove is derived from a law of the United States, and whether a case is made for removal is a federal question."

This case also decides that if, after a case has been made for removal, the state court refuses to surrender its jurisdiction, the petitioning party can remain in that court, and litigate, under protest, through all the state courts, and to the supreme court of the United States, and at the same time may take a transcript of the record, and file it in the United States circuit court, and proceed there at the same time as if the state court had not refused to surrender jurisdiction.

In *Steamship Co. v. Tugman*, 106 U. S. 122, 1 Sup. Ct. 60, the court say:

"The petition was accompanied by a bond which, it is conceded, conformed to the statute, and was ample as to security. Upon the filing, therefore, of the petition and bond,—the suit being removable under the statute,—the jurisdiction of the state court absolutely ceased, and that of the circuit court of the United States immediately attached. The duty of the state court was to proceed no further in the cause. Every order thereafter made in that court was *coram non jndice*, unless its jurisdiction was actually restored. * * * It was at liberty, its right of removal being ignored by the state court, to make defense in that tribunal in every mode recognized by the laws of the state, without forfeiting or impairing in the slightest degree its right to a trial in the court to which the action had been transferred, or without affecting, to any extent, the authority of the latter court to proceed."

In *Wills v. Railway Co.*, 65 Fed. 532, Sage, district judge, said:

"The defendant, on the 27th of January, filed its petition for removal to this court on the ground that the plaintiff is a citizen of the state of Ohio and the defendant a citizen of the state of Maryland. The petition shows upon its face a good cause of removal. The case of *Stone v. South Carolina*, 117 U. S. 430, 6 Sup. Ct. 799, is, therefore, not in point. The jurisdiction of the state court was ousted by the filing of the petition."

In *Noble v. Association*, 48 Fed. 338, Judge Wallace said:

"The statute requires him to make and file a petition and bond in the suit in the state court. It does not, in terms, require him to make any other presentation of them to the court; and, if he moves the consideration of the court or of a judge upon them, his rights are not enlarged or abridged by the action of the court or judge. The statute requires the state court to 'accept' the petition and bond, and 'proceed no further' in the suit. As is pointed out by Justice Field in *Wilson v. Telegraph Co.*, 34 Fed. 561, no order of the state court accepting them is contemplated to transfer jurisdiction of the action. As he says: 'The denial by the state court of a petition in no respect affects the jurisdiction of the circuit court of the United States, if the action is removable, and the bond offered such as the statute requires. The statute makes the removal upon the filing of the petition with the necessary bond.' If a state court declines to accept a sufficient bond, and erroneously decides it to be insufficient, the removal is effected nevertheless, and its jurisdiction ceases. *Removal Cases*, 100 U. S. 472."

He then says the decorous and safe practice is to present the petition and bond to the court, but holds it is not indispensable; saying that:

"When they are brought to the attention of the court in the manner prescribed by the statute, by filing them in the suit, the court can proceed no further, if they are sufficient. When filed, they become a part of the record in the cause, and the court is judicially informed that its power over the cause has been sus-

pended. Judge Drummond decided in *Osgood v. Railroad Co.*, 6 Biss. 340, Fed. Cas. No. 10,604, that the bond and petition need not be filed in term time."

And Judge Wallace deprecates the departure in some of the circuits from the principles here announced.

In *Brown v. Murray Nelson & Co.*, 43 Fed. 614, District Judge Shiras holds precisely the same opinion. He says:

"It is not the presentation of the petition and bond to the court in open session that terminates the jurisdiction, but the filing the same so that the same becomes a part of the record of the particular suit. As a matter of correct practice, not, however, affecting the jurisdiction, it is due to the state court that the party asking the removal should in due season present the petition for removal to the state court and invoke its consideration thereof, for it might be that the court might proceed in the cause without knowledge of the facts that its jurisdiction had been attacked."

In *Waite v. Insurance Co.*, 62 Fed. 769, District Judge Key decided, where in a case involving \$3,000 the defendant filed his petition and bond, and the plaintiff asked and obtained leave to amend, that if the petition and bond were filed first, the court lost its jurisdiction, and the allowance of the amendment reducing the amount below \$2,000 was *coram non judice*.

In *Marshall v. Holmes*, 141 U. S. 595, 12 Sup. Ct. 63, the petition and bond were presented for removal, and the court made an order denying the removal. The court said:

"If, under the act of congress, the cause was removable, then, upon filing of the above petition and bond, it was in law removed, so as to be docketed in that court, notwithstanding the order of the state court refusing to recognize the right of removal;" citing *Steamship Co. v. Tugman*, 106 U. S. 118, 1 Sup. Ct. 58; *Railway Co. v. McLean*, 108 U. S. 212, 2 Sup. Ct. 498; *Stone v. South Carolina*, 117 U. S. 430, 6 Sup. Ct. 799; *Crehore v. Railway Co.*, 131 U. S. 240, 9 Sup. Ct. 692.

The language used by the court in this case, "upon the filing of the above petition and bond," etc., I regard as very significant, because in this case the petition and bond had been presented and acted on by the state court, and, if the presentation had been necessary to deprive the state court of jurisdiction, it is scarcely probable the language would have been limited or narrowed to the mere filing, and the "presentation" omitted. Moreover, it is the very language used in other cases in that court already cited.

In *Railway Co. v. Brow*, 164 U. S. 279, 17 Sup. Ct. 128, which was a case where the petition and bond had been presented to the court also, the court said:

"The statute imposes the duty on the state court, on the filing of the petition and bond, 'to accept such petition and bond, and proceed no further in such suit.' and, if the cause be removable, an order of the state court denying the application is ineffectual, for the petitioner may, notwithstanding, file a copy of the record in the circuit court, and that court must proceed in the cause."

In view of these authorities, I cannot assent to the contention of plaintiffs that any other or different presentation of the petition and bond to the state court was necessary than was made in this case. To hold otherwise would be to sacrifice the substance for mere form. It would be a veritable case of sticking in the bark. Courts ought to get at the real merit and truth of things, and, in order to do so, disregard mere ceremonies and forms, and look through and beyond

mere appearances to the true facts. It is not necessary in this case for me to go as far as some of the judges have gone at circuit, and hold that the filing in vacation with the clerk constitutes judicial knowledge or presentation, and is all that is required. It will be time enough to determine that question when it is presented. But in this case it is true that on a day when the Crawford circuit court was in session the judge of that circuit on the bench, and when certain steps were being taken before him in this case, as at chambers, if you please, but when the court was in session nevertheless, his attention was specifically called to the fact that he could not rightfully proceed in the case, because defendants had filed in that suit on the previous day a petition and bond for its removal to this court. He was informed who the surety in the bond was, and what the petition contained, and the offer made to get the petition and bond for his inspection. True, the petition and bond were not in the clerk's office at the time, they having been sent to defendants' counsel, and inadvertently left at his office; but by consent defendants' counsel stated the facts contained in the petition, and no point was made on its absence. This, I think, constituted a waiver of its presence or inspection, and the judge and the court, it being in session, must be held to have known what its contents were. It specifically prayed for a removal to this court, and, had it been present and been inspected by the judge at that time (and under the circumstances its equivalent was done), could it be said that it was not presented, and the action of the court invoked upon it? I think not. Manifestly, the learned circuit judge did not base his nonaction upon the fact that the petition and bond were not formally presented, but rather upon the belief that he was not required to act upon it until the return term, in November following. In this he was in error. It was clearly his duty, the court then being in session, to obey the statute, and, the case being a removable one, to accept said petition and bond, and proceed no further in said suit. His failure to do so can in no wise deprive this court of its jurisdiction, or prejudice the rights of the defendants under the removal acts of congress.

2. Does the petition make a case, on its face, removable under the acts of congress? In this circuit that is not an open question, and I am not aware that the supreme court of the United States has ever been called upon to determine it. In this case all the parties to this suit are citizens and residents of other states than Arkansas, and were at the commencement of this suit, and all the plaintiffs are citizens of different states from each of the defendants. In *Bank v. Smith*, 36 U. S. App. 532, 19 C. C. A. 42, and 72 Fed. 569, Caldwell, J., the other circuit judges concurring, said:

"The removal of the case from the state to the federal court is attempted to be supported upon two grounds. The first contention is that the removal can be sustained upon the ground that the parties to the action are citizens of different states. But that is a ground of removal only where the defendant is a nonresident of the state in which the suit is brought,"—citing *Thurber v. Miller*, 32 U. S. App. 209, 14 C. C. A. 432, and 67 Fed. 371.

In that case plaintiff, Smith, was a citizen of Connecticut, and the bank a corporation organized under the laws of the United States,

and located at Wichita, Kan., and the removal was denied on the ground that only a nonresident defendant of Kansas could do that. Counsel for plaintiff cited to the contrary *Yuba Co. v. Pioneer Gold Min. Co.*, 32 Fed. 183, decided at circuit by Judge Sawyer, Justice Field and Judge Sabin concurring. Justices Field and Sawyer, at circuit, in *Wilson v. Telegraph Co.*, 34 Fed. 561, expressly overruled that case on the very point, expressing gratification at so early an opportunity to correct their error, of which they had been convinced for some time. It was doubtless the *Yuba Co.* Case which misled Judge Hallett in *Mining Co. v. Markell*, 33 Fed. 387, and perhaps other judges. Motion to remand denied.

STALKER v. PULLMAN'S PALACE-CAR CO.

(Circuit Court, S. D. California. May 1, 1895.)

REMOVAL OF CAUSES—NONRESIDENT DEFENDANT—JURISDICTION.

A suit commenced in a state court, by a British subject, against a non-resident corporation, to recover \$20,000 damages for personal injuries, is removable to the circuit court on the application of the defendant.

Action by James H. Stalker against the Pullman's Palace-Car Company to recover for personal injuries. The cause was removed from the state court on petition of defendant. Heard on motion to remand.

McLachlan & Cohrs, for plaintiff.

Hunsaker & Wright, for defendant.

ROSS, Circuit Judge. The plaintiff, a British subject, commenced this suit in one of the superior courts of the state, against a corporation organized and existing under the laws of the state of Illinois, to recover damages in the sum of \$20,000 for personal injuries. The defendant filed in the superior court a petition and bond for the removal of the cause to this court. The bond was approved, and an order of transfer entered, and here the defendant appeared specially for the purpose, and moved the court to set aside the service of process made in the state court, upon the coming on of which for argument, the plaintiff moved the court to remand the case to the state court, upon the ground that it was improperly brought here, and also made a motion that, in the event the motion to remand be denied, the plaintiff be allowed to amend the return of service of process, to which latter motion the defendant objected, for the reason that no notice thereof had been given.

The motion to remand must be denied, under the ruling of the supreme court made in the case of *Railroad Co. v. Davidson*, 15 Sup. Ct. 563, in which that court held that section 2 of the judiciary act of 1887, as amended by the act of 1888, refers to the first part of section 1 of the same act, by which jurisdiction is conferred on the circuit courts, and not to the clause thereof relating to the district in which suit may be brought, which restriction, as has been repeatedly held, is but a personal privilege of the defendant, and may be

waived by him. The necessary result of this ruling is that this court would have had original jurisdiction of the present suit by virtue of the first section of the act of 1887, as corrected by that of 1888, subject to the exercise of the personal privilege conferred upon the defendant by the restrictive clause referred to.

A ruling upon the motion of the defendant to set aside the service of process made in the state court should, I think, be withheld until the plaintiff has had an opportunity to give notice of his motion to amend the return of service of such process.

Motion to remand denied.

HEALEY v. HUMPHREY et al.

(Circuit Court of Appeals, Ninth Circuit. June 28, 1897.)

No. 333.

1. JUDGMENT—EJECTMENT—RENTS—JURISDICTION.

When an action in the circuit court to recover the possession of land situated in another district is joined with an action for rents, issues, and profits of the land, that part of the judgment rendered for the value of the rents is within the jurisdiction of the court, and is valid.

2. COURTS—VENUE IN REPLEVIN—LAW OF NEVADA.

The circuit court for the district of Nevada has jurisdiction in a replevin action though the property sought to be recovered is in another state, under Gen. St. Nev. 1886, §§ 3040-3042, which provide that the action may be brought wherever the defendant resides, and, if he be nonresident, in any county which the plaintiff may designate in his complaint.

Appeal from the Circuit Court of the United States for the District of Nevada.

This was a suit in equity by M. Healey against G. M. Humphrey, the Bullion & Exchange Bank, and others, to enjoin the enforcement of two judgments. There was a decree dismissing the bill, and complainant appeals.

E. V. Spencer, for appellant.
Trenmor Coffin, for appellees.

Before GILBERT and ROSS, Circuit Judges, and MORROW, District Judge.

GILBERT, Circuit Judge. This is an appeal from a decree of the circuit court of the United States for the district of Nevada dismissing the appellant's bill, which he brought to enjoin the appellees from enforcing two certain judgments which had been rendered in that court. The bill alleged that on March 21, 1893, the defendant the Bullion & Exchange Bank commenced an action against the complainant and another to recover possession of certain lands situate, not in Nevada, but in California, and that the answer in the action admitted that the lands were without the state of Nevada; that judgment was thereafter rendered in favor of the plaintiff for the recovery of the possession of the land, and for the sum of \$962.50, the value of the rents, issues, and profits thereof; that on said March 21,

1893, the said Bullion & Exchange Bank, together with James Marshall, commenced an action against the complainant and one Otto for the recovery of the possession of certain personal property, or, in case possession thereof could not be had, then for the value thereof, and alleging that the personal property was in the county of Lassen, state of California, which fact was admitted in the answer; that at the time of the commencement of said action the said personal property was in fact so situated in the state of California; that in said action judgment was given for the plaintiffs and against the defendants for the possession of said personal property, and, in case the possession thereof could not be had, for its value in the sum of \$6,312. The bill further alleged that the said circuit court of the United States for the state of Nevada had no jurisdiction of the subject-matter of either of said actions, for the reason that the property involved in each case was situate within the state of California; that on May 12, 1896, the said Bullion & Exchange Bank, being then the owner of both the said judgments, had caused executions to issue thereon, and had placed the writs in the hands of the defendant Humphrey, the marshal of said district of Nevada, and that under said writs the marshal had levied upon certain money and property belonging to the complainant, and threatened to and intended to enforce said judgments unless restrained by injunction. The answer admitted the facts substantially as above set forth, and upon the hearing on bill and answer a decree was entered dismissing the complainant's bill. The question presented for our determination on appeal is whether or not the enforcement of the judgments should have been enjoined for the reason that the property which was the subject of the actions was, when the actions were commenced, and thereafter remained, without the territorial jurisdiction of the circuit court.

Concerning the judgment for rents, issues, and profits of the land in the ejectment suit, we find no difficulty in concluding that, while the action of ejectment is local, and the circuit court for the district of Nevada was powerless to enter a judgment that could affect the possession of land in another district, yet the action with which it was joined—the action for rents, issues, and profits of the land—is transitory, and could be brought in the district of Nevada as well as elsewhere, and that that portion of the judgment is valid and enforceable by execution.

The second action is an action in replevin. This, at the common law, was a local action. It is made local likewise by most of the statutes of the states, by the provisions of which the venue in replevin is required to be laid in the county where the property is situate at the time of the commencement of the action. In the case before us it appears that no question was raised of the jurisdiction, and that the parties, so far as they could do so, waived all objections to the power of the court to hear and determine the matter in issue. There is authority for holding that, if the defendant in replevin neglect to plead to the jurisdiction the fact that a local action has been laid in the wrong venue, or if he go to trial upon the merits without raising the objection, he loses the benefit thereof. 1 Chit.

Pl. 427; *Craft v. Boite*, 1 Saund. 247; *Keller v. Miller*, 17 Ind. 206; *Mining Co. v. Bisaner*, 87 Ga. 193, 13 S. E. 461. But it is not necessary to rest the decision of this question upon so narrow a ground. Whether we measure the jurisdiction of the circuit court of the United States for the district of Nevada by the statutory provisions of that state or by the common-law rule, there is nothing in the bill before us to show that the circuit court had not jurisdiction of the action of replevin which is therein referred to. By the statute of Nevada (sections 3040-3042, Gen. St. 1885) the action of replevin, which is there denominated "claim and delivery," is made transitory, and it is provided that it may be brought wherever the defendant resides, or, if he be a nonresident, in any county which the plaintiff may designate in his complaint. By the common law the action of replevin was local, it is true, but the venue was laid, not in the county where the property was situated at the time of the commencement of the action, but in the county in which it was when taken by the defendant. 1 Chit. Pl. 385. In *Gould*, Pl. c. 3, § 2, it is said:

"In declaring in replevin it is necessary to describe and to describe truly the locus in quo,—i. e. the close, house, or common in which the cattle or goods in question were taken by the defendant,—and as the necessity of alleging the true place of caption involves the necessity of laying the true town, parish, or village, and of course the true county, the venue and county, as well as the close, etc., are consequently material, and the action of necessity local."

The bill does not inform us in what jurisdiction the property involved in the action of replevin was situated when taken by the defendant. For aught that appears to the contrary, it was then in the state of Nevada, and was thereafter taken by him into California. The presumption is that the court had jurisdiction, and that the judgment was valid. *Evers v. Watson*, 156 U. S. 527, 15 Sup. Ct. 430.

It is urged that the circuit court of the district of Nevada is powerless to enforce the judgment in the replevin action, because the personal property which is the subject of that action is not within the reach of the process of the court, and that the alternative judgment for the money cannot be enforced until after the failure of due process to recover the personal property. This argument involves a misconception of the force and effect of the judgment in replevin. It is a judgment which demands the return of personal property, or, in case the possession cannot be had, the payment of its value in a fixed sum. Whatever may be the right of the plaintiff generally in such a judgment to take the personal property in preference to its fixed value in cases in which the possession can be had, his option, if he have one, is certainly lost in a case in which he cannot obtain the possession, and there is nothing left him but to enforce the money judgment. But in the state of Nevada it has been held that the defendant in an action of this kind always has the right, if the property has not been delivered, to deliver it himself, and in such case it is not at the plaintiff's option to take the property or its value. If he cannot get the property, then he may claim its value, but not otherwise. *Carson v. Applegarth*, 6 Nev. 189. The right, therefore, of the plaintiff in the writ to issue the execution for the adjudged money value does not depend upon his first pursuing the property upon

the writ. The option to deliver the property in satisfaction of the writ, and thereby to relieve himself from the burden of paying its assessed value, rests with the defendant. If he choose to surrender the property, he may do so; and in this case he can as well surrender it if it be situate in California as he can if it be in Nevada, since it is under his control. If he fail to surrender it, he cannot complain if he is required to pay its value. In this case he has failed to exercise his option to surrender the property for a period of two years after the date of the judgment, and there is no ground in law or in equity upon which he may now be relieved from the judgment for its assessed value. The decree will be affirmed, with costs to the appellees.

UNITED STATES GLASS CO. v. WEST VIRGINIA FLINT BOTTLE CO.¹

(Circuit Court, D. West Virginia. April 2, 1897.)

1. CONTRACT—ALTERATION—WHAT IS—SURETIES.

Plaintiff, by written agreement, licensed defendant company to use certain machines in consideration of paying royalty, and defendant gave bond, with sureties, conditioned for the performance of the contract. Afterwards the president of defendant company interlined in the contract a provision as to the time of delivery of the machines, which was accepted and acquiesced in by plaintiff. *Held*, that this interlineation was an alteration of the contract so far as the sureties in the bond were concerned.

2. SAME—IMMATERIAL—DISCHARGE OF SURETIES.

When a bond with sureties is given for the faithful performance of a contract, and the parties to the contract afterwards make an alteration therein without the consent of such sureties, the latter are discharged, whether the alteration is a material one or not. *Mersman v. Werges*, 5 Sup. Ct. 65, 112 U. S. 139, distinguished.

3. SAME—WHAT IS MATERIAL.

A license for the use of certain machines provided that the licensee might call upon the licensor "for as many additional machines as the licensee deemed expedient," but the time of delivery was not fixed. The parties inserted in the contract, after it was executed, a provision that "said machines shall be shipped to the licensee within thirty days after written notice is given to the lessor." *Held*, that this was a material alteration in the contract.

A. J. Clarke and Henry M. Russell, for plaintiff.

Vinson & Thompson and Campbell & Holt, for defendant.

JACKSON, District Judge. This is an action of debt, founded upon a penal bond executed by the defendant company as principal, and five securities, who, by the condition of the bond, become responsible for the payment by the defendant company to the plaintiff of a certain license fee or royalty for the use of certain machines, as it appears from a contract entered into between the parties on the 22d day of November, 189-, which is attached and referred to in the bond, and made part of it. To the declaration of the plaintiff the defendant company as well as the other defendants file, with other pleas, not now necessary to notice, pleas of "non est factum," upon which issue is joined, and which is now heard.

¹ Reported by Benj. Trapnell, Esq., of the Charleston bar.

The question raised by the plea and relied on by the defendant to defeat this action is whether an alteration of the contract in the absence of and without the assent of some of the parties to it, renders it void.* It appears that after the bond had been executed by the defendant company, with H. E. Mathews, T. H. Cox, J. A. Cross, George McKendree, and Z. T. Vinson as sureties, Cox, who was the president of the company, without the knowledge or consent of his co-sureties, altered the agreement between the two companies which was attached to the bond as a part of it, by interlining the following words in pencil writing: "Said machines to be shipped to said licensee within thirty days after written notice is given to said licensor," and delivered the same to Mr. Ripley, the president of the plaintiff company, who had the words so interlined typewritten on a slip of paper, which was pasted on the margin of the contract, and made to cover the interlineation. After this interlineation the defendant company failed to pay the fees for the use of the machine according to the provision of the contract, and the plaintiff brought this action.

The question of fact set up in the pleas is not disputed, but the question of law arising upon the pleas is strongly contested. Conceding the fact to be true as claimed by the defendants, are they released from their liability under the contract? It is insisted that the interlineation, as well as the copy of it in typewriting, attached to the contract, is no part of it, and therefore no alteration. The answer to this position is that this alteration was made by one of the parties to the contract, and acquiesced in by the president of the plaintiff company, the other party to the contract, and thereby became as much a part of the contract as any other provision in it. At least, by adopting it, they considered it a material alteration. That there was an alteration I do not think admits of a doubt, but it is insisted that the alteration must be material to avoid the contract. Is this position tenable? Upon this question the authorities are conflicting, and, in fact, there seems to be two distinct lines of decision. The early rulings of the courts seem to hold that any alteration of a contract, however immaterial, after its execution, in the absence of either party to it, avoids it. In support of this position there is a long line of authorities, commencing as far back as the days of Lord Coke. Ever since *Pigot's Case*, 11 Coke, 27, it has been the settled doctrine of the common law that any alteration in a deed, whether material or immaterial, if made by one party to it without the concurrence or authority of the other party, will avoid the deed, and sustain a plea of non est factum,—First, because the alteration must effect the question of identity; and, second, because such an unauthorized act of a party having the custody of a deed should be construed most strongly against himself, and, if legalized, might facilitate injury and irremediable fraud. *Robertson, J., Johnson v. Bank*, 2 B. Mon. 311. This ruling seems to have been followed in many states, and in Virginia it seems to be well-settled law. In West Virginia, so far as I can find, the question raised in this case has not been passed upon. In *Dey v. Martin*, 78 Va. 1, it was held that "it is well settled that any change in the contract, made

without surety's consent, however immaterial, and even if for his advantage, discharges him." So in *Christian v. Keen*, 80 Va. 369, it was again held that the surety was discharged by any change of the contract, however immaterial, if made without the surety's consent. In the case of *Miller v. Stewart*, 9 Wheat. 681, Judge Story, speaking for the court, said:

"Nothing can be clearer, both upon principle and authority, than the doctrine that the liability of a surety is not to be extended by implication beyond the terms of his contract. To the extent and in the manner and under the circumstances pointed out in his obligation, he is bound, and no further. It is not sufficient that he may sustain no injury by a change in the contract, or that it may be even for his benefit. He has the right to stand upon the very terms of his contract; and, if he does not assent to a variation of it, and a variation is made, it is fatal."

In support of this position I cite *Smith v. U. S.*, 2 Wall. 219; *Reese v. U. S.*, 9 Wall. 13, 22; *Stephens v. Graham*, 7 Serg. & R. 505; *Walton v. Hastings*, 4 Camp. 223; *Jacobs v. Hart*, 2 Starkie, 45; *Outhwaite v. Luntley*, 4 Camp. 179; *Master v. Miller*, 4 Term R. 320, 2 H. Bl. 140; *Britton v. Dierker*, 46 Mo. 592; *Owings v. Arnot*, 33 Mo. 406. To this class of cases others might be added to sustain this position. If, therefore, the case rests upon the authorities cited, it follows that the securities must be released, and that the contract is void as to them.

But it is strongly insisted, with some show of authority, that the alteration must be material, and that the later adjudication of the supreme court sustains that position. In the case of *Wood v. Steele*, 6 Wall. 80, Mr. Justice Swayne says:

"It is now settled in both English and American jurisprudence that a material alteration, without the consent of the party sought to be charged, extinguishes his liability."

While this case does not decide in express terms that the alteration should be material, yet the language used by the learned judge would seem to indicate that it should be material to avoid the contract. But the case in 9 Wall., *supra*, decides that "any change in the contract on which they are sureties, made by the principal parties to it without their consent, discharges them, and for obvious reasons. When the change is made they are not bound by the contract in its original form, for that has ceased to exist. They are not bound by the contract in its altered form, for to that they have never assented." It is, however, suggested that the case under consideration falls within the ruling of the court in the case of *Mersman v. Werges*, 112 U. S. 139, 5 Sup. Ct. 65, and that it holds that the alteration must be material, and, being the latest of all the decisions of the supreme court, that it should be considered as establishing the law as laid down by that tribunal. I do not so understand that case. The only question in that case considered by the court was whether the addition of a single name as surety to a note was an alteration of the contract. The court decided, as the addition of the name of the surety did not change its terms, and did not either increase or diminish the liability of the maker, that it was not such an alteration as discharges the maker, for the reason assigned. While I am inclined to think that the reasoning of the court would strongly

indicate that the alteration must be a material one, and, if material, would avoid the contract, it seems to me, however, that the point was not ruled in that case, and that all that was said in the opinion of the court upon that point must be regarded as obiter.

From what has been said it will be observed that I reach the conclusion that any alteration of a contract, whether material or immaterial, if made after its execution, in the absence or without the assent of any of the parties to it, will avoid it, for the reason assigned by that eminent jurist, Justice Story, in *Miller v. Stewart*, 9 Wheat. 681, where he says that "a party has a right to stand upon the very terms of his contract; and, if he does not assent to any variation of it, and a variation is made, it is fatal." But, if this conclusion is incorrect, still I am of the opinion that the plea must be sustained, for the reason that there was a material alteration. It is apparent to my mind that this alteration increased the liability of the defendant company (and, as a consequence, the liability of the sureties was extended), inasmuch as it enabled the plaintiff company to ship additional machines more promptly and more frequently under the new provision of the contract than was contemplated under the contract as originally executed, and which the plaintiff company would, as a purely business matter, be anxious to do. By the terms of the contract the licensor had the right to call upon the licensee "for as many additional machines" as the licensee deemed expedient. Under this provision of the contract no limitation as to the number of machines was imposed. The licensor was at the mercy of the licensee as to the number that might be demanded. It is true that the contract provided for additional machines when they were required by the defendant, but the time of delivery was not fixed. It must be assumed that this provision of the contract contemplated a reasonable demand for extra machines to be furnished in a reasonable time, and that reasonable time would always be an open question between the parties, and might (as often occurs under contracts loosely drawn) give rise to litigation. If the execution of an order for machines was long delayed, of course the liability of the sureties would be postponed, and by the time the license expired might be comparatively small. If this position is not correct, the licensee might serve a notice every day in the week for extra machines. Would this be reasonable, under the terms of the original contract? I think not. If unreasonable, would not such a demand every 30 days extend the liability of the sureties? And, if so, it must avoid the contract as to them. Under the original contract, an order made for the machines might be so long delayed in its execution that the failure to deliver them promptly necessarily postponed the time of payment, whereby they become less frequent. If, however, there was a demand made for extra machines every 30 days under the contract as amended, payments for them would be required, and the liabilities of the sureties largely extended. This amendment had in view a specific purpose, which was to provide for what I regard as an important omission in the original contract. If it became important to supply that omission, it must be held to be material, otherwise no necessity existed for the inser-

tion of this provision in the contract. The fixing the time of delivery upon 30 days' notice, upon which the original contract was silent, which might have been given daily for every 30 days during the life of the license, would clearly extend and increase the liability of the sureties. I am therefore forced to the conclusion that the amendment was material, and that the plea of non est factum must be sustained, and judgment entered for the defendants.

GUCKENHEIMER et al. v. SELLERS et al. PFEIFER et al. v. GILREATH et al. SAME v. MOORHEAD et al. PORTER BREWING CO. v. SAME.

(Circuit Court, D. South Carolina. August 6, 1897.)

INTERSTATE COMMERCE—ORIGINAL PACKAGE—LIQUORS.

An original package, within the meaning of the law of interstate commerce, is the package delivered by the importer to the carrier at the initial point of shipment, in the exact condition in which it was shipped. In the case of liquors in bottles, if the bottles are shipped singly, each is an original package, but if a number are fastened together, and marked, or are packed in a box, barrel, crate, or other receptacle, such bundle, box, barrel, crate, or receptacle constitutes the original package.

B. A. Hagood, P. H. Nelson, and Shuman & Dean, for complainants.

William A. Barber, Atty. Gen., for respondents.

SIMONTON, Circuit Judge. These four cases, differing somewhat in detail, have been heard together. They all present the same question, what is an original package? and before any of these can be decided, this question must be first settled.

It has been established by decisions which cannot now be questioned that liquors imported into a state are subject to the exercise of its police power, whether brought in in original packages or otherwise, and that when the use of intoxicating liquors as a beverage has been forbidden by state law as injurious to the health, welfare, or safety of the state, no sale of such liquor can be made within that state, for such purpose, by any one, either resident or importer. It has further been established by the decision of the supreme court that the dispensary law of South Carolina does not declare the use of intoxicating liquors as a beverage injurious to the health, welfare, and safety of the state; that, on the contrary, the state itself imports in quantities, and sells at a profit, intoxicating liquors for use as a beverage; that the prohibition by the state against the importation of such liquors by any one except the state itself, or with the consent of the state, is not the exercise of the police power, but an interference with, and a regulation of, interstate commerce; that, under the constitution of the United States, such interference and regulation are void. But the police power begins when interstate commerce ends. The imported article, when it comes into a state and becomes mingled with the other property of the state, becomes subject to all infra-state commerce regulations; and in South Carolina the state, in the full and lawful exer-

cise of her police power, has, both in the constitution and in the dispensary act, made such regulations, which must be obeyed. Interstate commerce protects only that which is the subject of commerce, which is transported over the lines of interstate communication, and only so long as it preserves the form, and remains the exact subject, of importation. When it is broken, or when it changes its form, when it passes from the importer to the buyer, it ceases to be an article of interstate commerce, and no longer enjoys its protection. A cask of brandy may be imported into a state whose laws recognize that intoxicating liquors can be advantageously used as a beverage, and in that form can be sold by the importer; but he cannot change the form of the package, nor open it, nor draw from it, nor sell parts of it. He can only deal with it as a whole, if the state laws regulate or control or allow the sale, on condition or in a prescribed method, of intoxicating liquors as a beverage; and, unless the state laws permit it, no purchaser of the imported cask can sell or dispose of it to another in any way, in whole or in part. The original package only being protected under the law of interstate commerce, the question, what is an original package? is of grave importance. In arriving at a conclusion on this question, no aid is given from acts of congress, as is afforded in ascertaining what is an original package in the matter of cigarettes, another article of interstate commerce which frequently clashes with police regulations. Congress, in sections 3381 and 3392 of the Revised Statutes, has prescribed what shall be an original package of cigarettes. No similar provision has been made anywhere with regard to liquors. For this reason, the cases quoted relating to cigarettes cannot aid us. In *re Minor*, 69 Fed. 235; *State of Iowa v. McGregor*, 76 Fed. 957; *State v. Goetze* (W. Va.) 27 S. E. 225.

An examination of the large number of cases which have been quoted by counsel shows that the question under discussion is largely a question of fact, determinable by the circumstances of each case. A text writer in the American and English Encyclopædia of Law (volume 17, page 275, note) says:

"An original package, within the sense of the interstate commerce regulations, is the unbroken package imported into a state from another state or a foreign country, before, by sale or otherwise, it gets into the mass of the general property in the state."

The form or size of the package the importer determines for himself. *State v. Winters* (Kan. Sup.) 25 Pac. 235. However small the package may be, so long as it is an original package, it is protected. In *re Beine*, 42 Fed. 545. If, however, the package, as put up by the importer, contain a number of other and smaller packages, each sealed, such as beer bottles in a barrel, or wine or whisky in a case, to which would the term "original package" apply,—the bottles (each), or the barrel or box? The decided cases are not uniform in their answer to this question. In *Keith v. State*, 91 Ala. 2, 8 South. 353, these were the facts: The liquor was shipped by Lowenthal & Co., wholesale and retail liquor dealers, residing in Nashville, Tennessee, in half pint, pint, and quart bottles. The bottles were separately wrapped in tissue paper, each labeled "original package," with the name of the importer and shipper, in an open box, with hay laid between them,

each box marked with the number of bottles and their sizes contained therein. From the bill of lading in evidence it appeared that the box contained 1,075 bottles and 25 jugs of liquor, and that shipped at the same time were 20 casks, containing bottles of beer, and 3 casks containing bottles of ale. This was done to facilitate shipment. Rion sold whisky, as the agent of importer, by the single bottle, wrapped and labeled as stated. After an elaborate opinion, the court held that the boxes and barrels, not the bottles, were original packages. A similar decision was made in South Dakota (*State v. Chapman*, 47 N. W. 411); and also in Nebraska (*Haley v. State*, 60 N. W. 962); and in Iowa (*State v. Miller*, 53 N. W. 330). Another case in Iowa (*State v. Coonan*, 48 N. W. 921) holds that the bottles, if sealed without the state, were the original packages, and not the boxes or barrels in which they came. In *Com. v. Bishman* (Pa.) 21 Atl. 12, the court is emphatic. In that case the agent of a dealer in another state received on consignment pint and quart bottles of liquor, each bottle in a pasteboard box, sealed with a strip of paper pasted across the lid, and stamped with the name of the firm. These packages came in boxes and barrels to the agent, who unpacked them when they arrived, and put the pasteboard packages on the shelves. The court says, on the state of facts: "The claim of defendant that he was selling only in the original packages was little better than a burlesque."

The federal cases are few in number. Judge Hall, of the district of Mississippi, held, in *Re Harmon*, 43 Fed. 372, that when bottles of whisky were put in a wooden box, and so imported, the box, and not the bottles, was the original package. The circuit court of appeals of the Seventh circuit, in *U. S. v. One Hundred and Thirty-Two Packages of Spirituous Liquors and Wines*, 22 C. C. A. 228, 76 Fed. 364, discuss the meaning of the word "package," as used in section 3449, Rev. St. U. S.: "The term 'package' means every box, barrel, or other receptacle into which distilled spirits have been placed for shipment or removal, either in quantity or in separate small packages, as bottles or jugs." Although none of these authorities are conclusive, they greatly assist in reaching a decision. These shipments look for their protection to the law of interstate commerce. It is that unit, the thing which the carrier receives, transports, and delivers as an article of commerce, which is protected. The protection of the law is given to that which is imported through those channels, and in this way. The importer decides for himself the size and form of the package which he seeks to import. He puts it up in the shape in which he wishes to import it, gives it the initial steps which put it in transit, and so makes it the subject of interstate commerce. "The original package was and is the package as it existed at the time of its transportation from one state to another." *State v. Winters* (Kan. Sup.) 25 Pac. 237. "An original package is a bundle put up for transportation or commercial handling, and usually consists of a number of things bound together, convenient for handling and conveyance." *State v. Board of Assessors* (La.) 15 South. 10. The case of *State v. Keith*, 91 Ala. 2, 8 South. 353, expresses this idea clearly:

"Merely labeling each bottle 'original package' does not make it one, if it was not really the original package. The term 'to pack,' in its ordinary signification, especially when used in reference to carriage, means to place together and prepare for transportation,—as to make up a bundle, or bale, or box, or other receptacle. They do not form as many and separate packages as there are articles, though they may be wrapped separately. The case or bale in which separate articles are placed together for transportation constitutes the original package."

So, *In re Beine*, 42 Fed. 546, which holds that the importer will be protected in his importation, however small may be the bulk of the package, decided that bottles could be original packages when they were sealed and nailed up separately, not packed in any other box, but shipped singly and separately. This case, by the way, is at variance with the Pennsylvania cases quoted by the attorney general, (*Com. v. Paul*, 170 Pa. St. 284, 33 Atl. 82; *Com. v. Schollenberger*, 156 Pa. St. 201, 27 Atl. 30), and its conclusion is preferred to them. Retail trade, as well as wholesale trade, is included in the idea of commerce.

Considering all these cases and the others quoted in argument, it appears that the original package is the package delivered by the importer to the carrier at the initial place of shipment, in the exact condition in which it was shipped. If in single bottles, shipped singly, or if in packages of three or more securely fastened together and marked, or if in a box, barrel, crate, or other receptacle, the single bottle, in the one instance, the three or more bottles, in another instance, the barrel, box, crate, or other receptacle, respectively constitute the original package. If sold or delivered, it must be sold or delivered as shipped and received. If the package be broken after such delivery, it comes within the police regulations of the state, and any sale or delivery in such case is unlawful.

Let an order be prepared in each case in accordance with this opinion.

DANIEL v. MILLER et al.

(Circuit Court, E. D. Pennsylvania. May 12, 1897.)

1. PATENTS—INFRINGEMENT—ACQUIESCENCE.

Knowledge of a long-continued acquiescence by a complainant in an infringement may, in special cases, be fatal on a motion for a preliminary injunction.

2. SAME—VALIDITY OF—ESTOPPEL.

The assignor of a patent and those in privity with him are estopped to set up, as against the assignee, the invalidity of a patent.

3. SAME—PACKING FOR PISTON RODS, ETC.

Letters patent, No. 524,178, for an improvement in packing for piston and other rods, *held* valid and infringed.

Bill for an injunction against the infringement of a patent and an accounting. Sur motion for preliminary injunction.

The bill averred that Norman Bruce Miller, one of the defendants, had assigned to the complainant, in February, 1894, his patent, for which application was then pending, for improvements in the packing for piston rods, etc., and

that on August 7, 1894, the patent (No. 524,178) was issued to the complainant, as assignee of the said Norman Bruce Miller, the inventor. It further set out that the other defendants were acting in privity with said Miller in infringement of the patent, and prayed an injunction and an accounting in the usual form. The answers virtually admitted the infringement, but contended that the patent was invalid, and that, therefore, recovery could not be had.

Preston K. Erdman and Chas. Howson, for complainant.
Charles L. Smyth, for defendants.

DALLAS, Circuit Judge. This case has been heard upon the plaintiff's motion for a preliminary injunction, and I am persuaded that, under the circumstances disclosed by the proofs as now presented, the defendants should be restrained from continuance of the infringement complained of, which is virtually admitted, until final hearing. The several matters urged in resistance of this motion are separately stated and discussed in the defendants' brief, and they may be briefly disposed of.

1. "Knowledge of and long-continued acquiescence by a complainant in an infringement may, in special cases, be fatal on a motion for a preliminary injunction." *Taylor v. Spindle Co.*, 22 C. C. A. 205, 75 Fed. 303. But the evidence now before the court, instead of establishing acquiescence, seems to disprove it. See, also, the case above cited, in 69 Fed. 837.

2. The plaintiff does not allege either prior adjudication or public acquiescence in support of the validity of his patent. He stands upon the presumption of its validity, and upon the fact that he acquired it by assignment from one of the defendants, who, therefore, is precluded from asserting that it is void. The fact that he so acquired it is plainly shown, and is not controverted; and that the estoppel relied upon as against the assignor exists has not been seriously questioned. As to him, at least, there can be no doubt about it.

3. There is more room for dispute as to whether the other defendants are also estopped; but I am clearly of opinion, upon the proofs of privity and of co-operative infringement which have been adduced, that they are.

4. In view of what has already been said, the attack made upon the validity of the patent need not be considered; but I may say that, as the case now appears, it is not very forcible, and does not commend itself to favorable consideration.

The motion for a preliminary injunction is granted.

MEMORANDUM DECISIONS.

BURLINGAME v. LYONS. (Circuit Court of Appeals, Ninth Circuit. February 6, 1896.) No. 260. In Error to the Circuit Court of the United States for the Northern Division of the District of Washington. Bausman, Kelleher & Emory, for plaintiff in error. White & Munday, for defendant in error. No opinion. Dismissed by agreement pursuant to the twentieth rule.

BURNS v. WELLS CULTIVATOR CO.¹ (Circuit Court of Appeals, Sixth Circuit. May 6, 1897.) No. 489. Appeal from the Circuit Court of the United States for the Eastern District of Michigan. Chas. H. Fisk, for appellant. N. S. Wright, for appellee. No opinion. Decree reversed and bill ordered dismissed.

CAMPBELL et al. v. IRON-SILVER MIN. CO. (Circuit Court of Appeals, Eighth Circuit. February 15, 1897.) No. 906. In Error to the Circuit Court of the United States for the District of Colorado. Edward O. Wolcott and Joel F. Valle, for defendant in error. No opinion. Docketed and dismissed, with costs, pursuant to the sixteenth rule, on motion of defendant in error. See 10 C. C. A. 172, 61 Fed. 982.

CENTRAL TRUST CO. OF NEW YORK v. SOUTHERN RY. CO. et al. (Circuit Court, W. D. North Carolina. June 30, 1897.)

SIMONTON, Circuit Judge. This bill is filed by the trustee of a mortgage executed by the Southern Railway Company to secure bonds to the amount of millions of dollars. The mortgage covers the entire system and all the property of the mortgagor, including the lease of the North Carolina Railroad. The bill declares that this lease is of vital importance to the value of the system, and to the security of the mortgage; that the threats to rescind, destroy, or break the lease will not only result in a permanent injury to the security it holds, but is now creating alarm, and is disturbing the value of the securities on the market; that the danger and loss threatened are irreparable. The bill, stating the same facts, is against the same parties, meets the same responses, and depends on the same facts and principles as in the case of Southern Ry. Co. v. North Carolina R. Co. (just decided) 81 Fed. 506. It is subject to the same conclusion. It is therefore ordered that the question of fact inquired into, which question is as follows: "Was the lease executed bona fide, without fraud, covin, misrepresentation, or malpractice of any sort? This is a question wholly of fact. The charge is made by the defendants Messrs. Russell and Walser, and of the new board of directors, and in the answer of the lessor filed by them." Let this issue be referred to Kerr Craige, Esq., as special master, under the following instructions: That he take such testimony as may be produced before him touching all matters relating to or incidental with this question, holding references at such time and place as may be most convenient; that upon this issue the defendants the new board of directors and Messrs. Russell and Walser have the affirmative of this issue, and the opening and reply in the testimony; and that they be allowed 60 days, if so long be necessary, within which to produce testimony, dating from the service of this order; that the complainant and the old board of directors have the negative of this issue, and that they be allowed 60 days, if so long be necessary, after the opposite party announce their evidence closed, and that 20 days, if so long be necessary, be allowed for reply, beginning when respondents announce that

¹ Rehearing denied July 6, 1897.

they have closed; and that said special master report the evidence with all convenient speed thereafter. In the meantime the restraining order heretofore issued is continued until further order.

CHICAGO & A. R. CO. v. CAMPBELL.¹ (Circuit Court of Appeals, Eighth Circuit, February 23, 1897.) No. 843. In Error to the Circuit Court of the United States for the Eastern District of Missouri. Joseph S. Laurie, Marshall F. McDonald, and Thomas T. Fauntleroy, for plaintiff in error. F. W. Lehmann and O'Neill Ryan, for defendant in error. No opinion. Affirmed, with costs, by divided court.

CITY OF PLATTSBROUGH, NEB., v. POLLOCK. (Circuit Court of Appeals, Eighth Circuit. May 4, 1897.) No. 926. Appeal from the Circuit Court of the United States for the District of Nebraska. Matthew Gering, for appellant. Samuel M. Chapman and A. N. Sullivan, for appellee. No opinion. Dismissed, with costs, on motion of appellee, for want of jurisdiction.

GRASS v. MCGHEE. (Circuit Court of Appeals, Fifth Circuit. May 4, 1897.) No. 384. Appeal from the Circuit Court of the United States for the Northern District of Alabama. Lawrence Cooper, for appellant. Milton Humes and John H. Sheffey, for appellee. Before PARDEE and McCORMICK, Circuit Judges, and NEWMAN, District Judge.

PER CURIAM. The decree appealed from is affirmed, with costs.

CURRAN et al. v. GRADY TRADING CO. (Circuit Court of Appeals, Eighth Circuit. May 4, 1897.) No. 928. In Error to the United States Court of Appeals for Indian Territory. T. N. Foster, for plaintiffs in error. No opinion. Dismissed, with costs, on motion of counsel for plaintiffs in error.

DAVIS v. DAVIS et al. (Circuit Court of Appeals, Fifth Circuit. May 4, 1897.) No. 555. Appeal from the Circuit Court of the United States for the Southern District of Mississippi. This was a suit in equity by W. J. Davis against H. L. Davis and others to establish an equitable title to, and recover possession of, the one undivided half of the Homo Chitto plantation, in Adams county, Miss. The circuit court sustained a general demurrer to the bill, but on appeal this decree was reversed by this court, and the cause remanded for further proceedings. See 18 C. C. A. 438, 72 Fed. 81. The court below, having accordingly heard the cause upon the merits, dismissed the bill because the plaintiff had failed to show any right to the relief sought. From this decree the complainant has now appealed. T. A. McWillie, for appellant. Edward Mayes, for appellee. Before PARDEE and McCORMICK, Circuit Judges, and NEWMAN, District Judge.

PER CURIAM. The facts established by the evidence are not sufficient to warrant the finding that Samuel B. Newman, Sr., had actual notice of W. J. Davis' equity in the lands in controversy, nor to warrant the presumption that Mrs. Mattie L. Newman, the mortgagee, knew, or ought to have known, of any such equity. The decree appealed from is affirmed.

¹ Rehearing denied April 12, 1897.

DOW et al. v. UNITED STATES.

(Circuit Court of Appeals, Eighth Circuit. June 21, 1897.)

No. 922.

CERTIORARI TO PERFECT RECORD.

In Error to the District Court of the United States for the District of Colorado. Motion for a writ of certiorari. Denied.

Greeley W. Whitford and Henry V. Johnson, for the motion.

Before SANBORN, Circuit Judge, and LOCHREN, District Judge.

PER CURIAM. The motion of the defendant in error for a writ of certiorari to the court below for the purpose of perfecting the record herein is denied, (1) because it does not appear from the moving papers that the portions of the evidence which the defendant in error seeks to have returned to this court form a part of the bill of exceptions in the case; (2) because it appears from the motion papers that the absence of the evidence can be of no disadvantage to the defendant in error, since it seeks to sustain the ruling of the court admitting the evidence, which is omitted, and submitting the case to the jury, and the appellate court will presume that the ruling of the trial court upon these questions was right, unless the evidence admitted by its ruling appears in the printed record.

FARMERS' LOAN & TRUST CO. v. OREGON IMP. CO. (Circuit Court of Appeals, Ninth Circuit. June 1, 1896.) No. 234. Appeal from the Circuit Court of the United States for the District of Oregon. Dolph, Mallory, Simon & Strahan and Dolph, Nixon & Dolph, for appellant. A. F. Burleigh, Zera Snow, and Milton W. Smith, for appellee. No opinion. Dismissed after argument.

FARMERS' LOAN & TRUST CO. v. OTIS. (Circuit Court of Appeals, Ninth Circuit. June 1, 1896.) No. 279. Appeal from the Circuit Court of the United States for the Northern Division of the District of Washington. Dolph, Mallory & Simon, for appellant. Zera Snow and H. M. Herman, for appellee. No opinion. Dismissed by agreement, pursuant to the twentieth rule.

FRANKLIN v. UNION LOAN & TRUST CO. (Circuit Court of Appeals, Ninth Circuit. October 29, 1894.) No. 129. Appeal from the Circuit Court of the United States for the Southern District of California. Charles D. Houghton, for appellant. Edwin Lamme, R. E. Houghton, and W. J. Curtis, for appellee. No opinion. By consent the decree entered upon the appeal in Southern California Motor-Road Co. v. Union Loan & Trust Co., 29 U. S. App. 110, 12 C. C. A. 215, and 64 Fed. 450, stands against the appellant in this appeal.

GILLINGHAM et al. v. MILLIGAN et al. (Circuit Court of Appeals, Sixth Circuit. May 17, 1897.) No. 496. Appeal from the Circuit Court of the United States for the Eastern District of Tennessee. Templeton & Cates, for appellant. No opinion. Dismissed for failure to print record, pursuant to the twenty-third rule.

GREEN et al. v. AMERICAN SODA-FOUNTAIN CO. (Circuit Court of Appeals, Third Circuit. March 4, 1897.) Appeal from the Circuit Court of the United States for the Eastern District of Pennsylvania. Counsel for appellants

requested to have taxed, as part of the costs for printing, the bill of Alfred M. Slocum Company for reprinting complainant's record; and under rule 23 this was disallowed, to which order counsel for appellants duly excepted. Strawbridge & Taylor, for appellants. Joshua Pusey, for appellee.

PER CURIAM. Under the circumstances of the case, which we do not think it necessary to state, as counsel have not differed respecting the facts, we are of opinion that the conclusion reached by the clerk of this court upon the contested question of costs is right, and accordingly his taxation of the costs is confirmed.

HUNT v. FARMERS' LOAN & TRUST CO. (Circuit Court of Appeals, Ninth Circuit, June 4, 1896.) No. 269. In Error to the Circuit Court of the United States for the District of Oregon. William L. Brewster, for plaintiff in error. L. L. McArthur, for defendant in error. No opinion. Dismissed by agreement, pursuant to the twentieth rule.

INTERSTATE COMMERCE COMMISSION v. ATCHISON, T. & S. F. R. CO. (Circuit Court of Appeals, Ninth Circuit, June 1, 1896.) No. 93. Appeal from the Circuit Court of the United States for the Southern District of California. No opinion. Dismissed on motion of Henry S. Foote, United States attorney, for appellant. See 50 Fed. 295.

LEAVENWORTH COAL CO. v. UNITED STATES. (Circuit Court of Appeals, Eighth Circuit, March 1, 1897.) No. 628. Appeal from the Circuit Court of the United States for the District of Kansas. Robert Crozier, Lucien Baker, and William C. Hook, for appellant. W. C. Perry, U. S. Dist. Atty. No opinion. Reversed in part and affirmed in part, by consent of parties, pursuant to compromise.

MCPECK v. CENTRAL VERMONT R. CO. (Circuit Court of Appeals, First Circuit, June 19, 1897.) No. 187. In Error to the Circuit Court of the United States for the District of Massachusetts. This was an action by Henry McPeck against the Central Vermont Railroad Company to recover damages for personal injuries. The court directed a verdict for defendant, and plaintiff sued out a writ of error. The judgment of the circuit court was affirmed (79 Fed. 590), and plaintiff now petitions for the right to file in the circuit court a motion for a new trial, and to be heard thereon, etc. Before COLT and PUTNAM, Circuit Judges, and WEBB, District Judge. No opinion. Petition denied.

MARKHAM et al. v. DAISY MANUF'G CO. (Circuit Court of Appeals, Sixth Circuit, May 18, 1897.) No. 487. Appeal from the Circuit Court of the United States for the Eastern District of Michigan. James Whittemore and Edward Rector, for appellants. Charles H. Fisk, for appellee. No opinion. Decree reversed and bill ordered dismissed.

NATIONAL HARROW CO. v. HENCH et al. (Circuit Court of Appeals, Third Circuit, March 24, 1897.) Appeal from the Circuit Court of the United States for the Eastern District of Pennsylvania. No opinion. Dismissed pursuant to the twenty-third rule. See 76 Fed. 667.

OREGON RY. & NAV. CO. v. FARMERS' LOAN & TRUST CO. (Circuit Court of Appeals, Ninth Circuit. June 1, 1896.) No. 268. Appeal from the Circuit Court of the United States for the District of Oregon. Zera Snow and J. M. Woolworth, for appellant. William L. Brewster, Dolph, Mallory & Simon, and Story & Strumble, for appellee. No opinion. Dismissed by agreement, pursuant to the twentieth rule.

PAYNE v. WALKER et al. (Circuit Court of Appeals, Eighth Circuit. February 15, 1897.) No. 817. In Error to the Circuit Court of the United States for the District of Kansas. Waters & Waters and Mr. Light, for plaintiff in error. A. A. Hurd, O. J. Wood, and W. Littlefield, for defendants in error. No opinion. Affirmed, with costs.

PHILLIPS et al. v. SULLIVAN MACHINERY CO. (Circuit Court of Appeals, Third Circuit. March 24, 1897.) No. 13. Appeal from the Circuit Court of the United States for the Western District of Pennsylvania. No opinion. Dismissed, without prejudice, on motion of counsel for appellants.

REED v. CLARK. (Circuit Court of Appeals, Ninth Circuit. June 1, 1896.) No. 242. Appeal from the Circuit Court of the United States for the District of Oregon. Dolph, Mallory, Simon & Strahan, for appellant. Zera Snow, for appellee. No opinion. Dismissed after argument.

RIO GRANDE BRIDGE & TRAMWAY CO. v. HOLLAND TRUST CO. (Circuit Court of Appeals, Fifth Circuit. May 18, 1897.) No. 560. Appeal from the Circuit Court of the United States for the Western District of Texas. This was a suit in equity to foreclose a mortgage on a bridge across the Rio Grande river, and the property and franchises connected therewith. The question raised by the assignment of error was the same as that in International Bridge & Tramway Co. v. Holland Trust Co., 81 Fed. 422. Oscar Bergstrom, for appellant. Winchester Kelso and Geo. M. Van Housen, for appellee. Before PARDEE and McCORMICK, Circuit Judges, and NEWMAN, District Judge.

PER CURIAM. The assignment of error in this case is not well taken. Muller v. Dows, 94 U. S. 444. The decree appealed from is affirmed.

SCANES v. BURT. (Circuit Court of Appeals, Sixth Circuit. May 4, 1897.) No. 493. In Error to the Circuit Court of the United States for the Northern District of Ohio, Western Division. F. E. Wright, for plaintiff in error. No opinion. Dismissed for failure to print the record, pursuant to the twenty-third rule.

SINTON v. PECK, Tax Collector. (Circuit Court of Appeals, Sixth Circuit. May 17, 1897.) No. 492. In Error to the Circuit Court of the United States for the District of Kentucky. Harmon, Colston, Goldsmith & Hoadly, for plaintiff in error. No opinion. Dismissed, pursuant to the twenty-third rule, for failure to print record.

SMITH v. TEXAS & P. RY. CO.

(Circuit Court of Appeals, Fifth Circuit. June 1, 1897.)

No. 519.

MASTER AND SERVANT—ASSUMPTION OF RISKS.

In Error to the Circuit Court of the United States for the Eastern District of Louisiana.

This was an action at law by Mrs. G. T. Smith, widow of Paoli A. Smith, suing in her own behalf and that of her minor child, to recover damages from the Texas & Pacific Railway Company for the death of her husband. The court directed a verdict for defendant, and entered judgment accordingly, and the plaintiff brought the case here on writ of error.

B. F. Jonas and J. H. Hall, for plaintiff in error.

W. W. Howe and C. P. Cocke, for defendant in error.

Before McCORMICK, Circuit Judge, and TOULMIN and NEWMAN, District Judges.

McCORMICK, Circuit Judge. This case was before us at a former term. It is fully stated in the report of our decision then rendered. 30 U. S. App. 176, 14 C. C. A. 509, and 67 Fed. 524. It is very similar, in its issues of fact and law, to the case of Railway Co. v. Minnick, decided by this court, and reported in 23 U. S. App. 810, 10 C. C. A. 1, and 61 Fed. 635, on the authority of which, in part, our former decision in this case was made to rest. Upon a full consideration of the case when it was before us at the former term, the court were unanimous in reversing the judgment of the circuit court, and a majority of this court held that on the case then shown by the record the general charge for the defendant should have been given in the court below; and the judgment below was reversed, and the cause remanded for proceedings in accordance with the views expressed in the opinion. When the case came on for trial again in the circuit court the pleadings and the proof offered were substantially the same as at the first trial, and the judge of the circuit court, in accordance with the views of this court, gave to the jury the general charge to find their verdict for the defendant; and on the verdict returned in compliance with the charge the court rendered judgment that the plaintiff take nothing, and that the defendant go hence with its costs. To review this judgment this writ of error is prosecuted. On the authority of our former decision in this case, we must hold that the judge of the circuit court did not err in directing a verdict for the defendant. We therefore conclude and decide that the judgment of the circuit court should be, and is hereby, affirmed.

SPAULDING v. TATUM. (Circuit Court of Appeals, Ninth Circuit. June 1, 1896.) No. 283. Appeal from the Circuit Court of the United States for the Northern District of California. No opinion. Dismissed, pursuant to the twenty-third rule, for failure to print record, on motion of J. P. Langhorne, for appellee.